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No. 68468-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

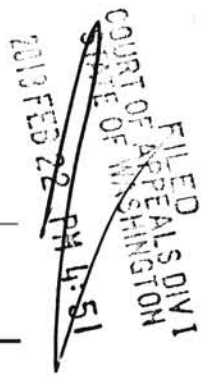
v.

KEVIN G. LARSON, SR.,

Appellant.

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

The Honorable Richard D. Eadie



AMENDED BRIEF OF APPELLANT

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6. Cumulative errors violated Mr. Larson's constitutional right to fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Between the time of conviction and the time of sentencing, RCW 10.58.090 was ruled unconstitutional for violation of the separation of powers doctrine. Did the trial court commit reversible error when it

admitted evidence of prior acts pursuant to RCW 10.58.090 where the statute was ruled unconstitutional?

2. ER 404(b) authorizes admission of evidence of prior acts only if the acts establish a common scheme or plan and are more probative than prejudicial. Did the trial court commit reversible error when it admitted evidence of prior acts, most of which allegedly occurred approximately twenty years previously, where the allegations were highly prejudicial but failed to meet the "common plan or scheme" exception to ER 404(b)?

3. When evidence is admitted under ER 404(b), a trial court must give a limiting instruction to the jury that it can the evidence only insofar as it establishes a common plan or scheme, and not as proof of a defendant's character or criminal propensity. Did the trial court commit reversible error when it admitted evidence of prior acts pursuant to ER 404(b), but failed to give the defendant's proposed ER 404(b) limiting instruction and instead gave an instruction tailored to RCW 10.58.090?

4. The constitutional right to a fair trial includes a trial free of undue sympathy or prejudice. Was Mr. Larson's right to a fair trial violated when the trial court admitted photographs of two alleged victims of prior bad acts that purported to represent how they looked approximately twenty and twenty-seven years previously, where the

photographs were irrelevant and merely an appeal to the sympathy of the jury?

5. A defendant may move for a new trial when an error of law occurred during trial and was objected to at the time by the defendant. Did the trial court commit reversible error when it denied a defense motion for a new trial where, over defense objection, it admitted evidence pursuant to RCW 10.58.090 and the statute was ruled unconstitutional between the time of conviction and sentencing and refused to give an ER 404(b) limiting instruction?

6. Cumulative errors may violate a defendant's constitutional due process right to a fair trial. Did the cumulative effect of the multiple evidentiary errors and instructional error result in a trial that was fundamentally unfair and requires reversal?

C. STATEMENT OF THE CASE

In August 2010, Kevin G. Larson, Sr. moved in with his son, Shon Larson,[1] Shon's girlfriend, Blair Owens, Ms. Owens' daughter, nine year-old A.O., and their eighteen month-old son, to babysit the children while Shon and Ms. Owens were at work. 11/16/11 RP 8-9, 10, 21-22. They shared a one-bedroom apartment where Shon, Ms. Owens, and the

[1]To avoid confusion, this brief refers to Shon Larson by his first name. No disrespect is intended.

children slept in the bedroom and Mr. Larson slept on the living room couch. 11/16/11 RP 22.

On September 19, 2010, the three adults spent the day watching television and drinking beer and vodka. 11/16/11 RP 23-24; 11/17/11 RP 142. At nighttime, the children went to sleep in the bedroom, while Shon and Ms. Owens moved their mattress into the living room where they continued to watch television. 11/17/11 RP 24-25, 143-44. Eventually, Mr. Larson fell asleep on the couch and Shon and Ms. Owens fell asleep on the mattress. 11/17/11 RP 25, 144.

Very early the following morning, around 4 a.m., A.O. came into the living room, woke Ms. Owens, and reported that she was asleep until she felt "something" wet. 11/17/11 RP 101-02, 146, 149. Her pajama bottoms were rolled up to her thigh and Mr. Larson was reportedly licking her feet. 11/17/11 RP 105-06, 113-14. Mr. Larson then allegedly licked her toes and legs, touched her genital area, licked her genital area over her pajamas, and rubbed her chest over her pajamas. 11/17/11 RP 107, 110, 112. A.O. rolled over as if just waking up, Mr. Larson went into the bathroom, and A.O. went into the living room. 11/17/11 RP 107-08, 114-15.

According to Ms. Owens, A.O. was scared and shaking, and her legs were "soaked." 11/17/11 RP 146. Ms. Owens woke Shon and then

pushed Mr. Larson out of the apartment. 11/16/11 RP 26-27; 11/17/11 RP 115, 147. According to Shon, A.O. was crying and smelled of beer. 11/16/11 RP 26. He did not touch A.O.'s legs but her back was "a little damp" from sweating in her sleep. 11/16/11 RP 27-28.

Mr. Larson was charged with child molestation in the first degree, in violation of RCW 9A.44.083. CP 9. The defense theory contended Mr. Larson was an alcoholic, he was intoxicated at the time of the incident and in a relatively unfamiliar apartment, he stumbled into the bedroom where A.O. misconstrued his conduct. 11/22/11 RP 40-42.

At trial, a police officer and a registered nurse practitioner, both of whom interviewed A.O., testified that A.O. repeated the same allegations she reported to her mother. 11/21/11 RP 47, 94-97.

Over defense objection, the court admitted allegations of prior sexual misconduct by Mr. Larson involving two nieces when they were minors and Ms. Owens when she was an adult, pursuant to both RCW 10.58.090 and ER 404(b). 11/1/11 RP 77-103; 11/3/11 RP 4-16, 46-57; 11/7/11 RP 18-19, 21-22, 35-37; 11/14/11 RP 26-30; 11/21/11 RP 118-20. Thirty-one-year-old Lyndsay Wilhelm, Mr. Larson's niece by marriage, testified she had two "uncomfortable" encounters with Mr. Larson when she was much younger. 11/16/11 RP 51, 52; 11/17/11 RP 18. Ms. Wilhelm testified pre-trial that the incidents occurred when she was in

seventh grade, when she presumably was approximately thirteen years old, whereas at trial she stated the incidents occurred when she was eleven or twelve years old, eighteen to twenty years ago. 11/16/11 RP 55; 11/17/11 RP 18. At the time, both her family and Mr. Larson's family were temporarily living in the home of another relative. 11/17/11 RP 18. According to Ms. Wilhelm, one incident occurred when she was in front of the bathroom sink and Mr. Larson came in behind her, gave her a "bear hug," pushed her against the counter, and she felt his erection on her back. 11/17/11 RP 21. Within weeks of that incident, Ms. Wilhelm and Mr. Larson were wrestling and tickling each other when Mr. Larson allegedly pinned her face down and she again felt his erection on her back. 11/17/11 RP 25. She told her sister and they agreed to not be alone with Mr. Larson, if possible, but she did not report these incidents to other family members until she was an adult. 11/17/11 RP 24, 28, 33.

Thirty-three-year-old Shannon Smith, Ms. Wilhelm's sister and Mr. Larson's niece by marriage, also testified about two incidents involving Mr. Larson when she was much younger. 11/17/11 RP 46, 47. First, when she was approximately five years old, twenty-seven years previously, Ms. Smith was asleep in Mr. Larson's house and awoke when Mr. Larson lay on top of her and rhythmically moved up and down her leg. 11/17/11 RP 64-65. Several minutes later, Mr. Larson fell asleep and

Ms. Smith wiggled from beneath him and got into bed with a cousin sleeping across the room. 11/17/11 RP 66. Regarding the second incident, Ms. Smith testified at pre-trial that she was twelve or thirteen years old whereas at trial she testified she was eleven or twelve years old. 11/3/11 RP 13; 11/17/11 RP 67. According to Ms. Smith, she was asleep on a couch at a relative's house and awoke to feel Mr. Larson's hand under her shirt holding, but not fondling, one breast. 11/17/11 RP 69. Ms. Wilhelm told her sister about the second incident, but, like her sister, she did not report the allegations to other family members until she was an adult. 11/17/11 RP 24, 70-71.

The nieces further testified that Mr. Larson and his married sister-in-law entered had an affair that resulted in estrangement and a "big blowup" among extended family members. 11/17/11 RP 35, 72.

Thirty-year-old Ms. Owens testified that she and Shon were living in the same apartment approximately four years earlier and Mr. Larson occasionally spent the night on the couch. 11/17/11 RP 131-32. One night when she and Shon were asleep in the bedroom she woke to Mr. Larson licking her genital area. 11/17/11 RP 132-33. Shon kicked Mr. Larson out of the apartment and they were estranged for several years until the birth of their son. 11/17/11 RP 133-34, 136. Mr. Larson apologized for the incident with Ms. Owens, they resumed a relationship, and they

eventually asked Mr. Larson to babysit their children. 11/16/11 RP 17, 17-18, 18-19; 11/17/11 RP 137, 139.

Over defense objection, the trial court admitted a photograph of Ms. Wilhelm when she was approximately ten years old and a photograph of Ms. Smith when she was eleven or twelve years old, pursuant to ER 402. 11/17/11 RP 3-7, 19, 68; Ex.1, 2.

Again over defense objection, the court instructed the jury that it could use the evidence of the alleged prior misconduct "for its bearing on any matter to which it is relevant." 11/21/11 RP 5-9, 114; CP 44 (Instruction No. 6). The court refused to give the defense proposed ER 404(b) limiting instruction. 11/21/11 RP 4-9; CP 31. In closing argument and in rebuttal, the prosecutor relied extensively on the allegations of prior misconduct and urged the jury to "use that testimony for any purpose you deem relevant." 11/22/11 RP 25-30, 50-53.

During deliberations, the jury requested a copy of the transcript of A.O.'s interview with the police officer. CP 33. The request was denied because the transcript had not been admitted into evidence. CP 34. Mr. Larson was convicted as charged. 11/22/11 RP 72-75; CP 52.

Between the time of conviction and sentencing, the Washington Supreme Court ruled RCW 10.58.090 was unconstitutional and Mr. Larson moved for a new trial. CP 57-61. The court denied the motion on

the basis that there was overwhelming evidence of guilt. 3/2/12 RP 13-14; CP 82.

D. ARGUMENT

1. The trial court erred in admitting allegations of Mr. Larson's prior sexual misconduct.

a. The evidence of prior misconduct was inadmissible under RCW 10.58.090.

The trial court admitted allegations of prior sexual misconduct pursuant to RCW 10.58.090. 11/7/11 RP 18-19, 21-22, 35-37. Between the time of conviction and sentencing, however, RCW 10.58.090 was ruled unconstitutional for violation of the separation of powers doctrine. State v. Gresham, 173 Wn.2d 405, 426-32, 269 P.3d 207 (2012). Therefore, the allegations of prior misconduct were wrongly admitted pursuant to that statute.

b. The evidence of prior misconduct was inadmissible under ER 404(b).

The trial court also admitted the allegations of prior sexual misconduct pursuant to ER 404(b), to establish intent and lack of mistake or accident. 11/21/11 RP 118-20. This too was in error.

ER 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts in 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.

"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). Admission of evidence pursuant to one of the ER 404(b) exceptions is reviewed for abuse of discretion. State v. Perez-Valdez, 172 Wn.2d 808, 814, 265 P.3d 853 (2011).

The State's burden to demonstrate admissibility is "substantial." DeVincentis, 150 Wn.2d at 17. Before evidence of other bad acts may be admitted pursuant to ER 404(b), the acts must be 1) proved by a preponderance of the evidence, 2) admitted for the purpose of proving a common scheme or plan, 3) relevant to prove an element of the offense charges or to rebut a defense, and 4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995); accord State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (ER 404(b) evidence must "be logically relevant to a material issue before the jury" and "its probative value must ... outweigh its potential for prejudice.").

Here, the State's evidence failed to satisfy the second and fourth step.

i. The alleged prior bad acts did not demonstrate a "common plan or scheme" because each allegation was manifestly unlike the crime charged.

No single allegation of prior misconduct, standing on its own, sufficiently resembles A.O.'s allegations to merit admission as a common plan or scheme. To prove a common scheme or plan for purposes of ER 404(b), the prior acts must demonstrate the defendant "committed markedly similar acts of misconduct against similar victims under similar circumstances." Lough, 125 Wn.2d at 852. "[T]he evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Id. at 860. For example, in State v. Scherner, where the defendant was charged with three counts of child molestation in the first degree, the court found sufficient evidence of a common scheme or plan because, 1) "the girls were of similar prepubescent age and size," 2) "in each instance Scherner was a trusted relative or friend of the girl," 3) "in each instance he molested the girl in bed, sometimes after she had gone to sleep," and 4) "in each case the abuse involved rubbing the girl's genital area or performing oral sex."

153 Wn. App. 621, 657, 225 P.3d 248 (2009), aff'd sub nom., State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).

Here, the only commonality between the allegations involving A.O., Ms. Wilhelm, Ms. Smith, and Ms. Owens was their familial relationship with Mr. Larson. Initially, it may be noted that Ms. Wilhelm's allegations of misconduct eighteen to twenty years previously and Ms. Smith's allegations of misconduct twenty-seven years and twenty years previously were extremely remote in time to the current charge. Although the passage of time is not itself a decisive reason for exclusion, it "erodes the commonality between acts. The probability of an ongoing plan or scheme becomes tenuous." State v. Jones, 322 N.C. 585, 365 S.E.2d 822, 824 (1988) (conviction for first degree rape and indecent liberties with a child reversed where trial court admitted evidence of prior acts of sexual misconduct alleged to have occurred seven and twelve years prior to pending charge).

Moreover, although Ms. Wilhelm and Ms. Smith alleged Mr. Larson abused them when they were minors, neither the alleged conduct nor their age bear any meaningful similarity to the present case. Ms. Wilhelm alleged the incidents occurred when she was eleven to thirteen years old, presumably prepubescent or pubescent, she was awake and either in the bathroom or in the living room, and she felt an erection. By

contrast, A.O. was nine years old, before prepubescence, she was asleep in her bedroom, and she did not state that she noticed or felt an erection.

Ms. Smith's accusations were equally dissimilar to the present case, the only commonality being the alleged misconduct occurred while Ms. Smith was asleep. Ms. Smith alleged Mr. Larson lay on top of her while she slept and rubbed his erection against her leg when she was five years old and put his hand under her shirt while she slept and held her breast when she was twelve or thirteen years old. Again, A.O., at nine years old, was between those ages and her allegations are markedly unlike Ms. Smith's testimony. Because the age and conduct were dissimilar, the alleged prior misconduct involving Ms. Wilhelm and Ms. Smith did not meet the requirements for admission as a common scheme or plan.

Ms. Owens alleged she woke to Mr. Larson licking her genital area when she was approximately twenty-six years old. Clearly, there is no similarity in age, although the conduct is similar. But this is not sufficient to justify admission. Evidence of a common scheme or plan requires "markedly similar act of misconduct against similar victims." Lough, 125 Wn.2d at 852 (emphasis added). Because A.O. and Ms. Owens are not "similar victims," the alleged misconduct involving Ms. Owens also did not meet the requirements for admission as a common scheme or plan.

ii. The alleged prior bad acts were highly inflammatory but had little probative value.

The alleged prior misconduct was unfairly prejudicial to Mr. Larson. As is common in child sex abuse cases, A.O.'s testimony was the only evidence against Mr. Larson; the medical examination showed no evidence of penetration or injury. However, the sheer volume of the testimony regarding the prior bad acts overshadowed the testimony regarding the charged offense, making it very difficult for the jurors to keep the "other act" evidence in perspective.

The state Supreme Court has recognized that the potential for unfair prejudice is particularly high in sex abuse cases such as here.

> A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential is at its highest.
>
> > Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, that he could help be otherwise.

State v. Salarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (quoting Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325, 333-34 (1956)). Yet this is precisely the argument put forth by the prosecutor in rebuttal.

> Mr. Larson molests children. He has a physical, visceral response to having physical contact with children.

11/22/11 RP 51.

In Lough, supra, the Court considered three factors in deciding the probative value of prior bad acts clearly outweighed its prejudicial effect. These factors were discussed in State v. Krause, 82 Wn. App. 688, 696-97, 919 P.2d 123 (1996).

> First, the [Lough] Court determined the evidence in question was highly probative because it tended to show the defendant had followed the same design or plan on a number of occasions. Second, the Court determined the need for the evidence was especially great because the defendant had drugged his victims and rendered them unable to clearly remember the events in question. Finally, the Court noted that the trial court had "clearly and repeatedly" given a limiting instruction, thus ensuring the evidence would not be used to prove the defendant's bad character.

None of these factors are present here. As discussed above, the prior misconduct did not demonstrate a common scheme or plan. In addition, A.O. was ten years old at the time of trial and able to provide detailed testimony. Finally, as discussed below, the trial court refused to give a proper limiting instruction and instead instructed the jury to use the prior bad acts evidence "for its bearing on any matter to which it is relevant."

In a close case, the balance between probative value and unfair prejudice should tip in favor of the defendant and exclusion of the

evidence. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Applying the Lough factors to the present case shows the evidence here was not more probative than prejudicial and should have been excluded.

c. The proper remedy is reversal.

Where evidence is prior bad acts is erroneously admitted, reversal is required if "within reasonable probabilities ... the outcome of the trial would have been different if the error had not occurred." State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 129 (1996). Here, without the evidence of prior misconduct, the jury would have had only A.O.'s testimony and her prior statements. The jury's request for a transcript of A.O.'s prior statement to the investigating officer, however, indicates the jury had questions or concerns about her prior statements.

Gresham, supra, is instructive, wherein the Court considered companion cases involving defendants Scherner and Gresham, both of whom were separately convicted of child molestation following trials at which evidence of prior sexual misconduct was admitted under both RCW 10.58.090 and ER 404(b). After ruling that RCW 10.58.090 was unconstitutional, the Court reversed Gresham's conviction, and stated:

> What would remain absent the erroneously admitted evidence would be J.L.'s testimony that Gresham had molested her and her parents' corroboration that Gresham had had the opportunity to do so, along with the investigating officer's testimony. There were no

> eyewitnesses to the alleged incidents of molestation. While this evidence is by no means insufficient for a jury to convict a defendant, there is a reasonable probability that absent this highly prejudicial evidence of Gresham's prior sex offense, the jury's verdict would have been materially affected. Thus, we cannot say that the erroneous admission of the evidence of Gresham's prior conviction was harmless error.

173 Wn.2d at 433-34 (internal citation omitted). By contrast, the Court affirmed Scherner's conviction, and stated:

> M.S.'s detailed testimony, evidence of Scherner's flight from prosecution, the jury's opportunity to assess Scherner's credibility, and, perhaps most damning, the recorded phone conversation in which Scherner all be admits his molestation of M.S. all, taken together, establish that there is no reasonably probability that the out come would have been materially affected by the elimination of the impermissible interference.

Id. at 425.

Here, unlike Scherner's case, there was no evidence of flight and there certainly was no confession. Rather, as in Gresham's case, the only evidence Mr. Larson molested A.O. was the testimony of A.O. and the investigating officer and the improperly admitted evidence of prior bad acts clouded the real issues, making made a fair trial impossible, and only a fair trial comports with the constitutional right to due process. See State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3. Reversal is required.

2. The trial court erred in refusing to give Mr. Larson's proposed limiting instruction for ER 404(b) evidence.

Over defense objections, the trial court erroneously instructed the jury that it could consider the allegations of prior misconduct for any matter to which it was relevant.

> In a criminal case in which the defendant is accused of an offense of sexual assault or sexual molestation, evidence of the defendant's commission of another offense or offense of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which is it relevant.
>
> However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.

CP 44 (Instruction No. 6). This instruction comported with RCW 10.58.090, which was later ruled unconstitutional, and was consistent with the State's use of the allegations to demonstrate Mr. Larson's propensity for sexual misconduct.

Although the allegations of prior misconduct were also admitted pursuant to ER 404(b), the court refused to give the defense proposed ER 404(b) limiting instruction.

> During the course of this trial, testimony was presented regarding alleged prior sexual misconduct with people

> other than [A.O.]. Such testimony may be considered by you as evidence of a possible common scheme or plan involving both the prior alleged victims and [A.O.]. You are not to consider the prior allegations as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegations.
>
> However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.

CP 31 (citing United States v. Benally, 500 F.3d 1085 (10th Cir. 2007); Scherner, 153 Wn. App. at 647; DeVincentis, 150 Wn.2d at 21). This was in error.

When evidence is admissible for one purpose but not admissible for another purpose, the court, upon request, shall restrict the evidence to its proper purpose and instruct the jury accordingly. ER 105; State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011). It is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990); accord State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary").

Here, not only did the court refuse to give a limiting instruction, but the jury was affirmatively instructed it could use the evidence of prior misconduct as proof of Mr. Larson's propensity to commit sexual abuse of children. Moreover, the prosecutor specifically urged the jury to consider the prior misconduct to prove that Mr. Larson molests children. In closing argument, the prosecutor stated, "[T]his man molests children while they sleep." 11/22/11 RP 29. Again, in rebuttal, the prosecutor argued:

> [T]he law allows victims of prior assault to come in and testify about their experience, and that you can use that testimony for any purpose you deem relevant. And the reason it's relevant is it goes to what Mr. Larson's intent was when he touched [A.O.]. ...
>
> This is sexual contact that was – it was done for the defendant's sexual gratification. Mr. Larson molests children. He has a physical, visceral response to having physical contact with children.

11/22/11 RP 50-51.

The error here was not harmless. Failure to give an ER 404(b) limiting instruction is harmless only if the outcome of the trial is not materially affected. Gresham, 173 Wn.2d at 425. Courts have recognized that the unfair prejudicial impact of evidence of prior sexual misconduct cannot always be neutralized even with a proper limiting instruction. "Courts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696. The likelihood that the erroneous admission

of highly prejudicial prior bad acts evidence materially affected the verdict, as discussed above, combined with the improper instruction permitting consideration of that evidence to establish Mr. Larson's criminal propensity requires reversal.

3. The trial court erred in admitting photographs of Mr. Larson's nieces that purported to represent how they looked at the time of Mr. Larson's alleged acts of misconduct against them.

The trial court erroneously admitted photographs of Ms. Wilhelm and Ms. Smith when they were ten or eleven years old, where the photographs were both irrelevant and unfairly prejudicial.

a. The photographs were inadmissible for irrelevance.

The photographs purporting to depict Ms. Wilhelm and Ms. Smith when they were somewhat close in age to the alleged misconduct twenty to twenty-seven years previously were irrelevant to any fact of consequence. ER 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

To be "relevant," the evidence must be both probative and material, that is, it must prove or disprove a fact that is of consequence to the outcome

of the trial. 5 K. Tegland, Washington Practice § 401.2, at 258 (5th ed. 2007).

ER 402 provides:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of the state. Evidence which is not relevant is not admissible.

Here, the photographs did not make any fact of consequence more or less probable. The State did not argue they were physically similar to A.O. Rather, the State argued the photographs established Ms. Wilhelm and Ms. Smith were children and vulnerable at the time of their allegations; 11/17/11 RP 3-7. But minor children are inherently vulnerable. A photographic depiction of their appearance somewhat close in time to some of the allegations did not make any fact of consequence more or less probable and added nothing to the State's position. Tellingly, the State did not offer a photograph of Ms. Smith when she was five years old, her age at the first alleged instance of misconduct. Certainly, a five-year old child would appear more "vulnerable" than an older child. The State's justification was at odds with its offered evidence and did not establish the relevance of the photographs.

b. The photographs were inadmissible for unfair prejudice and confusion of the issues.

Even if relevant, the photographs were unfairly prejudicial and confused the issues. ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

"'[U]nfair prejudice' is that which is more likely to arouse an emotional response than a rational decision by the jury [and which creates] ... an undue tendency to support a decision on an improper basis...." State v. Haq, 166 Wn. App. 221, 261, 268 P.3d 997 (2012) (internal quotation and citations omitted). As the prosecutor acknowledged, he offered the photographs to illustrate the vulnerability of Ms. Wilhelm and Ms. Smith. But Ms. Wilhelm and Ms. Smith were not the alleged victims of the charged offense and vulnerability was neither an element of the charged offense nor an issue at trial. The photographs were nothing more than an unabashed appeal to the emotions of the jury.

c. The improperly admitted evidence was not harmless and requires reversal.

The physical appearance of Ms. Wilhelm and Ms. Smith as minors had no bearing to a fact of consequence. Therefore, the court's decision to admit the photographs was manifestly unreasonable and an abuse of

discretion. See State v. Briejer, __ Wn. App. __, 289 P.3d 698, 707 (2012) (admission of evidence under ER 403 is reviewed for abuse of discretion).

The error was not harmless. An inordinate portion of the trial was consumed by the testimony of misconduct involving Ms. Wilhelm and Ms. Smith, even though their allegations were not the basis of the charged offense. The photographs unduly emphasized their allegations and improperly bolstered the State's reliance on their testimony to demonstrate Mr. Larson's alleged criminal propensity. Reversal is required.

4. The trial court erred in denying Mr. Larson's motion for a new trial.

Mr. Larson moved for a new trial under CrR 7.5(a)(6), which provides:

> (a) Grounds for New Trial. The court on motion from a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> (6) Error of law occurring at the trial and objected to at the time by the defendant.

As discussed above, the erroneously admission of highly prejudicial evidence combined with the erroneous instruction that the jury could consider the improper evidence as proof of Mr. Larson's propensity

to sexual misconduct, materially affected Mr. Larson's right to a fair trial. Therefore, the denial of his motion for a mistrial was equally in error.

5. The accumulation of errors violated Mr. Larson's constitutional due process right to a fair trial.

In the alternative, if this Court does not find that the above errors individually merit reversal, the cumulative effect of the errors deprived Mr. Larson of a fair trial. Under the cumulative error doctrine, a criminal defendant may be entitled to a new trial when errors cumulatively resulted in a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The cumulative error doctrine requires reversal where several trial errors standing alone may not require reversal but, when the errors are combined, the defendant was denied a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); Coe, 101 Wn.2d at 789. "And only a fair trial is a constitutional trial" that upholds a defendant's right to due process of law. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3.

Here, the trial court erroneously admitted allegations of prior misconduct under an unconstitutional statute, erroneously admitted the allegations under ER 404(b), erroneously refused to give a proper ER 404(b) limiting instruction, and erroneously admitted irrelevant but highly

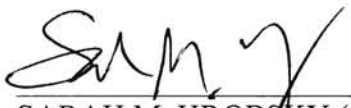
prejudicial photographs, and erroneously denied Mr. Larson's motion for a new trial. The cumulative effect of these errors deprived Mr. Larson of his right to a verdict based solely on properly admitted, relevant evidence. Reversal is required. See State v. Venegas, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010) (accumulation of trial errors required reversal).

E. CONCLUSION

The individual and cumulative impact of the trial court's evidentiary errors, instructional errors, and its failure to grant a new trial requires reversal. For the foregoing reasons, Mr. Larson requests this Court reverse his conviction for child molestation in the first degree and remand for a new trial.

DATED this 22nd day of February 2013.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. KEVIN LARSON, SR., Appellant.	)	NO. 68468-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] KEVIN LARSON, SR., 790134 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2013.

X_____

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