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NO. 71754-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE APOLINAR FLORES-SOLORIO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial court determined that uncharged acts of misconduct was substantially similar to the charged crimes such that it evidenced a common scheme or plan, and was relevant to prove an element of the charged crimes. The court determined that the probative value outweighed the danger of unfair prejudice. Did the trial court properly exercise its discretion to admit ER 404(b) evidence of common scheme or plan? If the trial court erroneously admitted the evidence, was the error harmless?

2. After a witness alluded to excluded misconduct involving Flores-Solorio's daughter, the trial court denied Flores-Solorio's motion for a mistrial and instructed the jury not to consider the testimony. The trial court determined that Flores-Solorio was not so prejudiced that a new trial was required to ensure fairness. Did the trial court properly exercise its discretion when it denied Flores-Solorio's motion for a mistrial?

3. The trial court denied Flores-Solorio's pretrial motion to sever counts relating to different victims. Flores-Solorio did not renew his motion for severance during trial. Has he waived the right to raise this claim on appeal? Did the trial court properly exercise its discretion when it denied Flores-Solorio's pretrial motion to sever? If the trial court erred by denying the motion to sever, was the error harmless?

4. Flores-Solorio wanted his wife to testify, but she was in Mexico and could not legally enter the United States. He sought assistance from the prosecutor, who contacted the Department of Justice and was informed that the State could not assist. Flores-Solorio asked the court to allow his wife to testify telephonically, and the court agreed. Did Flores-Solorio waive his right to compulsory process by proceeding with telephonic testimony? Was Flores-Solorio's right to compulsory process protected by the State's efforts on his behalf? Because in-person testimony by Flores-Solorio's wife would not have altered the outcome of the trial, was error, if any, harmless? Did Flores-Solorio receive effective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In 2009, allegations that Appellant Jose Flores-Solorio had sexually assaulted three children came to light. 1RP 5; 7RP 91.[1] Two of the children were twin sisters, P.Y. and S.Y. 1RP 4-5. The abuse had occurred several years earlier, during a period of time between 2001 and 2006. CP 1-4; 1RP 4-5. The State filed charges against Flores-Solorio for

[1] The Verbatim Report of Proceedings consists of 11 volumes. They are referred to in this brief as follows: 1RP (pretrial motion hearings from 05/02/13, 05/10/13, 01/13/14, 01/14/14, 01/15/14, the jury's verdict on 02/06/14, and the sentencing hearing on 03/28/14); 2RP (01/15/14); 3RP (01/21/14)); 4RP (01/22/14); 5RP (01/23/14); 6RP (01/27/14); 7RP (01/28/14); 8RP (01/29/14); 9RP (01/30/14); 10RP (02/04/14); and 11RP (02/05/14).

the allegations involving P.Y. and S.Y. in December of 2009. CP 1-8. Shortly thereafter, the prosecutor's office became aware that the police had investigated allegations involving a third child, R.R. 1RP 5. Flores-Solorio's sexual abuse of R.R. had also occurred in 2003. CP 58. In February of 2010, the State filed charges against Flores-Solorio for his conduct involving R.R. 1RP 5. All of the charges against Flores-Solorio were joined for trial. CP 35; 1RP 4-19.

Although Flores-Solorio had initially been arrested in 2009, he was released prior to the filing of charges. 3RP 3; 5RP 147-51, 156-57; 7RP 99-100. Flores-Solorio left the country, and the State was ultimately required to extradite him from Mexico to stand trial. 2RP 69.

Approximately four years after the charges were filed, in early 2014, Flores-Solorio was tried in King County Superior Court on counts of first-degree child molestation for engaging in prohibited sexual contact with S.Y. (Count 1), second-degree rape of a child for having sexual intercourse with S.Y. (Count 2), first-degree child molestation for having sexual contact with P.Y. (Count 3), second-degree child molestation for sexual contact with P.Y. (Count 4), first-degree rape of a child for having sexual intercourse with R.R. (Count 5), and first-degree child molestation for having sexual contact with R.R. (Count 6). CP 56-58.

On February 6, 2014, the jury returned guilty verdicts on all charged counts. CP 131-36. Flores-Solorio received standard-range sentences totaling 173.5 months to life. CP 149; 1RP 65. He now appeals his convictions. CP 158.

2. SUBSTANTIVE FACTS

In the summer of 2003, Flores-Solorio and his family lived in an apartment in Kirkland. 9RP 99-100. His wife babysat R.R., who had recently turned six years old. 5RP 51-53, 78, 82. R.R.'s mother would drop R.R. and her older sister off at the apartment early every weekday morning, and would pick them up in the evening. 5RP 52. Flores-Solorio's wife would often go back to bed after R.R. and her sister arrived. 9RP 20. The girls would either watch television or go back to sleep themselves once they arrived. 5RP 85; 9RP 20.

One morning, Flores-Solorio's wife went to the store to get food for breakfast. 5RP 85-86. R.R. was lying down in the living room when Flores-Solorio came out of the shower wearing a towel. 5RP 86. He lay on top of R.R. and told her to "be quiet." 5RP 86-87. He rubbed R.R.'s vaginal area and her chest, under her clothing. 5RP 87-88. The same thing happened on multiple other occasions that summer. 5RP 91.

However, one time was different. One morning, Flores-Solorio took R.R. into one of the bedrooms and put her on the bed. 5RP 91. He

removed her clothing and underwear, as well as his own. 5RP 91-92. Flores-Solorio put his penis inside of six-year-old R.R.'s vagina and had sexual intercourse with her. 5RP 93. It hurt. R.R. was scared. Id. R.R. did not tell anyone about the sexual abuse because she was afraid, and because she did not understand what had been happening to her. 5RP 94.

During that summer, eleven-year-old twins P.Y. and S.Y. would also visit the Kirkland apartment. 6RP 4, 25-28, 196-97; 9RP 109. Flores-Solorio and his wife had known the twins' mother since childhood; they had grown up together in Mexico. 9RP 124, 127; 10RP 51. The twins' mother was very close to Flores-Solorio. In fact, prior to moving to the Kirkland apartment, Flores-Solorio and his family had lived with the twins at their Woodinville home. 6RP 13-14, 132; 9RP 99-100, 130.

Flores-Solorio had first moved in with P.Y. and S.Y.'s family in April of 2000, when the twins were eight years old. 9RP 128, 130. Soon after Flores-Solorio moved in with the twins, he began to talk inappropriately to them – speaking about sexual positions, condoms, and making other sexual references. 6RP 15, 137-38. He would watch pornography on television while they were present. 6RP 21-22, 138-39.

Flores-Solorio also began to touch P.Y. and S.Y. inappropriately. 6RP 17, 139. He would touch and stroke P.Y.'s legs, her inner thighs, and her waist. 6RP 17. He would rub P.Y.'s body while he thought she was

sleeping. 6RP 20-21. On one occasion, he tried to put his hands down P.Y.'s pants while she was lying down. 6RP 19. During the time that Flores-Solorio lived with her family in Woodinville, he touched P.Y. inappropriately at least 20 times. 6RP 46. Although P.Y. had seen Flores-Solorio touching S.Y. in the same manner, she did not discuss the abuse with her sister. 6RP 23. She did not bring it up because it was uncomfortable and awkward, and she knew that "it probably wasn't right," what Flores-Solorio was doing. Id. P.Y. was also unsure of the extent to which Flores-Solorio abusing her sister, and she "didn't really want to know," because she did not think she "could have handled knowing" if he was doing "more" to S.Y. than he had been doing to her. Id.

Unfortunately, Flores-Solorio's abuse of S.Y. was more extensive than that of P.Y. Flores-Solorio took advantage of any chance that he had to be alone with S.Y. 6RP 140. He would touch between her thighs and underneath her shirt. 6RP 141-42. Once, when S.Y. was not feeling well, Flores-Solorio picked her up from school and brought her home. 6RP 143. After she went to bed he followed her, unbuttoned her pants, and penetrated her vagina with his fingers. Id.

Even after Flores-Solorio moved out of the twins' home in Woodinville, he continued to abuse S.Y. 6RP 150. Once at the Kirkland

apartment, he put his tongue on her vagina. Id. He tried to put his penis inside her, but she squeezed her legs together, and he gave up. 6RP 151.

Later, Flores-Solorio and his family moved from the Kirkland apartment to a house in Renton. 6RP 147; 9RP 61, 112. They had a housewarming party and the twins' family was invited. 6RP 17; 9RP 75. During the party, Flores-Solorio insisted that S.Y. join him on a "tour" of the home, which ended upstairs in his bedroom. 6RP 147. There, he pulled S.Y.'s pants down and had sexual intercourse with her. 6RP 147-50. It was the first and only time that Flores-Solorio fully penetrated S.Y. with his penis. 6RP 147. It hurt. 6RP 148. She bled, and had to ask for a sanitary pad. 6RP 149. S.Y. felt vulnerable and weak, and could not explain why she did not scream while the abuse was happening. 6RP 150. S.Y. did not discuss the abuse with P.Y. because she did not realize that Flores-Solorio was also abusing P.Y., and because she did not "want to put her through the pain of knowing what I was going through." 6RP 152.

Although the record is unclear whether it was before or after the summer of 2003, Flores-Solorio's wife also babysat R.R. at the twins' Woodinville home. 5RP 95-96; 6RP 27-28, 153-54; 9RP 55. The twins never discussed the sexual abuse with R.R., and were unaware that Flores-Solorio had also abused R.R. 5RP 96; 6RP 29, 155. Likewise, R.R. was unaware that Flores-Solorio had been abusing P.Y. and S.Y. Id.

In 2005, when P.Y. was 13 years old, Flores-Solorio and his wife came to the twins' home in Woodinville. 6RP 30. Flores-Solorio's wife planned to take P.Y., S.Y., and their brothers to spend the weekend at their home in Renton. 6RP 30, 159; 9RP 113. P.Y. refused to go. She thought "it would just end up in the usual touching during the night, and all the stuff that I didn't want to go through anymore." 6RP 31; 9RP 113. After Flores-Solorio's wife left with the other children, P.Y. realized that Flores-Solorio and his wife had arrived in separate cars and that Flores-Solorio was still at her house getting ready for work. 6RP 31. Flores-Solorio and his wife had been working in Everett, and Flores-Solorio did not have time to return home to shower before his second job. 9RP 113.

When P.Y. realized that she and Flores-Solorio were alone in the house, she panicked and barricaded herself in her bedroom. 6RP 31-32. Flores-Solorio knocked on the bedroom door for several minutes, but P.Y. was afraid and did not answer. 6RP 32. Even after P.Y. thought Flores-Solorio was gone, she hid under her bed and then in her closet, afraid that he might come back. 6RP 33. P.Y.'s mother finally found her in her closet, crying. 6RP 33-34. P.Y. finally confided to her mother that Flores-Solorio had been touching her inappropriately. 6RP 34; 9RP 139.

P.Y.'s mother's reaction was hardly what P.Y. expected. She called Flores-Solorio at work. 6RP 34. After learning that P.Y. had told

her mother about the abuse, Flores-Solorio called his own home, where S.Y. was visiting. 6RP 159. Flores-Solorio's wife handed the phone to S.Y., stating "Jose wants to talk to you." Id. Flores-Solorio told S.Y. that if she told anyone about the abuse, he would hurt her family. Id. As a result of Flores-Solorio's threats, S.Y. later denied any abuse to her mother. 6RP 35, 161-62. P.Y. felt betrayed and devastated. 6RP 35. S.Y. felt terrible for not supporting P.Y., but was scared that Flores-Solorio would follow through with his threats. 6RP 161.

Although P.Y. and S.Y.'s mother felt a "level of mistrust" toward Flores-Solorio, she chose not to report what P.Y. had disclosed, and instead forbid P.Y. from mentioning it again. 6RP 36; 9RP 144. However, it was decided that Flores-Solorio would not be allowed to visit the twins without the presence of other adults. 6RP 36, 85; 9RP 72, 87, 144-45; 10RP 54. P.Y.'s relationship with her mother became strained and never recovered as a result of her mother choosing not to believe that Flores-Solorio had molested her. 6RP 109.

Two years later in December of 2007, S.Y. got into an argument with her mother that turned physical. 6RP 38, 165; 9RP 147-49. Her mother's husband intervened, grabbing S.Y. by the hair. 6RP 38, 165. When he grabbed her, S.Y. told her stepfather to let go of her or she would tell her mother what had been going on. 6RP 38, 90-91, 165-66. S.Y.'s

stepfather had also been sexually abusing her, starting before Flores-Solorio had moved in with their family and began his abuse of the twins. 6RP 133-34.

S.Y.'s mother asked her husband if what S.Y. had said was true, but he denied it.[2] 10RP 54. Even though she told S.Y. that she did not believe her, S.Y.'s mother went home and tore up every picture that she had of her husband. 6RP 167. Five days later, S.Y.'s mother sent her to Mexico, where she remained for almost a year, despite repeated requests by S.Y. to return home. 6RP 39, 91, 167-68; 10 RP 55.

After she returned from Mexico in 2008, S.Y. and her mother had a difficult relationship. Every time they would argue about something, S.Y. would ask her mother why she did not believe her about the abuse by her stepfather. 6RP 170. Her mother would become very angry and walk away. Id. Finally, in 2009, S.Y. became so unhappy that she ran away to a friend's house. Id. Her mother called the police to report her missing. 9RP 154. When S.Y. heard that her mother had called the police, she went to the Kent Police Department to let them know where she was, so that her friend would not get into trouble for "sheltering a runaway." 6RP 171. S.Y. tried to tell the police about the abuse by her stepfather, and what led

[2] S.Y.'s stepfather was charged with sexually abusing S.Y., and following a jury trial in 2012, he was found not guilty of one count and the jury failed to reach a unanimous agreement as to the other four counts. CP 19.

to her running away. Id. They informed her that she needed to report it to the Woodinville police. 6RP 171-72.

In August of 2009, that same day that S.Y.'s mother picked her up at the Kent police station, she told S.Y. that she was a liar, and that she wished S.Y. had never been born. 6RP 173. When they arrived home and S.Y. saw her stepfather come outside, she got out of the car and ran down the street; P.Y. followed her. 6RP 42, 174-75. The twins went to a friend's home, where they disclosed the abuse by Flores-Solorio, as well as their stepfather's abuse of S.Y. 6RP 43-44, 95, 174. Their friend's father took them to the Woodinville police station. 6RP 43-44, 174-75; 7RP 94. Although P.Y. had told her mother about the abuse by Flores-Solorio four years earlier when she was 13, her mother never contacted the police, and no investigation was done until 2009.[3] 6RP 30; 7RP 93-94.

Despite the twins and R.R. having had no real contact with each other in the preceding six years, Flores-Solorio's abuse of R.R. coincidentally also came to light in 2009. 5RP 95-97; 6RP 93. When R.R. was 12 years old, her parents took in C.P., a 16-year-old friend of the family, who lived with them for a year and a half. 5RP 54-55, 96. One night C.P. discussed with R.R. sexual abuse that she had suffered.

[3] Flores-Solorio asserts that the twins never made allegations about his sexual abuse until 2009. Brf. of Appellant at 6. That is inaccurate. P.Y., S.Y., their mother, their brother, and Flores-Solorio's wife all testified that P.Y. disclosed the abuse to her mother in 2005, but the police were not contacted. 6RP 34, 159; 9RP 86, 119-20, 139.

5RP 97. R.R. confided to C.P. that she too had been abused – by Flores-Solorio – and asked C.P. not to tell her parents. 5RP 97-98, 106. However, C.P. immediately went to R.R.'s mother and told her that R.R. had something to tell her; R.R. told her mother about the sexual abuse by Flores-Solorio, and the police were contacted. 5RP 56-57, 98-99, 107-07.

C. ARGUMENT

1. EVIDENCE THAT FLORES-SOLORIO SEXUALLY ASSAULTED TWO UNCHARGED VICTIMS WAS PROPERLY ADMITTED.

Flores-Solorio argues that reversal is required because the trial court admitted ER 404(b) evidence that he sexually abused two other young girls, E.G. and M.G. However, Flores-Solorio has failed to demonstrate that the court abused its discretion when it concluded that the evidence was properly admitted to demonstrate a common scheme or plan. Moreover, even if the trial court erred in admitting the evidence, reversal is unwarranted because any error was harmless.

a. Relevant Facts.

Prior to trial, the State moved to admit evidence that Flores-Solorio had molested three other young girls – E.G., M.G., and Flores-Solorio's own daughter, C.F. CP 188-94, 197; 2RP 61-63.

E.G. was just a few months younger than P.Y. and S.Y. 6RP 4-5; 7RP 7. She lived down the street from Flores-Solorio's Kirkland

apartment. 7RP 11. E.G.'s family became friends with Flores-Solorio's family, and they would visit each other's homes. 7RP 9-11. The summer of 2002, just before E.G. turned ten years old, she met P.Y. and S.Y., who were cared for by Flores-Solorio's wife at the Kirkland apartment during the summers. 7RP 10-11, 51. The girls all played together at the park across the street. 6RP 25, 155-57; 7RP 9-11; 9RP 111.

One day, E.G. was at her apartment alone, watching television. 7RP 13. Flores-Solorio came to her door and asked if he could come inside to have a drink of water and to use the restroom. Id. He left the door to the bathroom open while he used the toilet, and asked E.G. if she wanted to see how a man ejaculated. 7RP 13-14, 59, 67. E.G. did not understand what Flores-Solorio was talking about and turned away. 7RP 14. She was taking a load of laundry down to the apartment complex laundry room, and Flores-Solorio offered to carry it for her. Id. As she was unloading the washer, Flores-Solorio began to hug her from behind, telling her that she looked good, that her breasts were starting to get big and looked nice. 7RP 15, 57. He was grinding his penis against E.G. as he said these things. 7RP 15. E.G. felt intimidated and told him to stop. Flores-Solorio gave her $20 and told her not to tell anyone. 7RP 15, 62, 66. Flores-Solorio exposed his penis and told her to look at it. 7RP 15-16.

During the several months that E.G. lived near Flores-Solorio, he would "talk dirty" to her, telling her that she was growing into a lovely woman and that her breasts looked good. 7RP 17, 52, 65, 66-67.

One day, E.G. told P.Y. and S.Y. about what Flores-Solorio had done. 6RP 26, 157; 7RP 16, 18. During that brief conversation, P.Y. told E.G. that Flores-Solorio was also abusing P.Y. 6RP 26; 7RP 18. Shortly afterward, E.G. and the twins lost contact with each other. 6RP 27, 158; 7RP 19-20.

M.G. was born in 1995. 7RP 75. Like P.Y. and S.Y.'s mother, M.G.'s mother had also grown up with Flores-Solorio in Mexico. 7RP 109-10. M.G.'s mother was close to P.Y. and S.Y.'s mother as well. 7RP 83, 115. When M.G. was six or seven years old, her family lived in Redmond. 7RP 77, 110. There was a short period of time that Flores-Solorio needed a place to stay, and he asked M.G.'s mother if he could stay with her family. 7RP 110-11. Because their house was small, M.G.'s mother declined, but she allowed Flores-Solorio to park his van in their driveway. Id.

Early one morning at approximately two a.m., Flores-Solorio came into the house to use the restroom. 7RP 79, 116. M.G. was on the couch where she typically slept, watching television. 7RP 116-17. After Flores-Solorio came out of the bathroom, he sat down next to M.G. on the couch

and began to watch television with her. 7RP 79-80. After a few minutes he started rubbing her leg, moving his hand from her knee toward her inner thigh. 7RP 81. When Flores-Solorio began to move his hand toward M.G.'s crotch, she got up and went into her mother's room and told her what had happened. 7RP 81-82, 113-14. M.G.'s mother confronted Flores-Solorio and made him leave immediately. 6RP 114-15.

M.G.'s mother later heard that Flores-Solorio was living with P.Y. and S.Y.'s family. 7RP 115. She called P.Y. and S.Y.'s mother and told her what Flores-Solorio had done to M.G., in an effort to "prevent things from happening." 7RP 115. The evidence at trial was clear that the twins' mother ignored the warning from M.G.'s mother.

P.Y. and S.Y. disclosed to the police that while Flores-Solorio and his family lived with them in Woodinville, they observed him sexually abusing his biological daughter, C.F., who was roughly the same age as they were. CP 189. C.F. later denied the abuse to the police. Id.

Over Flores-Solorio's objection, the trial court admitted the misconduct relating to E.G. and M.G. 2RP 66-69. The court determined that the acts were sufficiently similar to the charged crimes to be relevant to prove the existence of a common scheme or plan, and that the probative value of the evidence outweighed the risk of unfair prejudice. 2RP 67-68. The court found substantial similarities between E.G. and M.G. (in terms

of their ages, their gender, the particular manner in which Flores-Solorio gained access to them through known friends and family, the nature of their interaction with Flores-Solorio, and the manner in which they were assaulted) and the victims of the charged offenses. 2RP 67-68. The court declined to admit Flores-Solorio's sexual abuse of his daughter, C.F., finding that due to her denial, there was insufficient proof that the misconduct occurred. 2RP 67. At Flores-Solorio's request, the trial court provided a limiting instruction, and directed the jury as to the proper uses of this evidence and prohibited its misuse. CP 70, 107.

b. The Trial Court Properly Exercised Its Discretion To Admit The Evidence Pursuant To ER 404(b).

When an issue exists as to whether a crime actually occurred (as opposed to the identity of the person who committed the crime), the existence of a scheme by a defendant to fulfill sexual compulsions, as evidenced by a pattern of similar behavior, may be admissible under ER 404(b) as probative of whether the current crime occurred. State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). This basis for admission of prior bad act evidence is referred to as the "common scheme or plan" exception.

To admit common scheme or plan evidence, the prior acts must be: (1) proven by a preponderance of the evidence; (2) admitted for the

purpose of proving a common plan or scheme; (3) relevant to prove an element of the crime charged or to rebut a defense; and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). In regards to the third factor, our Supreme Court has held that, "[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." DeVincentis, 150 Wn.2d at 13. If, the court said, the trial court finds the existence of a prior similar plan, this past behavior is probative as to the issue of whether the crime occurred. Id. at 17-18.

In setting the standard that there need only be marked similarities sufficient to demonstrate a common scheme or plan, the court rejected the argument that the similarities between the prior acts and the current acts must be unique or uncommon. DeVincentis, 150 Wn.2d at 13. While the purpose of ER 404(b) is to prohibit admission of evidence designed to prove bad character, "[I]t is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case." Lough, 125 Wn.2d at 859. Thus, if the prior bad acts are similar enough to be naturally explained as individual manifestations of an identifiable plan, the acts are admissible. DeVincentis, 150 Wn.2d at 18.

The facts of DeVincentis illustrate well the type of similarity the court is looking for to show a common plan, despite the substantial

dissimilarities of individual facts that can exist. In the summer of 1998, DeVincentis offered K.S. (age 12), the friend of a neighbor, money to mow his lawn. In September, he asked if she would also clean his house. While K.S. would clean, DeVincentis would be present dressed in either a G-string or bikini underwear. In October, DeVincentis asked K.S. to give him a massage and then told her not to tell anyone or she would get in trouble. Two weeks later, DeVincentis again asked for a massage, and this time he had K.S. massage his penis, after which, he massaged her breast and touched inside her vagina. After one other similar incident, K.S. disclosed the abuse to her mother. DeVincentis, 150 Wn.2d at 13-14.

To help prove that the abuse of K.S. occurred, the State sought to admit DeVincentis' prior molestation of ten-year-old V.C., abuse that had occurred 15 years prior to the acts committed against K.S. DeVincentis met V.C. through his daughter, as they were best friends. V.C. would spend three or four evenings a week at the DeVincentis residence, many times with DeVincentis present, wearing only a G-string or bikini underwear. The sight of DeVincentis in underwear became normal for V.C. DeVincentis, 150 Wn.2d at 15.

One time, after his daughter's birthday party, DeVincentis showed V.C. photos of naked people and asked if she had ever seen a penis before. On another occasion, he had V.C. sit on a rowing machine with him. V.C.

could feel DeVincentis' erect penis on her back and he touched her private areas. On other occasions, DeVincentis demanded that V.C. try on transparent mesh-like clothing, he offered her $10 to pose nude, and he would leave magazines with pictures of nude people throughout the house where V.C. could find them. V.C. also recalled DeVincentis asking for a back massage and having V.C. put his penis in her mouth. DeVincentis, 150 Wn.2d at 15.

Without question, there were substantial differences between the meeting, grooming and sexual assault perpetrated upon V.C. and the meeting, grooming, and sexual assault perpetrated upon K.S. The way DeVincentis met and got the victims into his home was substantially different; one was paid to clean his house, the other was best friends with his daughter. DeVincentis showed V.C. photos of naked people and left pornographic magazines for V.C. to find, neither of which occurred with K.S. V.C. was asked to pose nude and ordered to wear sexually provocative clothing, neither of which occurred with K.S. The sexual acts themselves were profoundly different with V.C. having to perform oral sex, while K.S. was asked to manually masturbate DeVincentis.

Despite these many dissimilarities, the Supreme Court upheld the trial court's determination that the prior acts committed against V.C. demonstrated a plan to get to know young people through a safe channel,

create a familiarity in the defendant's home, and to bring the children into "an apparently safe but actually unsafe and isolated environment," so that he could pursue his compulsion to have sexual contact with pubescent girls. DeVincentis, 150 Wn.2d at 22. In short, despite the many factual differences, there were enough similarities to demonstrate DeVincentis had an overarching plan to gain access to and molest young girls.[4]

This is exactly the type of situation that exists here. The trial court made clear that it was admitting evidence of the events involving E.G. and M.G. because they bore significant similarities to the charged crimes. 2RP 67-68. In other words, Flores-Solorio used the same approach to commit separate but similar offenses. Indeed, the commonalities among the charged incidents and Flores-Solorio's misconduct with E.G. and M.G. are abundantly clear, and the trial court's decision to allow the evidence comports with established case law issued by this and other appellate courts in this state.

[4] See also State v. Carleton 82 Wn. App. 680, 919 P.2d 128 (1996) (pattern of meeting teenage boys through youth organizations and engaging in sex acts after describing himself as having an alternate homosexual personality found to be a common scheme or plan); State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996) (accessing young boys through his relationship with his girlfriends, playing games with the children, taking them on outings, and molesting them in isolated locations found to be a common scheme or plan); State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997) (allowing young girls at slumber parties to sleep with him and then touching them as they slept found to be a common scheme or plan).

Flores-Solorio preyed upon young girls of roughly the same age; all were between the ages 6 and 10 when the abuse occurred or began. See 5RP 82 (R.R. was six years old); 6RP 405, 14-15, 134, 137; 9RP 128 (P.Y. and S.Y. were between eight and ten years old); 7RP 7, 10, 12 (E.G. was ten years old); 7RP 77, 111 (M.G. was six or seven years old).

Flores-Solorio developed and used close friend/familial relationships to gain and secure access to young girls. See 6RP 14-15 (moved his family in with P.Y. and S.Y.'s family); 7RP 10-11, 60 (He became close to E.G.'s family in a short period of time, and E.G. trusted him enough to let him into her home when no one else was there). Flores-Solorio had grown up with P.Y., S.Y., and M.G.'s mothers in Mexico and either lived with, or asked to live with their families in the United States. 7RP 109-11; 9RP 124, 127, 130; 10RP 51. Flores-Solorio knew that P.Y. and S.Y.'s mother relied on his wife to care for her children, 9RP 130, and he took advantage of the children that his wife babysat (P.Y., S.Y., and R.R.) as well as those who played at his house with the children his wife babysat (E.G). Flores-Solorio placed himself in a position where he could bring young girls into "an apparently safe but actually unsafe and isolated environment," so that he could initiate sexual contact at his choosing.

Moreover, the manner in which Flores-Solorio abused his victims demonstrates that the misconduct involving E.G. and M.G. is similar

enough to the charged conduct to be naturally explained as individual manifestations of an identifiable plan. DeVincentis, 150 Wn.2d at 18. He exhibited grooming behavior toward P.Y., S.Y., and E.G., by openly and repeatedly discussing sexual topics with them and complimenting their bodies. See 6RP 15, 137 (discussing condoms and sexual positions with P.Y. and S.Y.); 7RP 17 (discussing sexuality and puberty with E.G.), 6RP 59 (demonstrated for P.Y. how to put on a condom); 6RP 142 (explaining sexual practices to S.Y. and telling her that she should like it); 7RP 13-14 (asking E.G. if she wanted to see how a man ejaculated). Flores-Solorio would come up behind them and rub his erect penis on their bodies. See 6RP 139 (S.Y.); 7RP 14-15 (E.G.). He gained access to their homes by asking to use the restroom. See 7RP 13 (E.G.), 7RP 79 (M.G.). He would approach them while they were lying down to rest or watching television and molest them. See 5RP 86 (R.R.); 6RP 19 (P.Y.), 143 (S.Y.); 7RP 79-82 (M.G.). He exposed his penis to them. See 6RP 22 (P.Y.); 7RP 15-16 (E.G.).

Additionally, this case is somewhat unique in a manner that is not helpful to Flores-Solorio. The acts of abuse against E.G. and M.G. did *not* occur 15 years prior like the acts admitted in DeVincentis. In fact, they are not truly prior acts at all. Flores-Solorio sexually assaulted E.G. contemporaneously to P.Y., S.Y., and R.R. See 7RP 7-15, 17 (Flores-

Solorio assaulted E.G. in October of 2002 or 2003, while he lived in the Kirkland apartment that R.R., P.Y., and S.Y. would visit). Flores-Solorio's sexual assault of M.G. occurred in 2001 or 2002, when M.G. was six or seven years old, and just prior to his moving into the twins' home in Woodinville. 7RP 75, 77, 111, 115. Indeed, the only reason that the acts perpetrated against P.Y., S.Y., and R.R. and the acts perpetrated against E.G., were not charged and tried in a single trial is because they were discovered at different times. See 2RP 7-8.

Flores-Solorio points to the fact that the misconduct involving M.G. and E.G. was not ongoing, as it had been with the charged victims. However, Flores-Solorio's ability to molest E.G. and M.G. was cut short through no device of his own. Rather, E.G. moved away (7RP 52), and M.G. disclosed to her mother, who denied Flores-Solorio further access to her daughter (7RP 114-15). These interventions – over which Flores-Solorio had no control – do not undermine the fact that the misconduct involving E.G. and M.G. demonstrated a pattern evidencing Flores-Solorio's overarching plan to satisfy his sexual compulsions.

In an effort to characterize the misconduct as mere propensity, Flores-Solorio argues that his abuse of the charged victims was more egregious than that of E.G. and M.G., that it was merely "coincidental" that all of the girls were known to him through friends and family, and the

fact that some of the touching occurred while the victims watched television is inconsequential. His argument is not convincing. Although the degree of similarity must be substantial, the level of similarity does not require the evidence of common features to show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21. "[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." Id. at 13.

Here there are sufficient similarities wherein a reasonable person could find that Flores-Solorio used a common plan to access and sexually assault young girls in a similar manner. The trial court complied with the criteria enunciated by our Supreme Court in Lough and DeVincentis and this determination must be upheld. After all, the decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Flores-Solorio has not met this burden.

c. Any Error In Admitting The Evidence Was Harmless.

Even assuming Flores-Solorio could demonstrate that the trial court abused its discretion, reversal is not required if the error is harmless. Error under ER 404(b) is not of constitutional magnitude and therefore, to prevail, the defendant must prove that within reasonable probabilities, the outcome of trial would have been different but for the error. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204 (1986). To determine the probable outcome, the appellate court must focus on the evidence that remains after excluding the tainted evidence. Id. at 151.

The evidence that remains consists of the largely uncontroverted testimony of three young girls. Although Flores-Solorio insinuated that the twins had an immigration motive to fabricate the allegations, there was no evidence that P.Y. or S.Y. had ever heard of a "U-Visa" before they reported the abuse by Flores-Solorio. See 6RP 99 (P.Y. had never heard of a U-Visa until "we were placed by C.P.S. with our aunt in Kent," after all of the allegations had come to light); 6RP 204 (S.Y. did not talk to a lawyer about immigration issues "after all of this happened"); 6RP 214 (S.Y.'s immigration status had not entered her mind when she reported Flores-Solorio to the police).

Moreover, Flores-Solorio's own witnesses (the twins' mother and brother, as well as Flores-Solorio's wife) conceded that P.Y. had disclosed the sexual abuse by Flores-Solorio in 2005 when she was only thirteen years old – a full *four years* before the allegations were reported to the police, and *seven years* before P.Y. actually received her U-Visa. 6RP 30, 101; 9RP 86, 114-21, 139. P.Y. had no motive whatsoever to lie when she disclosed the abuse to her mother in 2005, and Flores-Solorio's own witnesses corroborated her 2005 disclosure and testified that attempts were made to keep Flores-Solorio away from P.Y. and S.Y. after the disclosure. 9RP 72, 87, 120-21, 144-45; 10RP 54.

Further, Flores-Solorio's attempt to prove that S.Y. had previously threatened to fabricate claims of sexual abuse against her stepfather was thoroughly discredited. The twins' half-brother, K.Y., testified that during the 2007 argument with her mother, S.Y. told her stepfather, "If you don't let me go, I will tell them that you touched me and you raped me." 9RP 74. Upon further questioning, he changed his testimony, and claimed that S.Y. said she would *make up* that he was raping her. 9RP 89-90. However, he admitted that he never told the police that S.Y. threatened to "make up" the abuse. 9RP 88. Additionally, although S.Y.'s mother testified that S.Y. had threatened to "make up" that her stepfather raped her, she later testified on cross-examination that she asked her husband if

he had raped S.Y. 10RP 54. As the prosecutor pointed out in closing argument:

> If what [S.Y.] said to [her stepfather] in that store, was: Get off me or I'm going to make up you have been doing something to me, why in the world would [her mother] then ask [her stepfather] is it true? If S.Y. said: I'm going to make something up, why would [her mother] ask him if it's true?

10RP 115-16.

Similarly, victim R.R. had no motive to fabricate abuse by a man she had not seen in years.[5] All three charged victims underwent intrusive physical examinations and testified at trial to a set of difficult, embarrassing, and yet substantively consistent facts. Finally, Flores-Solorio's own witnesses significantly undermined his defense with their attempts to minimize and deny the abuse that they were clearly aware was occurring, yet did nothing to stop.

Flores-Solorio cannot show that there is a reasonable probability the outcome of trial would have been different if the evidence pertaining to E.G. and M.G. had not been admitted. Therefore if the trial court erred in admitting it, the error was harmless.

[5] Flores-Solorio appears to concede as much. See Brf. of Appellant at 27 ("[T]here was very little evidence to undermine [R.R.]'s credibility.").

2. THE TRIAL COURT'S DENIAL OF FLORES-SOLORIO'S MOTION FOR A MISTRIAL WAS A PROPER EXERCISE OF DISCRETION.

Flores-Solorio argues that reversal of his convictions is required because the trial court denied his motion for a mistrial after witness E.G. alluded to the excluded abuse of C.F. However, Flores-Solorio has failed to demonstrate that the trial court – who was in the best position to determine the existence of any prejudice to him from the irregularity – abused its discretion.

a. Relevant Facts.

As noted previously, the trial court declined to accept the State's invitation to admit evidence of misconduct relating to Flores-Solorio's sexual abuse of his daughter, C.F., finding that there was insufficient proof that the misconduct occurred. 2RP 67. During testimony, Kirkland Police Detective McMillan, who had investigated the allegations regarding R.R., was asked about a conversation she had with King County Sheriff's Detective Luitgaarden, who had investigated the allegations involving P.Y. and S.Y. 5RP 147-48. The following exchange occurred:

> Q: Why did she call?
>
> A: She had called to inform me that she had arrested the suspect in my case, Jose Flores. That there had been allegations involving him with two children. *They were also concerned about his daughter*. And wanted to find out and discuss the case a little bit. And usually we'll see if we

can file a case together sometimes if they are involving the same suspect.

Q: At the point you got that phone call, did you have any awareness there was any other allegations out there or another investigation going on?

A: No, I did not.

5RP 147-48 (emphasis added). Flores-Solorio did not object to this testimony. However at the next break, he brought up Detective McMillan's mention of C.F. and asked that the State admonish the witness "not to go there." The State agreed. 5RP 155-56.

During P.Y.'s testimony, the prosecutor asked P.Y. whether she had reason to believe that Flores-Solorio was doing more than simply touching S.Y. 6RP 23. P.Y. responded, "His daughter would tell me like why don't you let yourself - - ." 6RP 23-24. Flores-Solorio objected, and the court sustained the objection. 6RP 24. P.Y. made no further mention of C.F. Nonetheless, Flores-Solorio moved for a mistrial, arguing that P.Y.'s testimony "suggested" to the jury that Flores-Solorio was molesting his daughter. 5RP 72, 114-15. The court denied the motion, finding that the testimony was merely a fleeting reference to C.F. that did not disclose the existence of any sexual contact. 5RP 117.

Later, during E.G.'s testimony, the prosecutor asked if she had ever told her mother about Flores-Solorio's abuse. 7RP 20. In response,

E.G. referred back to her earlier testimony about the conversation she had had with P.Y. about Flores-Solorio. She said:

> I told my mom after. When I turned twelve, I told her and -- oh, excuse me, now that I'm remembering, when I told [P.Y.] about what had happened, she told me that [Flores-Solorio] had something to do with his daughter as well.

7RP 20. Flores-Solorio objected and asked for a recess. The prosecutor moved on briefly before the court excused the jury. 7RP 20-21. Flores-Solorio moved for a mistrial based on E.G.'s comment about C.F. 7RP 21-22. The prosecutor clarified that he did not admonish E.G. about the exclusion of evidence relating to C.F. because he did not have any reason to believe that E.G. was aware of the abuse. 7RP 22, 142-43. The trial court determined that E.G.'s statement that P.Y. had told her that Flores-Solorio was "doing something to his daughter as well," was not sufficiently prejudicial to warrant a mistrial. 7RP 27. However, the court allowed Flores-Solorio to re-bring his motion after thoroughly investigating the source of the testimony and any potential misconduct on the part of the State.[6] 7RP 27, 35. The court also told the parties that it would consider striking E.G.'s testimony about her conversation with P.Y.

[6] Although E.G. testified outside the presence of the jury that she had told the prosecutor and his paralegal about what P.Y. said, neither of them recalled such a conversation, and the paralegal's notes did not reflect that any such conversation took place. 7RP 34, 40-42, 136-37. The trial court specifically determined that there was no misconduct on the part of the State. 7RP 145.

and S.Y. 7RP 46-48. Although the court ultimately refused to strike the entirety of E.G.'s testimony, the court instructed the jury:

> The witness has testified to a conversation she had with [P.Y. and S.Y.]. You are not to consider the testimony of the responses of [P.Y. and S.Y.] in that conversation. Those responses are stricken, and you are not to consider them.

7RP 50. After Flores-Solorio renewed his motion for a mistrial, the court concluded that, considering the prohibited testimony in the context of the entirety of evidence, and in light of the instruction it had given to disregard the testimony, it did not believe there was sufficient prejudice to Flores-Solorio to warrant a mistrial. 7RP 146.

b. The Trial Court Properly Determined That Flores-Solorio Was Not So Prejudiced That Nothing Short Of A New Trial Could Ensure Fairness.

A trial irregularity is an irregularity which occurs during a criminal trial that potentially implicates a defendant's due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762 n.1, 675 P.2d 1213 (1994). Such an irregularity neither independently violates a defendant's constitutional rights, nor violates a statute or rule of evidence. Id. When a trial irregularity occurs, a trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting State v. Mak, 105 Wn.2d 692,

701, 718 P.2d 407 (1986)); State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). "More than a possibility of prejudice must be shown." Bourgeois, 133 Wn.2d at 406.

The granting or denial of a motion for a mistrial based on a trial irregularity is left to the sound discretion of the trial court. Mak, 105 Wn.2d at 701. This Court applies an abuse of discretion standard in reviewing a trial court's denial of a motion for a mistrial. Id. An abuse of discretion is found only where the defendant can show that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

In reaching a decision, a reviewing court must consider the fact that the trial judge, having seen and heard the proceedings, is in a better position to evaluate and adjudge the situation than an appellate court reading from a paper record. State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853, 858 (2011). See also State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991) (The trial court is in the best position to determine whether a juror can be fair and impartial based on mannerisms, demeanor, and general behavior).

Only errors that actually affect the outcome of the trial will be deemed prejudicial. Hopson, 113 Wn.2d at 284. In determining the effect of a trial irregularity, a reviewing court will examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. Id. (citing Mak, 105 Wn.2d at 701). Even a fairly serious irregularity does not warrant a mistrial if it is relatively insignificant in the context of the entire record. See Hopson, 113 Wn.2d at 284-86 (a witness's remark that the victim met the defendant before "he went to the penitentiary the last time" was not prejudicial in light of the whole record and substantial evidence of guilt). In any case, jurors are presumed to follow the trial court's instructions to disregard inadmissible evidence. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Moreover, the issue must always be examined "against the backdrop of all the evidence" and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Flores-Solorio has not demonstrated that the court abused its discretion. Judge Rietschel, who was in the best position to assess the effect of the testimony in light of the record as a whole, determined that the comment about Flores-Solorio "having something to do with his daughter as well," although prejudicial, did not prejudice him to the extent

that he was unable to receive a fair trial.[7] The court instructed the jurors to disregard the testimony, and given the significantly damaging nature of the admissible evidence as a whole, it is presumed that they followed the court's instruction and that E.G.'s remark did not unfairly influence them.

Flores-Solorio cites to State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008), State v. Escalona, supra, and State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965) in support of his argument that reversal is required. Those cases however, are significantly dissimilar with respect to the nature and extent of the evidence that the jury was instructed to disregard. In Babcock, the court admitted extensive child-hearsay testimony regarding charged counts of abuse. 145 Wn. App. at 161-62. When the victim later refused to testify, the court dismissed the charges involving that victim, but refused to declare a mistrial as to the remaining similar charges involving a different victim. 145 Wn. App. at 161. On appeal, this Court reversed, concluding that the case was most analogous to Suleski, supra, where, after the jury heard a plethora of evidence regarding possession of burglary tools, the trial court decided that the evidence should have been suppressed, dismissed the charge, and

[7] Detective McMillan's testimony and P.Y.'s testimony was ambiguous and did not improperly reveal that Flores-Solorio was abusing his daughter. E.G.'s testimony, however, implied as much. Regardless, given the vague and fleeting nature of Detective McMillan's and P.Y.'s testimony, their remarks did not substantially add to the prejudicial nature of E.G.'s testimony.

instructed the jury to disregard it and deliberate on the remaining charges. Babcock, 145 Wn. App. at 165 (citing Suleski, 67 Wn.2d at 45). Like Suleski, the court in Babcock concluded that due to the nature and extent of the improper evidence, there was no guarantee that the jury could effectively follow the instruction to disregard it. 145 Wn. App. at 165-66. In Escalona, a trial for second-degree assault with a knife, although the defendant's prior conviction for the exact same offense had been excluded, the jury was erroneously informed that he "already has a record and stabbed someone." 49 Wn. App. at 253.

In direct contrast here, the testimony complained of was not extensive, but rather a fleeting, unsolicited remark. Moreover, the evidence of the charged crimes was substantial, and the comment itself was not overly prejudicial in light of the evidence as a whole. The essentially uncontroverted evidence at trial was that Flores-Solorio sexually molested *five young girls* between the ages of six and ten, going so far as to rape two of them – one as young as six years old (R.R). Considered in light of this substantial and compelling evidence, the trial court properly found that the vague remark about Flores-Solorio "having something to do with his daughter" was not so prejudicial that he was deprived of a fair trial. The trial court instructed the jury to disregard all of the testimony relating to the conversation (not just the improper

remark) and Flores-Solorio has not met his heavy burden to establish that no reasonable judge would have denied his motion for a mistrial. His convictions should be affirmed.

3. THE TRIAL COURT PROPERLY DENIED FLORES-SOLORIO'S PRETRIAL MOTION TO SEVER.

Flores-Solorio argues that reversal is warranted because the trial court denied his motion to sever the counts involving P.Y. and S.Y. from those involving R.R. This argument fails for three reasons. First, because Flores-Solorio did not renew his severance motion during trial he has waived the right to raise it here. Second, the trial court did not abuse its discretion in denying the motion to sever. Third, even if the trial court erred by not severing the charges, any error was harmless.

a. Flores-Solorio Has Waived A Challenge To The Denial Of His Pretrial Severance Motion.

CrR 4.4 governs the timeliness of motions to sever offenses and waiver. Generally, a motion to sever offenses is made as a pretrial motion at the commencement of trial. CrR 4.4(a)(1). If the pretrial motion to sever is denied, the defendant may renew the motion "on the same ground before or at the close of all the evidence." CrR 4.4(a)(2). Per the express language of the rule and the applicable case law, "[s]everance is waived by failure to renew the motion." CrR 4.4(a)(2); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987) (failure to renew motion to sever

bail jumping count from rape and indecent liberties counts constitutes waiver on appeal); State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983) (failure to renew severance motion in regards to six counts unlawful issuance of checks constitutes waiver); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (waiver found where defendant failed to renew motion to sever).

Here, prior to trial, Flores-Solorio moved to sever the charges relating to the twins from the charges relating to R.R.[8] 2RP 13-18. After hearing argument, the court denied Flores-Solorio's motion for severance. 2RP 14-25. Flores-Solorio did not renew the motion again during trial, either before or after the close of the evidence. Because he did not renew his severance motion at trial, he has waived the right to challenge the issue on appeal.

b. The Trial Court Properly Exercised Its Discretion To Deny The Severance Motion.

In any event, Flores-Solorio has failed to demonstrate a manifest abuse of discretion. Separate trials are not favored in Washington. State

[8] In April of 2013, the State moved to join the offenses. CP 9-17; 1RP 4-11. Flores-Solorio resisted the motion. CP 18-22; 1RP 11-15. The Honorable Judge Jim Rogers granted the State's motion to join, but noted that should Flores-Solorio decide to testify as to one set of charges and not the other, a motion for severance might be appropriately brought. CP 35, 143-44; 1RP 15-19. Flores-Solorio's pretrial motion for severance was not based on a desire to testify about only some of the charges. Instead, he argued that, after Judge Rogers joined the charges, alleged "impeachment" evidence from Scott Clinton regarding the twins had come to light that undermined the strength of those counts. 2RP 13-17. The alleged "impeachment" evidence was never introduced at trial.

v. Herd, 14 Wn. App. 959, 963 n.2, 546 P.2d 1222 (1976); State v. McDaniel, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). Joinder of offenses conserves judicial resources and public funds and reduces delay in the disposition of criminal charges. State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990).

The defendant bears the heavy burden of demonstrating that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. In other words, a defendant must not only show prejudice from such joinder, but must also establish that such prejudice is so significant that it outweighs the court's strong interest in judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537-39, 852 P.2d 1064 (1993).

In deciding whether to grant severance, a court will consider the following factors that mitigate any potential prejudice to the defendant: (1) the strength of the State's evidence on each count; (2) the clarity of defenses raised for each count; (3) the court's instructions to the jury to consider each count separately; (4) the admissibility of evidence of the other crimes even if they had not been joined. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994) (citing Kalakosky, 121 Wn.2d at 539). The absence of one particular factor does not mean that offenses must be severed. For example, "[E]ven if evidence of separate counts would not

be cross-admissible, severance is not necessarily required." State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992).

A trial court's refusal to sever charges is reversible only when it constitutes a manifest abuse of discretion. State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). Thus, to prevail, Flores-Solorio bears the burden of proving that "no reasonable person would have decided the issue as the trial court did." State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). He has failed to do so.

Flores-Solorio's defense to the charges involving the twins was not inconsistent with his defense to the charges involving R.R. Although he presented a different motive for R.R. to fabricate the abuse, his defenses were identical – that each of the girls was making up the allegations – and his ability to present each defense was not hampered by the other. There is nothing inherently confusing in the presentation of these defenses, and the jury could be reasonably expected to have compartmentalized the evidence as to each count. This is especially true when the court's very first instruction to the jury was that a separate crime was charged in each count, and that each of them must decide each count separately. CP 99. "Your verdict on one count," the court instructed, "should not control your verdict on any other count." CP 99. Jurors are presumed to follow the

court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

Additionally, contrary to Flores-Solorio's assertions, there was not a significant disparity between the strength of the charges relating to the twins and the strength of the charges involving R.R. All of the charges were based on the testimony of the victims. But as outlined above, Flores-Solorio's claim that significant evidence undermined P.Y. and S.Y.'s credibility is belied by the record. His claim that the twins had an immigration motive to fabricate the claims was supported by sheer speculation. Moreover, Flores-Solorio's own witnesses conceded that P.Y. had disclosed the sexual abuse to them four years before she ever reported it to the police and that there was a "mistrust" of Flores-Solorio as a result. Finally, Flores-Solorio's unsubstantiated assertion that S.Y. had "previously" fabricated abuse by her stepfather ignores the fact that her twin sister P.Y. reported abuse by Flores-Solorio to her mother *two years before S.Y. ever alleged abuse by her stepfather*. Far from suffering credibility problems, P.Y. and S.Y.'s testimony was largely unassailable.

Importantly, the evidence was cross-admissible under ER 404(b), and as *res gestae*. As discussed above, evidence of a defendant's prior acts of sexual misconduct may be admissible under ER 404(b) in order to show a common scheme or plan, where the prior acts demonstrate a single

plan used repeatedly to commit separate but very similar crimes. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). Here, P.Y., S.Y., and R.R. were close in age at the time the abuse began – the twins were eight or nine and R.R. was six. 5RP 82; 6RP 405, 14-15, 134, 137; 9RP 128. The mothers of all three relied on Flores-Solorio's wife for childcare, and he took advantage of that relationship to initiate and perpetrate the sexual abuse. Finally, the manner in which he abused all three demonstrated that they were individual manifestations of an identifiable plan. He would wait in the home until no one was around, and then approach them while they were lying down to rest or watching television, and molest them. See 5RP 86 (R.R.); 6RP 19 (P.Y.), 6RP 143 (S.Y.).

Finally, the evidence relating to all three victims would have been properly admitted as *res gestae*. Although not strictly simultaneous in the sense that Flores-Solorio did not abuse his victims at the exact same moment, abuse of all three occurred during the same general timeframe and in the same apartment. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible to complete the picture for the jury. Brown, 132 Wn.2d at 571.

Finally, even if evidence pertaining to each crime would not have been admissible in two separate trials, that does not mean that severance

was required. To the contrary, "[e]ven where the evidence of one count would not be admissible in a separate trial of the other count," the "proposition that severance is required in every case is erroneous." Bythrow, 114 Wn.2d at 720. This is primarily because "[s]everance questions involve considerations of the judicial economy gained when cases can be tried together; these considerations are not present in a pure 404(b) case." State v. Gatalski, 40 Wn. App. 601, 609 n.6, 699 P.2d 804 (1985); see also Kalakosky, 121 Wn.2d at 538 (affirming trial court's refusal to sever five rape counts even though rape counts would not have been cross-admissible had there been separate trials).

Here, Flores-Solorio has failed to show that even if the other crimes were not cross-admissible, that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. He has failed to demonstrate that the trial court abused its discretion by denying his motion for severance.

c. If Error, The Trial Court's Failure To Sever Was Harmless.

Furthermore, even if a trial court abuses its discretion in not severing counts, this Court will not reverse if the error is harmless. State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1999). An erroneous ruling on a motion to sever will not result in reversal if, "within reasonable

probabilities, the outcome of the trial would not have been different had the charges been severed." State v. Hernandez, 58 Wn. App. 793, 800-01, 794 P.2d 1327 (1990).

Any failure to sever was harmless. All three victims provided detailed descriptions of extensive and ongoing sexual abuse by Flores-Solorio, and he produced no credible evidence that they fabricated the allegations. And not inconsequentially, the attempts of Flores-Solorio's own witnesses to minimize abuse that they were clearly aware of only lent credence and support to the girl's testimony. Had the counts relating to P.Y. and S.Y. been tried separately from the counts relating to R.R., he would have undoubtedly been convicted in both trials. Flores-Solorio has not demonstrated that, within reasonable probabilities, the outcome of the trial would have been different had his motion for severance been granted.

4. FLORES-SOLORIO HAS FAILED TO ESTABLISH THAT HIS RIGHT TO COMPULSORY PROCESS WAS VIOLATED.

Flores-Solorio complains that his right to compulsory process was violated due to impermissible interference with securing the presence of his out-of-country witnesses. According to Flores-Solorio, the trial court's denial of a continuance motion, in combination with the State's failure to "file a request for parole," violated his rights under the Sixth Amendment.

His argument fails for three reasons: (1) Flores-Solorio *waived* his right to compulsory process when he chose to proceed to trial rather than ask for a continuance to secure the presence of his witnesses, presented the telephonic testimony of his wife, and made the reasonable tactical choice not to present the telephonic testimony of his daughter; (2) Flores-Solorio's right to compulsory process *was not violated* because a motion for a continuance on such grounds was not denied, there was no "deliberate failure to act" on the part of the State, and he has failed to establish any materiality for his daughter's testimony; and (3) error, if any, was *harmless* when Flores-Solorio's wife testified telephonically, he chose not to have his daughter testify telephonically, and there is no reasonable doubt that the jury would have reached the same conclusion had Flores-Solorio's wife testified in person.

a. Relevant Facts.

On May 10, 2013, Flores-Solorio appeared before the court and asked to continue the trial date until July 29, 2013. 1RP 23. He based his request on both the court's order joining the charges and on the need to secure the presence of his "out-of-country witnesses." 1RP 22. With no detail, Flores-Solorio's attorney informed the court that she had received information that it might be possible to "get them here" with the assistance of the State. Id. She did not disclose the identity of the witnesses or the

nature of their testimony to the court.[9] Id. The State did not object to the continuance and stated that it was willing to assist Flores-Solorio secure the presence of his witnesses if it was able to. 1RP 23-24. The court granted the motion, and continued the trial to July 2013. 1RP 25. Although the court indicated it would not continue the matter again to secure the witness, the trial was in fact continued again – for six months. The further continuances were not based on any requests by Flores-Solorio to secure out-of-country witnesses, and Flores-Solorio never requested the assistance of the court in securing his witnesses.

Pretrial, Flores-Solorio moved the court to allow telephonic testimony from both his wife and daughter. CP 33-34. However, after the court excluded ER 404(b) evidence relating to Flores-Solorio's abuse of his daughter, C.F., Flores-Solorio indicated that because of the ruling, the *only* out-of-country witness he sought to introduce was his wife. 2RP 100. He informed the court that her testimony was relevant because she had been the one to care for R.R., P.Y., and S.Y. when the abuse was alleged to have occurred, and that she would testify about Flores-Solorio's work schedule, his presence in the home during the relevant time period, and his access to the victims. 2RP 100-01. The court granted Flores-Solorio's

[9] However, in expressing his dissatisfaction with his attorneys, Flores-Solorio himself informed the court that "it's only my wife, it's only my wife who's outside [the country]." 1RP 24.

request to present telephonic testimony, and his wife testified telephonically at trial. 2RP 104; 9RP 97-124.

b. Flores-Solorio Waived His Right To Compulsory Process.

A defendant may waive his right to compulsory process. Indeed, the principal case that Flores-Solorio relies on stands for that very proposition. In United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990), the court held that the defendant knowingly and intelligently waived his right to compulsory process by proceeding to trial instead of moving for a continuance to secure the presence of his witness. 918 F.2d at 248. Here, as in Filippi, Flores-Solorio elected to proceed with telephonic testimony, and thus he waived his right to compel his wife's testimony in person. He never sought the assistance of the court nor moved to compel the State to perform further action to secure her presence. He cannot complain on appeal that he was denied his right to compulsory process.

c. Flores-Solorio's Right To Compulsory Process Was Not Violated.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington State Constitution "guarantee an accused the right to compulsory process to compel the attendance of witnesses." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

The right to offer the testimony is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A violation of a defendant's right to compulsory process requires governmental conduct – either through act or omission when action is required – that impermissibly interferes with the right to mount a defense. State v. McCabe, 161 Wn. App. 781, 787, 251 P.3d 265 (2011) (citing Filippi, 918 F.2d at 247). Moreover, such act or omission must cause the loss or erosion of material testimony favorable to the defendant. Id.

Flores-Solorio sent the State an email containing vague "excerpts" of information it had received about the ability of its witnesses to enter the country to testify. CP 41-42. The State then forwarded those "excerpts" to its contact within the Department of Justice ("DOJ"), and inquired about the ability to either secure an S-Visa or "parole" the witnesses into the country. CP 39-41. The State was told by the DOJ that there were no procedures to secure the presence of *defense* witnesses.[10] Id. As a result of the advice from the DOJ, the State informed Flores-Solorio that it was unable to assist him further. CP 39. Flores-Solorio made no additional requests of the State and never requested the assistance of the court; rather he moved to allow telephonic testimony. CP 33-34; 2RP 101.

[10] Flores-Solorio concedes that the DOJ gave the prosecutor such information. See Brf. of Appellant at 20.

Although Flores-Solorio makes the conclusory assertion that the State failed to make a "good faith" effort to secure his witnesses, he makes no convincing argument that the State was required to take further action beyond what it did, and beyond what he asked the State to do. He merely cites to Filippi, a case whose facts stand in marked contrast to his own. In Filippi, the defendant sent two letters to the United States Attorney, neither of which the government responded to. 918 F.2d 245. Filippi's attorney raised the issue with the court, who requested the government to assist. Id. Filippi's attorney then sent a letter to the Parole Division of the Immigration and Naturalization Service ("INS") requesting a "parole" for the witness. Id. at 246. The INS notified counsel that the customary procedure was for the United States Attorney to make the request. Id. The court ordered the government to make such a request, but the government filed a motion for reconsideration, arguing it should not have to. Filippi elected to proceed to trial rather than delay the proceedings to obtain the witness. Id. The court stated that the government's "deliberate omission to act, where action was required," violates a defendant's right to compulsory process, but concluded that Filippi's decision to proceed to trial was a knowing and voluntary waiver of that right. Id.

In contrast here, the prosecutor did not refuse to act. Rather, he indicated his willingness to assist, and made efforts toward that end. CP

39-41; 1RP 23-24. Flores-Solorio's email request for assistance was itself not clear, and he never asked for the court's intervention when the State indicated that its efforts had culminated in a belief it was unable to assist further. This Court should not find that a defendant's right to compulsory process is denied where the record reveals that a substantial good faith effort was undertaken by the State, and when the defendant requests no further assistance. Flores-Solorio has not demonstrated that his right to compulsory process was denied.

d. Error, If Any, Was Harmless.

Moreover, even if the State should have done more to secure the presence of Flores-Solorio's wife at trial, any error resulting from her inability to testify in person is harmless. Violation of a defendant's right to compulsory process is harmless when the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same result absent the error. Maupin, 128 Wn.2d at 928-29.

Flores-Solorio concedes that he chose not to have his daughter testify at trial. Brf. of Appellant at 22. Although he claims it is "probable" that his decision would have been different had she been available in person, he does not explain why, and the record contradicts any such likelihood. First, the State moved to introduce ER 404(b) evidence that he had abused her, and after the court denied the State's

motion, Flores-Solorio indicated that he no longer had a reason to call her as a witness. 2RP 100. Thus, the materiality of her testimony evaporated with the court's ruling. Secondly, the chance that Flores-Solorio would have put his daughter on the witness stand and risked opening the door to evidence that he had abused her is infinitesimal.

Flores-Solorio asserts that he was prejudiced because the jury was unable to view his wife's demeanor during her testimony. However, from the record, it is clear beyond any reasonable doubt that the jury would have found him guilty even had she testified in person. Beyond responding to leading questions that she never left the children home alone with Flores-Solorio, 9RP 112, her testimony was not helpful to him in any meaningful regard. Moreover, she testified on direct examination to the unbelievable fact that Flores-Solorio worked eighteen hours a day, six days a week, the entire time he resided at the twins' home in Woodinville. 9RP 102-03. However, when explored further on cross-examination, she admitted that there was a period of time while living in Woodinville that he had hurt himself and was not working, although she attempted to explain that he "slept a lot" and had a lot of doctor's appointments. 9RP 123. She also corroborated details of the State's case, for instance that Flores-Solorio was not working and was often home while living in Kirkland, and that P.Y. had disclosed abuse in 2005, and that "everything

changed" after that. 9RP 110-11, 120. Any error involving her inability to testify in person was harmless.

5. FLORES-SOLORIO DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS DID NOT MOVE FOR AN ORDER COMPELLING THE STATE TO SEEK PAROLE.

Flores-Solorio alleges that he received ineffective assistance of counsel because his attorneys did not file a motion for an order compelling the State to request parole for his witnesses. However, even assuming for the sake of argument that his attorneys should have made such a motion, he has failed to establish any prejudice. He did not receive ineffective assistance of counsel.

A criminal defendant has the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing ineffective assistance of counsel falls on the defendant. Strickland, 466 U.S. at 687. To prevail on such a claim, Flores-Solorio must show that (1) his attorney's conduct fell below a professional standard of reasonableness (the performance prong), and that, (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different (the prejudice prong). State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If he fails to establish either prong,

the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

Even assuming that his attorneys were deficient for not seeking an order compelling the State to request parole,[11] Flores-Solorio cannot establish prejudice. First, even had the court ordered the State to request parole, it is not at all clear that such a request by the State would have successfully led to the admission of his wife into the country. A "substantial public interest parole" request is evaluated on a "case-by-case" basis, considering numerous factors. CP 42. Moreover, even assuming a parole request would have been successful, Flores-Solorio still cannot establish prejudice for all of the above reasons that any error by the prosecutor in not seeking parole is harmless. His wife's testimony was minimally helpful to him, and instead corroborated many aspects of the State's case. The opportunity for the jurors to assess her demeanor in court would not have overcome the strong bias she had in favor of Flores-Solorio, and would not have supplanted the believability of the victims' testimony. There is no reasonable probability that the outcome of the trial

[11] A point the State does not concede.

would have been different had Flores-Solorio's lawyers successfully moved for an order compelling the State to seek parole.

D. CONCLUSION

For all of the above reasons, the State respectfully requests that this Court affirm Flores-Solorio's convictions and sentence.

DATED this 26th day of May, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Christopher Black and Teymur Askerov, at crb@crblack.com, and timaskerov@crblack.com, containing a copy of the Brief of Respondent, in STATE V. JOSE FLORES-SOLORIO, Cause No. 71754-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

05/26/15
Date