

71134-2

71134-2

COA NO. 71134-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN GARRISON,

Appellant.

REC'D  
JUL 03 2014  
King County Prosecutor  
Appellate Unit

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

2014 JUL 13 PM 1:22  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining To Assignments Of Error</u> .....	2
B. <u>STATEMENT OF THE CASE</u> .....	3
i. <i>Argument and Ruling on ER 404(b) Evidence</i> .....	3
ii. <i>Background to Charged Offense</i> .....	5
iii. <i>S.'s Testimony</i> .....	6
iv. <i>A.W.'s Testimony</i> .....	7
v. <i>Mrs. Garrison's Testimony</i> .....	9
vi. <i>Garrison's Testimony</i> .....	10
vii. <i>A.F.'s Testimony About Prior Misconduct</i> .....	10
viii. <i>Instruction and Outcome</i> .....	11
ix. <i>Sentencing</i> .....	11
C. <u>ARGUMENT</u> .....	14
1. IMPROPER ADMISSION OF PRIOR SEXUAL MISCONDUCT EVIDENCE AND A FLAWED LIMITING INSTRUCTION PREJUDICED THE OUTCOME OF THE TRIAL.....	14
a. <u>ER 404(b) Overview</u> .....	14
b. <u>The Court Erred In Admitting The ER 404(b) Evidence To Show Absence Of Mistake Or Accident</u> .....	17

**TABLE OF CONTENTS**

	Page
c. <u>The Court Erred In Admitting The ER 404(b) Evidence Because It Did Not Properly Balance Its Probative Value Against Its Prejudicial Effect On The Record. ....</u>	19
d. <u>There Is A Reasonable Probability That The Error Affected The Outcome.....</u>	23
e. <u>The Court Also Committed Reversible Error In Failing To Correctly Instruct The Jury On The Permissible Purpose For Which It Could Consider The ER 404(b) Evidence... </u>	29
2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON CLASS B FELONY, AND THEREFORE THE TEXAS OFFENSE CANNOT BE CONSIDERED A STRIKE OFFENSE FOR SENTENCING PURPOSES. ....	33
a. <u>The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of First Degree Manslaughter.....</u>	33
b. <u>The Court Erred In Ruling The Texas Offense Did Not Wash Out From Garrison's Criminal History. ....</u>	46
D. <u>CONCLUSION.....</u>	50

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>In re Pers. Restraint of Cadwallader</u> , 155 Wn.2d 867, 880, 123 P.3d 456 (2005).....	34
<u>In re Pers. Restraint of Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005).....	34, 41, 43, 44
<u>State v. Bacotgarcia</u> , 59 Wn. App. 815, 801 P.2d 993 (1990).....	29
<u>State v. Beals</u> , 100 Wn. App. 189, 97 P.2d 941 (2000).....	34
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987).....	15, 28
<u>State v. Carleton</u> , 82 Wn. App. 680, 919 P.2d 128 (1996).....	24, 26, 27
<u>State v. Carpenter</u> , 117 Wn. App. 673, 72 P.3d 784 (2003).....	41, 46
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	22, 28
<u>State v. Dawkins</u> , 71 Wn. App. 902, 863 P.2d 124 (1993).....	16, 28
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	16
<u>State v. Dewey</u> , 93 Wn. App. 50, 966 P.2d 414 (1998), <u>overruled on other grounds by</u> <u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	17

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Ervin</u> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	48
<u>State v. Evans</u> , 45 Wn. App. 611, 726 P.2d 1009 (1986).....	32
<u>State v. Failey</u> , 165 Wn.2d 673, 201 P.3d 328 (2009).....	49
<u>State v. Ferguson</u> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	23
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	34, 43
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	16, 17, 19, 29
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	14, 15, 19, 21, 29, 30
<u>State v. Holmes</u> , 43 Wn. App. 397, 717 P.2d 766 (1986).....	28
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	22
<u>State v. Jordan</u> , __ Wn.2d __, 325 P.3d 181 (2014).....	44
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	20
<u>State v. Mehrabian</u> , 175 Wn. App. 678, 308 P.3d 660, <u>review denied</u> , 178 Wn.2d 1022, 312 P.3d 650 (2013) .....	48

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>State v. Neal,</u> 144 Wn.2d 600, 30 P.3d 1255 (2001).....	27
<u>State v. Olsen,</u> __ Wn.2d __, 325 P.3d 187 (2014).....	44
<u>State v. Powell,</u> 126 Wn.2d 244, 893 P.2d 615 (1995).....	27
<u>State v. Quismundo,</u> 164 Wn.2d 499, 192 P.3d 342 (2008).....	17, 19
<u>State v. Ramirez,</u> 46 Wn. App. 223, 730 P.2d 98 (1986).....	27
<u>State v. Ray,</u> 116 Wn.2d 531, 806 P.2d 1220 (1991).....	20
<u>State v. R.H.S.,</u> 94 Wn. App. 844, 974 P.2d 1253 (1999).....	40
<u>State v. Roth,</u> 75 Wn. App. 808, 881 P.2d 268 (1994).....	17
<u>State v. Saltarelli,</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	15, 21, 23
<u>State v. Thach,</u> 126 Wn. App. 297, 106 P.3d 782 (2005).....	22
<u>State v. Tharp,</u> 96 Wn.2d 591, 637 P.2d 961 (1981).....	21, 25, 26
<u>State v. Thieffault,</u> 160 Wn.2d 409, 158 P.3d 580 (2007).....	34, 44

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Thomas</u> , 144 P.3d 1178 (2006), <u>review denied</u> , 161 Wn.2d 1009, 166 P.3d 1218 (2007) .....	44
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 813, <u>review denied</u> , 170 Wn.2d 1003, 245 P.3d 226 (2010) .....	22
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1999) .....	15, 16
<u>State v. Werneth</u> , 147 Wn. App. 549, 197 P.3d 1195 (2008) .....	45
<u>State v. Womac</u> , 130 Wn. App. 450, 123 P.3d 528 (2005), <u>aff'd in part, rev'd in part on other grounds</u> , 160 Wn.2d 643, 160 P.3d 40 (2007) .....	18, 19
 <u>FEDERAL CASES</u>	
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) .....	44
<u>Descamps v. United States</u> , ___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) .....	44
<u>Shepard v. United States</u> , 544 U.S. 13, 125 S. Ct. 1254, 1262, 161 L. Ed. 2d 205 (2005) .....	44
 <u>OTHER STATE CASES</u>	
<u>Burrell v. State</u> , 526 S.W.2d 799 (Tex. Crim. App. 1975) .....	39

**TABLE OF AUTHORITIES**

Page

**OTHER STATE CASES**

Curry v. State,  
30 S.W.3d 394, 399 (Tex. Crim. App. 2000)..... 39

Gold v. State,  
736 S.W.2d 685 (Tex. Crim. App. 1987) ..... 43

Lugo-Lugo v. State,  
650 S.W.2d 72 (Tex. Crim. App. 1983) ..... 38-40

Menefee v. State,  
287 S.W.3d 9 (Tex. Crim. App. 2009) ..... 45, 46

Peterson v. State,  
659 S.W.2d 59 (Tex. Ct. App. 1983)..... 38

Trevino v. State,  
100 S.W.3d 232 (Tex. Crim. App. 2003) ..... 42

Turnipseed v. State,  
609 S.W.2d 798 (Tex. Crim. App. 1980) ..... 46

Wooten v. State,  
400 S.W.3d 601 (Tex. Crim. App. 2013)..... 42

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 402 ..... 15

ER 403 ..... 15

ER 404(b)..... 1-4, 11, 14-17, 19-23, 25, 28-32

Former RCW 9A.32.060 (1975) ..... 1, 46

Former RCW 9A.32.060(1)(a) (1975)..... 36, 40

**TABLE OF AUTHORITIES**

Page

**RULES, STATUTES AND OTHER AUTHORITIES**

Former RCW 9A.32.060(2) (1975) .....	47
Former RCW 9A.32.070(1) (1975) .....	47
Former RCW 9A.32.070(2) (1975) .....	47
Former V.T.C.A., Penal Code § 19.02 (1974).....	1, 43, 46
Former V.T.C.A., Penal Code § 19.02(a) (1974) .....	36
Former V.T.C.A., Penal Code § 19.02(a)(1) (1974).....	36-38, 41
Former V.T.C.A., Penal Code § 19.02(a)(2) (1974).....	37-41
Former V.T.C.A., Penal Code § 19.04 (1974).....	1, 46
Former V.T.C.A., Penal Code § 19.04(a) (1974) .....	35
Former V.T.C.A., Penal Code § 19.04(b) (1974) .....	36
Former V.T.C.A., Penal Code § 19.04(c) (1974) .....	36
Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice (5th ed. 2007). .....	17, 20
Laws of 1997, ch. 365 § 5.....	47
Persistent Offender Accountability Act.....	1, 12, 13, 33, 49
RCW 9.94A.030(32).....	47
RCW 9.94A.030(32)(l).....	49
RCW 9.94A.030(37).....	2, 47

**TABLE OF AUTHORITIES**

Page

**RULES, STATUTES AND OTHER AUTHORITIES**

RCW 9.94A.525 .....	2
RCW 9.94A.525(2)(b) .....	1, 46
RCW 9.94A.525(2)(c) .....	48
RCW 9.94A.525(3).....	34
RCW 9.94A.570 .....	47
U.S. Const. amend. VI .....	44

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of prior misconduct under ER 404(b).

2. The court erred in giving a flawed limiting instruction for ER 404(b) evidence.

3. The court erred in concluding appellant's Texas conviction for "voluntary manslaughter" was comparable to the Washington offense of first degree manslaughter and therefore qualified as a "most serious offense" under the Persistent Offender Accountability Act.

4. The court erred in concluding appellant's Texas conviction for voluntary manslaughter did not wash out from his criminal history.

5. The court erred in entering the following conclusions of law:

a. "The Texas voluntary manslaughter statu[t]e, V.T.C.A., Penal Code 19.02 and 19.04., in place in 1981, when the defendant committed the offense and was convicted of the offense, is comparable to the Washington manslaughter in the first degree statute, RCW 9A.32.060, in place in 1981." CP 132 (CL A).

b. "Pursuant to RCW 9.94A.525(2)(b), the defendant's Texas voluntary manslaughter conviction has not 'washed' and therefore is appropriately included in the defendant's offender score." CP 132 (CL C).

c. "Pursuant to 9.94A.030(37), the defendant shall be sentenced as a persistent offender. . . . the defendant was convicted as an offender on two separate occasions, in this state and elsewhere, of felonies that under the laws of Washington are considered most serious offenses and are appropriately included in the defendant's offender score under RCW 9.94A.525." CP 133 (CL F).

Issues Pertaining to Assignments of Error

1. Whether the court committed reversible error in ruling evidence of appellant's prior misconduct was admissible under ER 404(b) where (1) the court admitted the evidence for an improper purpose; and (2) failed to properly balance the probative value of prior misconduct with its prejudicial effect on the record?

2. Whether the court committed reversible error in issuing a limiting instruction for the ER 404(b) that allowed the jury to consider the evidence for an improper purpose?

3. Whether the court erred in concluding appellant's prior Texas conviction for "voluntary manslaughter" was comparable to the Washington offense of first degree manslaughter and therefore did not wash out from appellant's criminal history?

B. STATEMENT OF THE CASE

The State charged Kevin Garrison with one count of second degree child molestation against 12 year old A.W. CP 1. The defense was general denial, i.e., it did not happen. 1RP<sup>1</sup> 15, 23.

i. *Argument and Ruling on ER 404(b) Evidence*

The State moved under ER 404(b) to admit evidence that Garrison touched A.W.'s thigh on a prior occasion while she slept and that A.W. had awoken to find her shirt and bra askew on other occasions. CP 167-68; 1RP 105. The State contended such evidence was admissible to show lustful disposition towards A.W., the res gestae of the charged crime, and absence of mistake. CP 165-70; 1RP 105-11, 116-19, 128-30.

The State also sought to admit evidence concerning Garrison's actions towards A.F. from roughly 10 years ago when that girl was 12 years old. CP 170-79; 1RP 105-06. According to the State, Garrison molested A.F. while she slept. CP 174. The State contended such evidence was admissible to show common scheme or plan and absence of mistake. CP 170-79; 1RP 134-48, 159-64. The State alleged the common scheme or plan involved girls of the same approximate age (11-12) and physical characteristics, the creation of a trusting relationship with a girl

---

<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 3/11/13; 2RP - 3/12/13; 3RP - 3/13/13; 4RP - 3/14/13; 5RP - 3/18/13; 6RP - 3/28/13; 7RP - 9/6/13; 8RP - 9/10/13; 9RP - 10/4/13; 10RP - 11/1/13.

that spent nights sleeping where Garrison lived, the testing of boundaries by touching the girls to see if they negatively responded, and sexually touching the girls while they slept. 1RP 137-41.

The defense objected to the admission of the ER 404(b) evidence, arguing there was no valid basis to admit the evidence and that, even if there was, its probative value did not outweigh its prejudicial effect. CP 20-28; 1RP 112-15, 126-28, 148-57, 164-67.

The court admitted prior conduct involving the touching of A.W.'s thigh without identifying the basis for admissibility. 1RP 130-31. It excluded evidence that A.W. woke up with her bra and clothing askew on other occasions because it was highly prejudicial and whether it had been proven by a preponderance was questionable. 1RP 130-34.

The court admitted evidence related to A.F. for purposes of showing common scheme and lack of accident. 1RP 167-68, 173. The court did not allow the "more dramatic abuse" alleged by A.F. but ruled the State could elicit evidence of inappropriate touching. 1RP 168, 173; 2RP 4-5. With reference to the A.F. evidence, the State said "for the record, the Court is finding that the evidence which you have just set forth, it's probative value is not outweighed by its unfair prejudice." 1RP 174. The court responded, "That's correct." 1RP 174.

ii. *Background to Charged Offense*

In 2011, Garrison lived with his wife and stepdaughter S. 3RP 29-31. S. and A.W. were best friends. 3RP 30. A.W. saw Garrison as an uncle and the family treated her like one of their own. 3RP 34-35, 125, 127. A.W. often spent the night at S.'s residence. 3RP 34-35. She liked to do that, pleased to get away from her own home. 3RP 33, 35, 123-24.

On December 20, 2011, A.W. was over at the house with S., Garrison and his wife. 3RP 38-39. A.W.'s mother allowed her to sleep over that night. 3RP 54-55, 66, 85-87, 141. A.W.'s mother came over to visit. 3RP 39. S. and A.W. played an electronic game in Garrison's bedroom. 3RP 39-41. The adults chatted in the living room. 3RP 41.

Later in the evening, S. went to bed. 3RP 42. When A.W. stayed overnight, she usually slept on the living room couch or in S.'s bed. 3RP 42-43, 129-30. That night, A.W. fell asleep on the Garrisons' bed. 3RP 144. She later walked to the couch and went to sleep after being roused by Garrison and his wife. 3RP 145-46. A.W. was wearing a zip-up hoodie sweatshirt, a shirt and a pair of jeans that the family had bought her for Christmas.<sup>2</sup> 3RP 43, 127, 152-53.

---

<sup>2</sup> As a single mother of four, A.W.'s mother was grateful to the Garrison's for buying the clothing for A.W.; she thought they were generous. 3RP 98. Mrs. Garrison explained she went shopping with S. and A.W. and bought clothes for A.W. because it was Christmas time and she felt like A.W. was

As set forth below, witnesses had different accounts of what happened, or what did not happen, in the ensuing early morning hours.

iii. *S.'s Testimony*

S. was a light sleeper and would awaken if people moved about the house.<sup>3</sup> 3RP 52-53. She heard A.W.'s mother leave at about 1 in the morning and then fell back asleep. 3RP 44. At 5 in the morning, S. noticed A.W. standing and staring at her in the doorway, "like sleeping." 3RP 45. At some time before that, she heard someone move through the beaded kitchen doorway to go to the bathroom. 3RP 53-54, 65. A.W. came into S.'s room. 3RP 45. It seemed like A.W. was sleepwalking. 3RP 55, 57. S. asked her what was wrong. 3RP 45. A.W. mumbled something, "like when somebody's talking in their sleep," and got into S.'s bed. 3RP 45. A.W. did not seem upset. 3RP 56. She fell asleep and started snoring. 3RP 56. S. thought it was weird. 3RP 46. On an earlier occasion, A.W. had awakened from a dream and insisted it was real. 3RP 57-58, 77-78.

---

part of the family. 4RP 77-78. She bought gifts for A.W.'s siblings as well because she knew the family was struggling financially. 4RP 78-79. Garrison testified that he did not pick out gifts during the shopping trip. 4RP 155. His involvement was limited to being present and approving the amount spent. 4RP 156.

<sup>3</sup> The house was small, old and cluttered. 3RP 52-53, 196-97. The house made noises when a person walked through it. 3RP 53. There was also a beaded curtain hanging from the doorway of the bedroom that Garrison shared with his wife that made noise. 3RP 41, 129, 191.

Later that morning around 7 o'clock, as S. got ready for school, she heard A.W. ask Garrison for a ride home, which was just a block away. 3RP 47-48. A.W. acted fine. 3RP 50, 53.

iv. *A.W.'s Testimony*

In the early morning hours while sleeping, A.W. felt something grab her breast, on the inside of her bra, "kind of like rubbing" and squeezing. 3RP 153, 157-58. When she opened her eyes, she saw Garrison pull his hand away. 3RP 155. She elsewhere testified that when she opened her eyes his hand was still on her breast. 3RP 215. He was standing up, reaching down and bending over. 3RP 158, 213-15. He turned around and "scurried away" or walked "really fast" into his bedroom.<sup>4</sup> 3RP 160, 203. A.W. noticed her previously zipped garment was now unzipped and her shirt was pulled down, exposing her bra. 3RP 161-62. The cup of the bra was tucked in. 3RP 161, 163. Her breast was partially exposed. 3RP 163-64.

---

<sup>4</sup> Garrison had trouble walking due to recent surgery and injuries. 3RP 53, 66; 4RP 84-85. He could hobble or limp around. 3RP 141; 4RP 153. He used a walker and a cane, but it was hard to move about because the house was small. 3RP 53; 4RP 84-86, 153. Mrs. Garrison said her husband could not walk without assistance; he sometimes fell if he tried to walk without assistance. 4RP 85. According to A.W., Garrison had to hold onto something, like a table, as he moved around in order to brace himself. 3RP 141-42, 197. It was difficult for him to bend over. 3RP 197.

A minute or two later, she heard Garrison go into the kitchen. 3RP 165. A.W. was totally alert at this point. 3RP 166. Garrison made coffee and went back to his bedroom. 3RP 166. A.W. waited five minutes then went to S.'s room. 3RP 166. It was about 10 minutes before 5 o'clock. 3RP 167. A.W. plugged in her cell phone to recharge it and waited by the door. 3RP 167. S. did not wake up. 3RP 167. A.W. slapped and shook S. to get some blankets. 3RP 167, 204. A.W. described S. as a "hard sleeper." 3RP 167. A.W. then went to sleep in S.'s bed. 3RP 168-69. A.W. had never known herself to sleepwalk.<sup>5</sup> 3RP 152.

She later got up for school and acted like everything was fine. 3RP 169. She wanted to first tell her mother about what happened. 3RP 170. She let Garrison drive her home because she "didn't want him to be suspicious about me." 3RP 170-71. A.W. told her mother what happened later that day and police the following day. 3RP 173-76.

A.W. remembered a previous occasion, about a month or two earlier, where Garrison touched her. 3RP 177, 180. At 4 or 5 in the morning, A.W. woke up on the couch to find Garrison rubbing her upper thigh over her clothing. 3RP 177-79. She woke up and turned. 3RP 179-80. Garrison stopped. 3RP 180. She went back to sleep. 3RP 180. She

---

<sup>5</sup> A.W.'s mother testified that A.W. was a heavy sleeper back in 2011. 3RP 111. She was unaware of A.W. sleepwalking in the past or waking up and thinking a nightmare was real. 3RP 89.

did not tell anyone about it, including the police when she was later interviewed regarding the charged incident. 3RP 181, 193.

v. *Mrs. Garrison's Testimony*

The bedroom Mrs. Garrison shared with her husband is across from the couch in the living room, only five or six steps away. 4RP 79, 82-83. In the middle of the night, she is able to hear people walking around. 4RP 82. She is a light sleeper. 4RP 82. The dog, which shared the bed, would growl and wake her up when her husband got out of bed at night. 4RP 83. Also, her husband made noise when he got out of bed because of his physical ailments. 4RP 133. She would hear if her husband got up in the middle of the night. 4RP 84, 131.

Mrs. Garrison got up shortly after 5 in the morning.<sup>6</sup> 4RP 94. She A.W. sleeping in S.'s bed. 4RP 95-96. Her husband did not get up in the middle of the night; she would have been awakened by the growling if he had.<sup>7</sup> 4RP 98, 131.

Garrison got up at about 6:30. 4RP 98. Mrs. Garrison got up at 7:00. 4RP 98. Garrison was making coffee in the kitchen. 4RP 98. A.W.

---

<sup>6</sup> In an earlier statement, she told police that she got up at 3 and later got up at 7. 4RP 146, 176.

<sup>7</sup> In an earlier statement to police, she said she knows when her husband gets up because the beads wake her and she did not hear the beads until 7 o'clock. 4RP 134-35. She was nervous, stressed, scared and confused when she gave her statement to police. 4RP 141, 144-45.

was in the kitchen texting on her phone. 4RP 98. A.W. left at 7:30. 4RP 99-100. It seemed like an ordinary day. 4RP 100.

vi. *Garrison's Testimony*

After A.W.'s mother left at around 1 in the morning, Garrison led A.W. from the bedroom to the couch. 4RP 159. He fell asleep around 1:30 after taking his medication. 4RP 160. He woke up at 7 and made coffee. 4RP 160. A.W. asked for a ride home and he obliged, as was the usual routine. 4RP 160-61.

Garrison testified that he did not get up in the middle of the night and did not touch A.W. "in any way, shape, form, or fashion, at all." 4RP 160, 165. He did not unzip her sweatshirt. 4RP 164. He did not pull down her shirt. 4RP 164-65. He did not touch her breast. 4RP 165. Garrison also denied A.W.'s allegation that he touched her leg on a prior occasion. 4RP 156, 166. When later contacted by police about the allegation, he felt "Blown away. Shocked, pissed." 4RP 163.<sup>8</sup>

vii. *A.F.'s Testimony About Prior Misconduct*

A.F. lived with her mother and siblings in 2000, when she was 12 years old. 4RP 22. Garrison's was her mother's boyfriend at the time.

---

<sup>8</sup> Police testimony corroborated that Garrison expressed shock upon being told of the allegation. 2RP 36, 39, 41; 4RP 63.

4RP 22. He stayed overnight a few times, but usually left early in the morning. 4RP 24. A.F. had a trusting relationship with Garrison. 4RP 25.

On one occasion in 2000, A.F. awoke in her room to find Garrison rubbing her head and shoulders. 4RP 26. She did not think it was a big deal and did not really protest. 4RP 27. The next time, she awoke to find Garrison on the edge of her bed, touching her back, then moving to her breast and lower region. 4RP 27-28. A.F. pretended to be asleep or rolled over without doing anything to stop it. 4RP 28, 30. After that, Garrison touched her while she was sleeping "[m]ore times than I can count on my hands and toes combined." 4RP 30. He fondled her under her clothing. 4RP 30. She told someone about a year and a half later. 4RP 33. She had been convicted for a crime of dishonesty. 4RP 51.

viii. *Instruction and Outcome*

A limiting instruction confined the purposes for which the jury could consider the ER 404(b) evidence to common scheme/plan and absence of mistake. CP 50. The jury was instructed on the lesser offense of fourth degree assault. CP 51. The jury convicted as charged. CP 37.

ix. *Sentencing*

The State sought a sentence of life without the possibility of release, alleging Garrison's prior Washington conviction for second degree assault and a 1981 Texas conviction for "voluntary manslaughter" each

qualified as a "most serious offense" under the Persistent Offender Accountability Act (POAA). CP 199, 202-03.

The State argued the Texas manslaughter conviction was comparable to the Washington offenses of first degree manslaughter, second degree manslaughter and second degree assault. 8RP 50-52, 59-60, 65, 70; CP 205-11, 235-38. It further argued the conviction did not wash out due to Texas parole violations on the manslaughter conviction, which reset the clock on the 10 year wash out period for a class B felony. 8RP 83-84; CP 211-13, 241-43.

Defense counsel argued the Texas manslaughter conviction could not be included in Garrison's criminal history because it was not comparable to a Washington class B felony, was at most comparable to the class C felony of second degree manslaughter, and therefore washed out because he spent five crime free years in the community since his last date of release. 8RP 56-58, 71, 83; CP 84, 93-95. The defense further argued that even if the Texas conviction was comparable to a class B felony, it still washed out because he spent 10 crime free years in the community since his last date of release, reasoning the parole violation did not interrupt the 10 year clock because it occurred outside the comparable 10 year statutory maximum for first degree manslaughter. 8RP 54-55.

Counsel further argued the State was unable to prove a parole violation occurred or that it was due to criminal activity. 9RP 9, 20-21, 24; CP 98.

Counsel also argued Garrison's prior conviction for second degree assault could not be counted because the plea document was not filed until many years later and the judgment and sentence was constitutionally invalid on its face due to a miscalculated offender score. 8RP 94, 97; 9RP 50-52; 10RP 4-7; CP 89, 95-96.

The court initially ruled the Texas manslaughter was comparable to the Washington offense of second degree manslaughter. 8RP 72, 76-80. The State moved to reconsider. 9RP 3-10. The court changed its mind, ruling the Texas offense was comparable to first degree manslaughter, a class B felony back in 1981, and that the offense did not wash out due to parole violations. 9RP 20-22, 40-42, 47-48; 10RP 33, 37-38. The court found the parole violation was proven. 10RP 30-31, 33. It rejected the defense argument that the judgment and sentence for the second degree assault was invalid on its face. 9RP 53-54; 10RP 33-35. The court sentenced Garrison to life without the possibility of parole under the POAA. CP 120, 133. This appeal follows. CP 134-42, 144.

C. ARGUMENT

1. IMPROPER ADMISSION OF PRIOR SEXUAL MISCONDUCT EVIDENCE AND A FLAWED LIMITING INSTRUCTION PREJUDICED THE OUTCOME OF THE TRIAL.

The trial court erred in admitting testimony about prior sexual misconduct under ER 404(b). The evidence was inadmissible under the absence of mistake or accident theory. The court also erred in admitting the evidence without conducting a meaningful balancing analysis on the record regarding probative value versus prejudicial effect. In addition, the limiting instruction for the ER 404(b) evidence allowed the jury to use the evidence for an improper purpose. Reversal of the conviction is required.

a. ER 404(b) Overview

Under ER 404(b), "[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." "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "ER 404(b) forbids such inference because it depends on the defendant's

propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

Evidence of prior misconduct "*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Gresham, 173 Wn.2d at 420. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Saltarelli, 98 Wn.2d at 361-62. The evidence must

be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Id. at 362. Even relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. Id. at 361-62. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. Foxhoven, 161 Wn.2d at 175.

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of

the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

b. The Court Erred In Admitting The ER 404(b) Evidence To Show Absence Of Mistake Or Accident.

The court misapplied the law and thereby abused its discretion in ruling the prior misconduct evidence was admissible to show absence of mistake. The evidence was not relevant for that purpose. But the court allowed the jury to consider it for that purpose. CP 50.

"[A] material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance or misfortune." State v. Roth, 75 Wn. App. 808, 819, 881 P.2d 268 (1994). Evidence is admissible under a lack of accident or absence of mistake theory "only if the defendant actually claims that the charged crime was an accident or mistake, or that he or she was acting in good faith." Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 404.21 (5th ed. 2007); see, e.g., State v. Dewey, 93 Wn. App. 50, 58, 966 P.2d 414 (1998) (in prosecution for rape, defendant's previous rape of another woman was not admissible to show a lack of mistake; the defendant's defense was consent, not mistake), overruled on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

Garrison did not raise a defense of accident. His defense was that he never touched A.W.'s breasts or intimate parts, not that he touched them by mistake or accident. 1RP 15, 23; 2RP 28; 4RP 160, 165. In fact, the prosecutor argued in closing that there was no evidence of an accidental touching. 5RP 82.

There is likewise no evidence that Garrison mistakenly or accidentally touched A.F. in the past. The trial court admitted evidence related to A.F. for this purpose, but the court misapplied the law in so doing. 1RP 167-68, 173. Evidence of the prior touching in relation to A.W. and A.F. was irrelevant to show lack of accident or mistake.

Without citation to relevant authority, the State argued to the court that the prior touching of A.W. or A.F. negated the defense theory that A.W. was mistaken in her belief that somebody touched her. CP 178-79; 1RP 110; 4RP 203. That is not the type of mistake that triggers admissibility under an absence of mistake rationale. Indeed, the only case cited by the State in support of its argument involved a defendant charged with homicide and assault whose claimed defense was accident. State v. Womac, 130 Wn. App. 450, 452, 457, 123 P.3d 528 (2005), aff'd in part, rev'd in part on other grounds, 160 Wn.2d 643, 160 P.3d 40 (2007). Evidence that the defendant hit other children was relevant and admissible

to rebut his claim that he had dropped the child by accident — a claim that comprised the central issue at trial. Womac, 130 Wn. App. at 457.

In a sex offense case, it is the defendant's claim of accidental touching that triggers the absence of mistake theory of admissibility. There was no such claim in this case. The evidence was therefore not admissible for that purpose. The court abused its discretion in basing its ruling on an erroneous view of the law and in failing to adhere to the requirement of the evidentiary rule. Quismundo, 164 Wn.2d at 504; Foxhoven, 161 Wn.2d at 174.

- c. The Court Erred In Admitting The ER 404(b) Evidence Because It Did Not Properly Balance Its Probative Value Against Its Prejudicial Effect On The Record.

In ruling evidence of the prior touching of A.W's thigh was admissible, the court did not identify the purpose for admission. 1RP 130-31. The court's limiting instruction allowed the jury to consider the ER 404(b) evidence involving A.W. for common scheme or plan and absence of mistake. CP 50.

"One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan." Gresham, 173 Wn.2d at 420. To be admissible, evidence of a defendant's prior sexual misconduct offered to show a common plan or scheme must

be sufficiently similar to the crime with which the defendant is charged and not too remote in time. State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The State argued evidence of the previous touching was admissible to show lustful disposition. CP 165-70; 1RP 105-11, 116-19, 128-30. Evidence of a defendant's prior sexual acts against the same victim is admissible to show the defendant's lustful disposition toward that victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). "The courts have seldom articulated any way of reconciling the traditional lustful-disposition rule with Rule 404(b), but the traditional rule is so ingrained that it is unlikely to change." 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 404.26, at 581 (5th ed. 2007).

The limiting instruction, however, did not allow the jury to consider the ER 404(b) evidence involving A.W. for the purpose of showing "lustful disposition." CP 50. Defense counsel did not want "lustful disposition" in the limiting instruction because it was "incredibly prejudicial." 5RP 6. The court refused to let the jury consider the evidence to show lustful disposition because of difficulties in defining it. 5RP 10-11. Whether the evidence was admissible for the purpose of showing "lustful disposition" is therefore irrelevant because the jury was not authorized to consider the evidence for that purpose.

In any event, the court erred in not carefully balancing the probative value of the ER 404(b) evidence related to A.W. and A.F. against its prejudicial effect on the record. Evidence of prior misconduct *may* be admissible for a non-propensity purpose only if its probative value outweighs the danger of unfair prejudice. Gresham, 173 Wn.2d at 420; Saltarelli, 98 Wn.2d at 361-62. Evidence of prior bad acts must not be admitted "without a careful consideration of relevance and a realistic balancing of its probativeness against its potential for prejudice." Saltarelli, 98 Wn.2d at 364-65. The Supreme Court held long ago that "[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

The trial court admitted the ER 404(b) evidence related to A.W. (prior touching of thigh) without making any reference to whether its probative value outweighed its prejudicial effect. 1RP 130-31. Indeed, the court did not even identify the purpose of admission for this evidence. Id. Without identifying a purpose for admission, a court cannot even begin to carefully balance the probative value against the prejudicial effect of the evidence because the probative value of the evidence is inextricably linked to why it is admitted. The court should not have permitted testimony about this ER 404(b) evidence without carefully weighing its

probative value against its prejudicial effect on the record. State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005).

The ER 404(b) evidence related to A.F. stands on a somewhat different footing but leads to the same result. After the court admitted evidence related to A.F. for the purpose of showing common scheme and lack of accident (1RP 167-68, 173), the prosecutor stated "for the record, the Court is finding that the evidence which you have just set forth, [its] probative value is not outweighed by its unfair prejudice." 1RP 174. The court responded, "That's correct." 1RP 174. That rote recitation is insufficient to satisfy the rule.

"[A] judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue." State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). For this reason, a trial judge errs when she does not *enunciate* the reasons for her decision. Jackson, 102 Wn.2d at 694. "Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984).

There must be an "intelligent weighing" of potential prejudice against probative value. Salterelli, 98 Wn.2d at 363.

The court affirmed the prosecutor's statement that probative value was not outweighed by unfair prejudice, but the court did not state *how* it determined that the probative value of the evidence outweighed its prejudicial effect. 1RP 167-69; 173-74. The court's affirmation is conclusory. It failed to enunciate its reasoning. The record does not reveal a careful and intelligent weighing of probity against unfair prejudice, which is particularly important in sex cases like this one. The court erred in failing to meaningfully balance the probative value of the ER 404(b) evidence against its prejudicial effect on the record.

c. There Is A Reasonable Probability That The Error Affected The Outcome.

"[T]he balancing of the relevancy and desirability of evidence against its harmful effect is a matter *peculiarly* within the trial court's discretion." State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983) (emphasis added). It seems inappropriate, then, for an appellate court to substitute its judgment for that of the trial court when the latter fails to conduct an adequate ER 404(b) balancing analysis on the record. And yet appellate courts have recognized a trial court's failure to weigh probity and prejudice on the record under ER 404(b) is harmless error when the record

is sufficient for the reviewing court to determine the trial court would have admitted the evidence if it had considered the relative weight of probative value and prejudice. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

The trial court's failure to conduct the balancing on the record in Garrison's case is not harmless because the record is insufficient to determine that it would have admitted the evidence if it had carefully considered the relative weight of probative value and prejudice.

This Court's decision in Carleton is instructive. In that case, Carleton was convicted of third degree rape of a teenage boy (A) he had befriended. Carleton, 82 Wn. App. at 681. Carleton had also engaged in sexual conduct with two other teenage boys (B and C). Id. The State wanted to introduce evidence that Carleton had a scheme to "groom" younger teenage boys for sex, which involved meeting and befriending younger boys within youth organizations, talking with the boys about his supposed alternate homosexual personality by way of introducing sexual topics, and then initiating sexual contact when the boy was asleep. Id. at 682. B's anticipated testimony was that he consented to having sex with Carleton after Carleton told him it would help to bring the two personalities together and prevent the "bad" personality from taking over. Id. at 682. The State also wanted to present the testimony of C, another

young member of the youth organization, to describe how Carleton, who was spending the night at C's home, attempted to initiate sexual contact while C was asleep. Id. at 682-83. The trial court excluded evidence of the attempted molestation of C because it did not involve the ruse of the alternative personality and, in the court's judgment, would merely tend to prove propensity. Id. at 683. The court ruled that B's testimony could be presented as evidence of a common scheme. Id.

The Court of Appeals held the trial court did not abuse its discretion in determining that B's testimony would tend to establish a common scheme or plan, agreeing with the trial court that Carleton engaged in markedly similar conduct with A and B. Id. at 684. A fact finder could well conclude Carleton's conduct was directed by design, as Carleton's repetition of the device in similar contexts showed he consciously recognized its seductive appeal to the curiosity of younger boys. Id.

Notwithstanding the admissibility of this evidence for the purpose of showing common scheme under ER 404(b), the trial court committed error in not carefully balancing the probative value of the evidence against its prejudicial effect on the record. Id. at 685. The trial court "carefully sorted through the State's proffered evidence, and did not admit all of it. But the court focused solely on the probative value of B's testimony, and its relevance to prove the charged misconduct against A. As in Tharp, the

record does not reflect that the court considered how prejudicial the challenged testimony would be. As in Tharp, this was error." Id. "From the record before us, we simply cannot be sure that the trial court thoughtfully evaluated the prejudicial impact that B's testimony was inevitably going to bring to the trial." Id. at 686. The record was therefore insufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. Id.

As in Carleton, common scheme or plan is at issue in Garrison's case. The trial court identified common scheme or plan as a permissible purpose for evidence of prior misconduct related to A.F. 1RP 167-68, 173. As in Carleton, "the court carefully sorted through the State's proffered evidence, and did not admit all of it" in relation to A.F. Carleton, 82 Wn. App. at 685. Like the trial court in Carleton, the court here at most focused solely on the probative value of A.F.'s testimony and its relevance. 1RP 167-68, 173. The court's consideration of the A.W. evidence is even sparser. 1RP 130-31. As in Carleton, "the record does not reflect that the court considered how prejudicial the challenged testimony would be." Carleton, 82 Wn. App. at 685.

There can be little doubt that A.W.'s testimony about the prior touching, and A.F.'s testimony about prior sexual abuse in particular, was

highly prejudicial. Prior misconduct evidence is inherently prejudicial. Id. at 686. Inherent in the testimony of A.W. and A.F. was the prejudicial inference that Garrison had a propensity to initiate sexual contact with younger girls. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). It is difficult to avoid the conclusion that evidence of prior acts of sexual misconduct against another child is likely to stimulate an emotional response. In cases where the charge involves a sexual act against a child, evidence of uncharged sex acts against another child strongly creates "the impression of a general propensity for pedophilia." State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986). The failure to conduct the balancing analysis is not harmless when the record does not allow the reviewing court to be sure that the trial court thoughtfully evaluated the prejudicial impact that the ER 404(b) evidence was inevitably going to bring to the trial. Id. at 686. Such is the case here.

The next step is to consider whether the result would have been the same even if the trial court had not admitted the evidence. Carleton, 82 Wn. App. at 686-87. Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

The erroneous admission of the ER 404(b) evidence was not harmless. This case turned on the credibility of A.W. and Garrison, as there were no witnesses to the alleged contact. In closing argument, the prosecutor stressed that the case came down to the credibility of A.W. and A.F. 5RP 43. The prosecutor emphasized the importance of A.F.'s testimony to show a common scheme, which served to corroborate A.W.'s story. 5RP 51-55, 75, 77, 82-83. The prosecutor also placed significance on the previous touching of A.W.'s thigh as evidence that Garrison committed the charged crime. 5RP 53-54, 81-82. In light of the prosecutor's argument at trial, the State cannot plausibly claim on appeal that the error in admitting the ER 404(b) evidence was harmless. That evidence was the cornerstone of its case and was used to bolster the credibility of A.W.'s account.

Evidence of other bad acts *inevitably* shifts the jury's attention to the defendant's general propensity for criminality. Bowen, 48 Wn. App. at 195. To jurors, propensity evidence is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). The ER 404(b) evidence made Garrison look like a serial sex predator. That evidence cast Garrison as "a person of abnormal bent, driven by biological inclination." Dawkins, 71 Wn. App. at 910 (quoting Coe, 101 Wn.2d at 781). A juror's natural inclination is to reason that having previously committed a sex offense, the

accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The admission of the ER 404(b) evidence allowed the jury to follow its natural inclination and infer he acted in conformity with his character and therefore likely committed the criminal acts charged by the State. Reversal of the conviction is required because there is a reasonable probability that juror consideration of the ER 404(b) evidence influenced the outcome.

d. The Court Also Committed Reversible Error In Failing To Correctly Instruct The Jury On The Permissible Purpose For Which It Could Consider The ER 404(b) Evidence.

If evidence is admitted under ER 404(b), a limiting instruction must be given if requested to ensure the jury considers the evidence only for a proper purpose. Foxhoven, 161 Wn.2d at 175; Gresham, 173 Wn.2d at 423-24. The court gave the following written limiting instruction to the jury:

Certain evidence has been admitted in this case for only a limited purpose. Evidence of the defendant's alleged prior sexual misconduct may be considered by you only for the purpose of considering whether such evidence demonstrated 1) a common scheme or plan, or 2) absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 50 (Instruction 9).<sup>9</sup>

The problem is that the limiting instruction does not differentiate between the purposes attaching to each category of evidence involving A.W. (prior touching of thigh) and A.F. (prior sexual contacts). The instruction given to the jury allowed it to consider the prior misconduct involving A.W. and A.F. to show common scheme or plan when that purpose should have been limited to A.F. Once a criminal defendant requests a limiting instruction for ER 404(b) evidence, the trial court has a duty to correctly instruct the jury.<sup>10</sup> Gresham, 173 Wn.2d at 424.

Defense counsel's proposed limiting instruction differentiated between A.W. and A.F. and the purpose for which the ER 404(b) evidence related to each could be used. CP 64 (attached as Appendix A). The State's proposed limiting instruction did the same. CP 397 (attached as Appendix B).

The State contended it was "absolutely necessary and integral that we instruct the jury appropriately as to what evidence we use for what reason" in relation to the two witnesses. 5RP 5. It took exception to the court's failure to differentiate between A.W. and A.F. in the limiting

---

<sup>9</sup> An oral instruction was given to the jury following A.F.'s testimony that limited consideration of the prior misconduct to common scheme or plan. 4RP 54

<sup>10</sup> This is so, even if defense counsel fails to propose a correct instruction. Gresham, 173 Wn.2d at 424.

instruction, recollecting the court allowed the ER 404(b) evidence for A.F. under "common scheme or plan" and "absence of mistake," and the evidence for A.W. under "lustful disposition" and "absence of mistake." 5RP 25-26. Defense counsel likewise took exception to the limiting instruction, noting his proposed instruction distinguished between the two girls. 5RP 26.

It is unclear from the record why the court declined to give a differentiated limiting instruction, but during the instruction conference the court mentioned "[w]hen we concluded motions in limine, and when we had the more detailed discussions about what would come in from the two, both A.F. and A.W. They were permitted for both 'common scheme or plan.' That is whatever the similarities the jurors might notice, as well as 'a lack of accident.'" 5RP 11.

The problem is that the court never in fact identified common scheme or plan as a reason to admit the evidence related to the prior touching of A.W.'s thigh. 1RP 130-34. The court only identified evidence related to A.F. as admissible under common scheme or plan. 1RP 167-68, 173. Because the court never actually identified common scheme or plan as a basis to admit the A.W. evidence when it made its ruling, the limiting instruction should not have allowed the jury to consider the prior touching of A.W.'s thigh for that purpose.

The mistake is significant enough that there is a reasonable probability that it affected the outcome. The common scheme evidence involving A.F. was remote in time, occurring 10 years before the charged crime against A.W. While lapse of time does not necessarily prohibit admission of the evidence, it certainly affects the weight given to that evidence by the jury. State v. Evans, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986). A reasonable jury could discount the force of the A.F. evidence because it was so long ago. The limiting instruction, however, allowed the jury to consider a much more recent instance of misconduct as evidence of a common scheme or plan: the touching of A.W.'s thigh. The recency of the A.W. touching increased its persuasive force. Jurors could be swayed into concluding Garrison must have committed the charged crime because he touched A.W. in a sexual manner shortly before the charged crime took place.

The instruction is further flawed because it allowed the jury to consider the ER 404(b) evidence related to both girls for absence of mistake or accident.<sup>11</sup> As argued in section C. 1. b., supra, the evidence was not admissible for that purpose and so the jury should not have been allowed to consider it for that purpose.

---

<sup>11</sup> Defense counsel objected to the limiting instruction referencing absence of mistake as a permissible purpose. 4RP 204.

Again, the evidence against Garrison was not overwhelming. The case was primarily a credibility contest between A.W. and Garrison. There were no witnesses to the contact alleged by A.W. Under the circumstances, there is a reasonable probability that the limiting instruction error affected the outcome, requiring reversal of the conviction.

2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON CLASS B FELONY, AND THEREFORE THE TEXAS OFFENSE CANNOT BE CONSIDERED A STRIKE OFFENSE FOR SENTENCING PURPOSES.

The court at sentencing treated a prior Texas offense of voluntary manslaughter as comparable to the Washington offense of first degree manslaughter, a class B felony. From this premise, the court further ruled that the Texas offense did not wash out of Garrison's criminal history and thus qualified as a "most serious offense" for sentencing purposes.

This was error. The State did not prove the Texas offense was legally or factually comparable to the Washington offense of first degree manslaughter. The Texas offense therefore cannot be counted as a strike offense and Garrison is not subject to being sentenced under the POAA.

- a. The Texas Manslaughter Conviction Is Not Legally Or Factually Comparable To The Washington Offense Of First Degree Manslaughter.

In computing the offender score, "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense

definitions and sentences provided by Washington law." RCW 9.94A.525(3). The prosecution bears the burden of proving the comparability of out-of-state convictions. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 880, 123 P.3d 456 (2005). The comparability of out-of-state convictions to Washington crimes is a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000).

First, it must be determined whether the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The trial court must compare the elements of the out-of-state crime with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the elements are different or if the Washington statute defines the offense more narrowly than does the foreign statute. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); Lavery, 154 Wn.2d at 255-56. If the foreign offense's elements are broader or different than Washington's elements, precluding legal comparability, it must then be determined whether the offense is factually comparable. Thiefault, 160 Wn.2d at 415.

In Garrison's case, the analysis went no further than comparison of the legal elements. A factual comparison was not conducted, nor was it available based on the limited record produced by the State.

The Texas information alleged Garrison, on March 28, 1981, "did then and there: while under the immediate influence of sudden passion arising from an adequate cause, and intending to cause serious bodily injury to an individual, namely: [T.M.C.], intentionally and knowingly commit an act clearly dangerous to human life, to-wit: striking the head and body of the said [T.M.C.], thereby causing the death of an individual, namely: [T.M.C.]." CP 260. The judgment and sentence reflects that Garrison pled guilty to the charge of voluntary manslaughter in front of the judge. CP 262-63.

In 1981, V.T.C.A., Penal Code § 19.04(a)<sup>12</sup> defined the offense of "voluntary manslaughter" as follows: "A person commits an offense if he causes the death of an individual under circumstances that would constitute murder *under Section 19.02 of this code*, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause." (emphasis added).<sup>13</sup>

---

<sup>12</sup> Acts 1973, 63rd Leg., ch. 426, art. 2, § 1 (eff. Jan. 1, 1974), amended by Acts 1973, 63rd Leg., ch. 426, art. 2, § 1 (eff. Jan. 1, 1974).

<sup>13</sup> "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person

In 1981, V.T.C.A., Penal Code § 19.02(a)<sup>14</sup> provided as follows:

A person commits an offense if he:

- (1) intentionally or knowingly causes the death of an individual;
- (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
- (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

The trial court ruled Garrison's Texas voluntary manslaughter conviction was comparable to the Washington offense of first degree manslaughter. CP 132 (CL A). Under Washington law, a person is guilty of first degree manslaughter when he "recklessly causes the death of another person." Former RCW 9A.32.060(1)(a) (Laws of 1975, 1st ex.s. ch. 260). The trial court's comparability ruling is likely correct only *if* Garrison pled guilty to committing voluntary manslaughter under circumstances that would constitute murder under *19.02(a)(1)* of the Texas

---

killed which passion arises at the time of the offense and is not solely the result of former provocation." Former V.T.C.A., Penal Code § 19.04(b) (1974). "Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Former V.T.C.A., Penal Code § 19.04(c) (1974).

<sup>14</sup> Acts 1973, 63rd Leg., ch. 426, art. 2, § 1 (eff. Jan. 1, 1974), amended by Acts 1973, 63rd Leg., ch. 426, art. 2, § 1 (eff. Jan. 1, 1974).

code: "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual."

The flaw in the court's ruling is that Garrison did *not* plead guilty to committing voluntary manslaughter under circumstances that would constitute murder under *19.02(a)(1)*. Rather, he pled guilty to committing voluntary manslaughter under circumstances that would constitute murder under *19.02(a)(2)*. That crucial difference leads to a different result.

Neither the Texas information nor the plea document specifies by number the statutory subsection to which Garrison pled guilty. The only guidance available comes from the language of the information itself: "while under the immediate influence of sudden passion arising from an adequate cause, and intending to cause serious bodily injury to an individual, namely: [T.M.C.], intentionally and knowingly commit an act clearly dangerous to human life[.]" CP 260.

From this, it is clear that the means of committing the crime at issue is Section 19.02(a)(2): "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." The information tracks the language of section 19.02(a)(2), not section 19.02(a)(1). If Garrison committed the crime under Section 19.02(a)(1), the language in the information would have omitted "intending to cause serious bodily injury to an individual" altogether and

substituted "causes the death of an individual" for "commit an act clearly dangerous to human life."

The prosecutor, however, emphasized additional language in the information that Garrison "intentionally and knowingly" committed an act dangerous to human life. The prosecutor seized upon that quoted language to argue the means of committing voluntary manslaughter was section 19.02(a)(1): "intentionally or knowingly causes the death of an individual." However, the language it relies upon to show Garrison at least recklessly caused the death, and therefore committed the equivalent of Washington's first degree manslaughter, is mere surplusage. The State treated language that Garrison "intentionally or knowingly" committed an act clearly dangerous to human life as a statutorily required mens rea element of the crime when in fact it is not.

Under Texas law, there is no culpable mental state for the act alleged to be "clearly dangerous to human life that causes the death of an individual" under 19.02(a)(2). Peterson v. State, 659 S.W.2d 59, 61 (Tex. Ct. App. 1983); Lugo-Lugo v. State, 650 S.W.2d 72, 80-82 (Tex. Crim. App. 1983). In Lugo-Lugo, the court held an indictment charging voluntary manslaughter under 19.02(a)(2) was proper in not stating a culpable mental state for "committing an act clearly dangerous to human life." Lugo-Lugo, 650 S.W.2d at 73, 80, 82. The statute only requires the

specific intent to cause serious bodily injury, while "the act clearly dangerous to human life" was an objective standard untied to any culpable mental state. Id. at 81-82. The statute thus "focuses the mental state of the individual on the particular result and not on the conduct that causes death." Id. at 82. For this reason, the Lugo-Lugo court, sitting en banc, condemned and withdrew an earlier panel decision that had held an indictment alleging voluntary manslaughter under Section 19.02(a)(2) was deficient in failing to allege the defendant intentionally or knowingly committed an act clearly dangerous to human life. Id. at 74-75, 82.

It is clear, then, that the language in Garrison's information consisting of "intentionally and knowingly" committing an act clearly dangerous to human life is surplusage. For the crime of voluntary manslaughter predicated on V.T.C.A., Penal Code § 19.02(a)(2), there is no mental state element that attaches to the commission of an act clearly dangerous to human life. "[A]llegations not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment are treated as mere surplusage, and may be entirely disregarded." Curry v. State, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000) (quoting Burrell v. State, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975)).

As a result, Garrison cannot be said to have been found guilty of committing voluntary manslaughter by "intentionally and knowingly" committing an act clearly dangerous to human life. Because no culpable mental state attaches to the result, Garrison's conviction for voluntary manslaughter is not legally comparable to the Washington offense of first degree manslaughter, which does require a culpable mental state in relation to the result. A person is guilty of that crime when he "recklessly causes the death of another person." Former RCW 9A.32.060(1)(a).

The Texas statute is broader than the Washington statute. A person could be convicted of Texas voluntary manslaughter without having any culpable mental state connected to the result of death, whereas the Washington offense of first degree manslaughter requires that a person recklessly cause a person's death.

Further, the recklessness standard in Washington includes both a subjective and objective component. State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). "Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." R.H.S., 94 Wn. App. at 847. A Texas voluntary manslaughter conviction predicated on Section 19.02(a)(2) at the very least does not require that a person subjectively know he is committing an act dangerous to human life. Lugo-Lugo, 650 S.W.2d at 81-82. A person

could be convicted of Texas voluntary manslaughter without having any subjective mental state connected to the result of death, whereas the Washington offense of first degree manslaughter requires a subjective component be proven as part of recklessly causing a person's death. An out-of-state offense that is broader than a Washington offense is not legally comparable. Lavery, 154 Wn.2d at 255-56.

If the State persists on appeal in arguing Garrison was actually convicted of voluntary manslaughter under the Section 19.02(a)(1) predicate ("intentionally or knowingly causes the death of an individual") instead of Section 19.02(a)(2) ("intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual"), the State is doomed to fail in that endeavor. "[T]he State bears the burden of proving by a preponderance of the evidence that two applicable prior convictions exist when seeking a POAA sentence." State v. Carpenter, 117 Wn. App. 673, 678, 72 P.3d 784 (2003). Given the nature of the charging language and lack of specific statutory citation, the State cannot prove by a preponderance that Garrison was convicted of voluntary manslaughter under Section 19.02(a)(1) as opposed to 19.02(a)(2).

The State also contended the "sudden passion" aspect of the Texas voluntary manslaughter was really only a "mitigating circumstance" for

murder rather than an element of the offense. 8RP 53, 69. It asserted "sudden passion" was "essentially a defense to murder." CP 238. The State is incorrect. Some context is necessary to show why.

"Prior to September 1, 1994, whether a defendant committed murder under the immediate influence of sudden passion arising from an adequate cause was an issue that was litigated at the guilt phase of the trial." Wooten v. State, 400 S.W.3d 601, 604 (Tex. Crim. App. 2013). "If the evidence raised the issue of sudden passion, the question was submitted to the jury, and it had the option of finding the defendant guilty of the lesser offense of voluntary manslaughter." Wooten, 400 S.W.3d at 605-06. The Texas legislature acted in 1993 to remove the crime of voluntary manslaughter from the Texas Penal Code and thus, "[u]nder the current statutory scheme, the question of whether a defendant killed while under the immediate influence of sudden passion is a punishment issue." Id. at 606. But prior to that time, "sudden passion was a guilt/innocence issue." Trevino v. State, 100 S.W.3d 232, 236 (Tex. Crim. App. 2003).

"[W]hen there is evidence in a murder prosecution raising the issue whether the accused killed 'under the immediate influence of sudden passion arising from an adequate cause,' the absence of such 'sudden passion' becomes an implied element of murder which the State must establish beyond a reasonable doubt in order to obtain a conviction for

murder under V.T.C.A. Penal Code, § 19.02." Gold v. State, 736 S.W.2d 685, 686 n.1 (Tex. Crim. App. 1987). "In a prosecution for voluntary manslaughter, on the other hand, the State must prove exactly what it alleges, viz: the presence of 'sudden passion' beyond a reasonable doubt." Gold, 736 S.W.2d at 686 n.1. "[T]his 'ludicrous position' is a product of the Legislature's having fashioned voluntary manslaughter as an offense in its own right, rather than making 'the influence of sudden passion arising from an adequate cause' an issue of mitigation to be raised at the punishment stage in a murder prosecution . . . or an 'affirmative defense' to murder." Id. at 686.

Thus, when Garrison committed voluntary manslaughter in 1981, the issue of sudden passion was a guilt issue, not a sentencing issue. That he committed the crime while under the immediate influence of sudden passion was an element of the crime. It was not an affirmative defense.

Further, the State did not prove the Texas manslaughter conviction is factually comparable to the Washington offense of first degree manslaughter. If the elements are different or if the Washington statute defines the offense more narrowly than does the foreign statute, the court then determines whether the offenses are factually comparable. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. In assessing factual comparability, the court may look at the facts underlying the prior

conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255.

"In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Thieffault, 160 Wn.2d at 415. The court can go no further due to limitations imposed by the Sixth Amendment. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007). Blakely<sup>15</sup> protections apply to limit judicial inquiry into the underlying circumstances of the prior conviction where the exact facts of a prior offense are used to increase the statutory maximum sentence a sentencing judge is authorized to enter. State v. Jordan, \_\_ Wn.2d \_\_, 325 P.3d 181, 185 (2014) (citing Descamps v. United States, \_\_ U.S. \_\_, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 1262, 161 L. Ed. 2d 205 (2005)); see also State v. Olsen, \_\_ Wn.2d \_\_, 325 P.3d 187, 191 (2014) (Sixth Amendment implications of Descamps consistent with Washington's comparability analysis).

---

<sup>15</sup> Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (Sixth Amendment right to a jury trial provides a constitutional limit on the facts that a sentencing court can use to support a sentence above a statutorily mandated range).

The Texas paperwork related to the manslaughter conviction sets forth no underlying facts of the crime that were admitted, stipulated to, or proven beyond a reasonable doubt. Ex. 1. There is no way to determine whether Garrison, as a factual matter, *recklessly* caused the death. The Texas offense is therefore not factually comparable to Washington's first degree manslaughter. Courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008).

In Garrison's case, the Texas information contains a factual allegation: "to-wit: striking the head and body of the said [T.M.C.], thereby causing the death of an individual, namely: [T.M.C.]" CP 260. That factual recitation, like the "intentionally or knowingly" language that precedes it, is surplusage. Garrison did not admit to it as part of his plea.

On plea of guilty before a judge, "the defendant may consent to the proffer of evidence in testimonial or documentary form, or to an oral or written stipulation of what the evidence against him would be, without necessarily admitting to its veracity or accuracy; and such a proffer or stipulation of evidence will suffice to support the guilty plea so long as it embraces every constituent element of the charged offense." Menefee v. State, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Alternatively, a defendant "may enter a sworn written statement, or may testify under oath

in open court, specifically admitting his culpability or at least acknowledging generally that the allegations against him are in fact true and correct." Menefee, 287 S.W.3d at 13.<sup>16</sup>

The State produced no evidence of an evidentiary stipulation or "judicial confession" in Garrison's case. Any attempt at factual comparability falters before it leaves the gate. The State did not meet its burden of establishing comparability.

The trial court's application of relevant statutes in making sentencing determinations under the persistent offender statute is reviewed de novo. Carpenter, 117 Wn. App. at 679. The trial court concluded "[t]he Texas voluntary manslaughter statu[t]e, V.T.C.A., Penal Code 19.02 and 19.04., in place in 1981, when the defendant committed the offense and was convicted of the offense, is comparable to the Washington manslaughter in the first degree statute, RCW 9A.32.060, in place in 1981." CP 132 (CL A). For the reasons set forth above, that is an incorrect conclusion of law.

b. The Court Erred In Ruling The Texas Offense Did Not Wash Out From Garrison's Criminal History.

The trial court ruled "[p]ursuant to RCW 9.94A.525(2)(b), the defendant's Texas voluntary manslaughter conviction has not 'washed' and

---

<sup>16</sup> Conversely, a defendant who pleads guilty before a jury to a felony offense is deemed to have admitted all necessary elements of the offense. Turnipseed v. State, 609 S.W.2d 798, 800-01 (Tex. Crim. App. 1980).

therefore is appropriately included in the defendant's offender score." CP 132 (CL C). That conclusion is based on the incorrect premise that the Texas manslaughter conviction is comparable to Washington's first degree manslaughter offense, a class B felony that required a 10 year washout period.<sup>17</sup> CP 132 (CL A). As argued above, the Texas manslaughter conviction is not comparable to first degree manslaughter.

The State agreed that if the Texas conviction was comparable only to the Washington offense of second degree manslaughter, it would wash out as a class C felony. 9RP 18. "A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person." Former RCW 9A.32.070(1) (Laws of 1975, 1st ex.s. c 260 § 9A.32.070). In 1981, second degree manslaughter was a class C felony. Former RCW 9A.32.070(2).

RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in the offender score. That statute provides, in relevant part:

class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time

---

<sup>17</sup> In 1981, when the Texas voluntary manslaughter occurred, a Washington first degree manslaughter offense was classified as a class B felony. Former RCW 9A.32.060(2) (Laws of 1975, 1st ex.s. c 260 § 9A.32.060). The offense was elevated to a class A felony in 1997. Laws of 1997, ch. 365 § 5.

residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

The statute contains a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date that results in a conviction resets the five-year clock. Ervin, 169 Wn.2d at 821. Incarceration for a probation violation constitutes confinement pursuant to a felony conviction within the meaning of the statutory washout provision. State v. Mehrabian, 175 Wn. App. 678, 714, 308 P.3d 660, review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013).

The wash out statute pertaining to prior class C felonies requires that the offender, "since the last date of release from confinement . . . pursuant to a felony conviction," spend "five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). Garrison did just that. The latest five year clock began to run when he was released from confinement on the second degree assault conviction in May 2005. CP 132 (FF 6). The

offense for which he was convicted in the present case occurred in December 2011. Garrison spent five years in the community "since the last date of release from confinement" without committing any new crime that resulted in conviction. The Texas manslaughter conviction therefore washes out of Garrison's criminal history if it is comparable to Washington's second degree manslaughter offense as a class C felony.

Under the POAA, a defendant who commits a "most serious offense" faces a mandatory life sentence without the possibility of parole if he has two prior convictions for "most serious offenses." RCW 9.94A.030(32), (37); RCW 9.94A.570. A second degree manslaughter offense in Washington qualifies as a "most serious offense" for purposes of sentencing under the POAA. RCW 9.94A.030(32)(l). But because the Texas conviction washes out, it cannot count as a "most serious offense" in Garrison's criminal history. See State v. Failey, 165 Wn.2d 673, 678, 201 P.3d 328 (2009) (prior conviction that washes out is not counted as a strike offense).

The trial court's conclusion that Garrison must be sentenced as a persistent offender because he was convicted on two prior occasions of a "most serious offense" is therefore incorrect. CP 133 (CL F). Garrison's prior Texas conviction for voluntary manslaughter washed out and cannot be counted as a "most serious offense" because he committed no crimes

resulting in conviction for a five year period while in the community since his last release from confinement. His case must be remanded for resentencing within the standard range as a non-persistent offender.

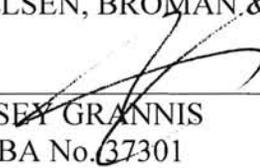
D. CONCLUSION

For the reasons set forth, Garrison requests reversal of the conviction. In the event the Court declines to reverse the conviction, Garrison requests remand for resentencing within the standard range as a non-persistent offender.

DATED this 31<sup>st</sup> day of July 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

# **APPENDIX A**

No. \_\_\_\_\_

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's alleged prior sexual misconduct with ABW and AF.

Evidence of the defendant's alleged prior sexual misconduct with ABW may be considered by you only for the purpose of considering whether such evidence demonstrates absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Evidence of the defendant's alleged prior sexual misconduct with AF may be considered by you only for the purpose of considering whether such evidence demonstrates 1) a common scheme or plan, or 2) absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30

# **APPENDIX B**

No. \_\_\_\_\_

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's alleged prior sexual misconduct with ABW and AF.

Evidence of the defendant's alleged prior sexual misconduct with ABW may be considered by you only for the purpose of considering whether such evidence demonstrates 1) a lustful disposition for ABW, 2) absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Evidence of the defendant's alleged prior sexual misconduct with AF may be considered by you only for the purpose of considering whether such evidence demonstrates 1) a common scheme or plan, or 2) absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71134-2-I
	)	
KEVIN GARRISON,	)	
	)	
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 3<sup>RD</sup> DAY OF JULY 2014, 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 AND/OR VIA EMAIL.

[X] KEVIN GARRISON  
DOC NO. 991241  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF JULY 2014.

X *Patrick Mayovsky*