69238-1

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NO. 69238-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN SHELBY,

Appellant.

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

Corrected APPELLANT'S OPENING BRIEF

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The trial court erred in admitting prior- acts evidence under ER 404(b).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Evidence of acts other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts. Although the trial court admitted evidence of another alleged act to show common scheme or plan and motive, the evidence was relevant only to imply John Shelby's alleged propensity to molest children. Did the trial court commit prejudicial error in admitting this evidence?

C. STATEMENT OF THE CASE

John Shelby and his wife LaTonya[1] have been living in the Seattle area since approximately 2003, when they moved to Washington from Kansas City. 6/18/12 RP 42-45. Due to the incarceration of one of Ms. Pratt's sisters, Ms. Pratt and Mr. Shelby offered to raise two of her children, including J.P. Id. at 53-55.

[1] LaTonya is referred to by first name in order to preserve the anonymity of J.P., the complaining witness, who shares a last name with her aunt; no disrespect is intended.

In February 2010, a CPS intake was received regarding J.P., who at that time was an eight year-old girl in the third grade. 6/14/12 RP 146-51; 6/18/12 RP 77-80. Due to noticeable marks on J.P.'s face, arms, and back, along with J.P.'s statements that her Aunt LaTonya regularly beat her with an extension cord, J.P. was removed from the home and law enforcement was contacted. 6/14/12 RP 154-56.[2]

A few weeks later, J.P. underwent a full examination at Harborview. 6/18/12 RP 66. Dr. Naomi Sugar, who conducted the examination, is the Director of the Center for Sexual Assault and Traumatic Stress at Harborview. Id. While Dr. Sugar was interviewing J.P., she asked her whether anyone ever hurt her on her privates in a way she didn't like. Id. at 93-94.[3] J.P. told the doctor that her uncle, Mr. Shelby, had done so when he was drinking. Id.[4]

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[2] LaTonya was arrested and charged with assault of a child in the third degree; she pled guilty in a separate proceeding and is not a party to this appeal. CP 6-7; 6/18/12 RP 22.

[3] As to the leading question, Dr. Sugar stated that she "just threw it out there," due to J.P.'s previous references to "being told she didn't deserve to live," along with the abusive discipline, the whipping, not being provided with food, etc. 6/18/12 RP 93-94.

[4] J.P. described her uncle, while fully clothed, rubbing his body on her body, also while fully clothed; she said this occurred twice. 6/19/12 RP 140-50.

Mr. Shelby was charged with two counts of child molestation in the first degree. CP 6-7.

At trial, the jury heard testimony from J.P. concerning Mr. Shelby's alleged sexual contact with her. 6/19/12 RP 123-59. The trial court also permitted the jury to hear about an incident 21 years earlier, in which Mr. Shelby allegedly had sexual contact with another minor family member, A.P. Id. at 164-95. Over Mr. Shelby's objection, A.P. testified at length about this prior incident, as did the girls' grandmother. Id.

Following a jury trial before the Honorable James Cayce, Mr. Shelby was convicted of both counts of child molestation. CP 61-62.

He timely appeals. CP 80-91.

D. ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING PROPENSITY EVIDENCE UNDER ER 404(b).

The trial court allowed the State to call family members to testify about an alleged incident occurring over 20 years ago as witnesses in this case, and to use that incident to prove Mr. Shelby had a "common scheme or plan" to molest minor family members. This ruling was erroneous. The additional evidence was used for

the forbidden purpose of proving action in conformity therewith. The admission of this evidence was prejudicial, and reversal is required.

a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404 (b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The "forbidden inference" of propensity to act in conformity with prior acts "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.

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if it is truly offered for a proper

purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). 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, 420-21, 269 P.3d 207 (2012) (citing Saltarelli, 98 Wn.2d at 362) (emphasis added).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise "motive" and "intent" could be used as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." Saltarelli, 98 Wn.2d at

364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Fisher, 165 Wn.2d at 745. Evidence of prior acts should be excluded if "its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). "[C]areful 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. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." Smith, 106 Wn.2d at 776.

This Court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court's ruling admitting evidence is reviewed for abuse of discretion. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

b. The trial court improperly admitted propensity evidence and permitted it to be used to show action in conformity therewith. The testimony of A.P. and her grandmother was not necessary to establish an essential element of the crime allegedly committed by Mr. Shelby against the complaining witness, J.P., but was merely offered as propensity evidence.

The trial court concluded A.P.'s allegations of molestation by Mr. Shelby from 21 years earlier were admissible to show a common scheme or plan and motive/intent under ER 404(b). CP 76; 6/4/12 RP 13-14. There are two types of evidence admissible to show a common scheme or plan under ER 404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003).

The lack of similarity between the allegations made by J.P. and those made 21 years earlier by A.P., the remoteness in time of A.P.'s claim, as well as the fact that A.P.'s allegations were unreported and unproved, take this case out of the realm of common scheme and distinguish the instant case from DeVincentis. The only actual purpose of this testimony was to

improperly imply that because Mr. Shelby allegedly touched A.P. when she was a child living in his home, he must have improperly touched J.P., as well. This is precisely the purpose forbidden by ER 404(b).

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) is instructive. There, the trial court admitted evidence of prior acts to rebut a defense, but this Court reversed because the way the evidence would rebut the defense was by showing a propensity to act in conformity with prior behavior. Id. at 982. Pogue involved a prosecution for possession of cocaine. Id. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. This Court pointed out that "[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." Id. at 985.

Similarly here, the only logical relevance of A.P.'s testimony is based on a propensity argument: Because Mr. Shelby allegedly touched A.P. inappropriately more than twenty years earlier, it is

more likely that he also inappropriately touched J.P. As in Pogue, the admission of the earlier uncharged act violated ER 404(b).

Although the State purportedly offered the earlier uncharged incident to prove motive and common scheme, motive is not a material issue, nor is it necessary to establish an essential element of the crime of child molestation. RCW 9A.44.083. And even if motive were an essential element, the only way the A.P. incident proves motive in this case is through a forbidden propensity implication.

State v. Holmes explains this phenomenon. There, this Court reversed the defendant's burglary conviction because the trial court had improperly admitted evidence of Holmes's two prior convictions for theft. 43 Wn. App. 397, 717 P.2d 766 (1986). The State argued, and the trial court agreed, that the evidence was relevant to prove intent. Id. at 398. This Court held the admission of the prior acts violated ER 404(b):

> Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

Holmes, 43 Wn. App. at 400.

In Wade, 98 Wn. App. 328, this Court similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. Id. at 332. The court reminded the prosecution that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334 (emphasis in original). Such a non-propensity theory rarely exists:

> When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

Id. at 335.

As in all of the above cases, the other bad act evidence in this case was ostensibly admitted for a proper purpose, but its only

relevance was for the improper purpose of proving action in conformity therewith. Its admission therefore violated ER 404(b).

Additionally, the admission of the earlier allegations made by A.P. violated ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative. To permit the jury to hear A.P.'s unreported and uninvestigated allegations – after 21 years – was unduly prejudicial. Moreover, the trial court in no way limited the testimony of the uncharged allegations, but instead permitted A.P. and her grandmother to testify emotionally and in as vivid detail as eight year-old J.P. did, herself.[5]

That propensity was the primary purpose of the prior-acts evidence is further illuminated by the prosecutor's closing argument. During closing, the prosecutor reminded the jury that when J.P. was taken into her aunt and uncle's home as an infant, the young child did not realize her entire family was worrying, "[G]osh, you know, is he going to do what he did to [A.P.] to [her]? She didn't know." 6/25/12 RP 7. The prosecutor also returned to this theme later in her closing argument, remarking upon the guilt A.P. must have felt after she left the home, leaving her younger

[5] According to the record, the testimony given by A.P. and J.P. is of approximately equal duration. 6/19/12 RP 123-59, 164-95.

cousins and sisters behind with Mr. Shelby, "when you know what he's capable of." Id. at 23.

This argument served to inflame the passions of the jury against Mr. Shelby, and was substantially more prejudicial than probative. The argument also invited the jury to do precisely what is forbidden – to use the evidence of the uncharged prior act "for the purpose of proving his character and showing that the person acted in conformity with that character." Gresham, 173 Wn.2d at 420-21

c. Reversal is required. Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to

be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of an alleged prior sexual molestation is at least an order of magnitude greater. Indeed, "in sex cases, ... the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury.

Here, the jury was instructed to consider the testimony concerning the uncharged sexual abuse incident for only the limited purpose of whether the conduct "was part of a common scheme or plan, motive, and/or intent." CP 50 (Jury Instruction 6). This instruction was inadequate and came far too late in the proceedings to mitigate the prejudice created by the admission of the propensity evidence, which had irrevocably altered the jurors' perceptions of Mr. Shelby. It is well settled that certain violations cannot be cured by a jury instruction. See, Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) ("Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute").

It is reasonably probable that Mr. Shelby would not have been convicted if not for the erroneous admission of the uncharged allegations made by A.P. Other than J.P. herself, there were no eyewitnesses, no physical evidence, and the record revealed suggestive questioning at the medical examination. 6/18/12 RP 93-94. Without the admission of the propensity evidence and the prosecutor's emphasis upon it during closing, a reasonable jury would have reached a different result.

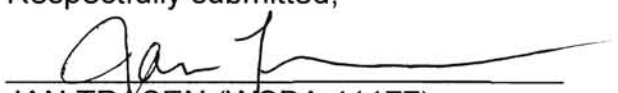
Accordingly, this Court should reverse and remand for a new trial at which evidence of the uncharged acts will be excluded.

E. CONCLUSION

For the foregoing reasons, Mr. Shelby respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 23rd day of September, 2013. [as corrected]

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. JOHN SHELBY, Appellant.	)))))))))	NO. 69238-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT W/ COVER LETTER** 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF SEPTEMBER, 2013.

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