SUPREME COURT NO. 95639-1
COA NO. 75429-7-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES LARRY JOHNSON, III

Petitioner.

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

The Honorable Hollis R. Hill, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James Johnson asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Johnson requests review of the decision in State v. James Larry Johnson, III, Court of Appeals No. 75429-7-I (slip op. filed Dec. 26, 2017), attached as appendix A. The order denying Johnson's motion to reconsider, entered February 1, 2018, is attached as appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court erred in admitting prior acts of sexual misconduct involving other children under ER 404(b) because the evidence did not meet the requirements for a common scheme or plan?

2. Whether the court violated Johnson's constitutional right to present a defense in sustaining the State's objection to evidence that impeached the complaining witness?

3. Whether counsel was ineffective in failing to use the proper procedure to impeach the complaining witness?

D. STATEMENT OF THE CASE

The State charged Johnson with two counts of first degree child rape against eight-year-old M.D. CP 1-2. The case proceeded to a jury trial, where the following evidence was produced.

Johnson and Ms. Vanskike began a relationship. 1RP[1] 375-76. In November 2013, Johnson started living with her and her son, M.D. 1RP 368, 377. Johnson looked after M.D. while Vanskike worked. 1RP 388, 399-400, 454. M.D. thought Johnson was mean and wouldn't let him do anything. 1RP 400, 454. M.D. claimed Johnson hit him in the throat on one occasion when they lived in Tacoma. 1RP 484. M.D. also claimed Johnson spanked him and forced him to do "wall sits," which he hated. 1RP 484-85. In November 2014, they moved to an apartment in Seattle. 1RP 394. Johnson again looked after with M.D. while Vanskike was at work. 1RP 399.

In March 2015, M.D. told his mother that Johnson had sexually abused him, telling her that Johnson put something in his butt. 1RP 408, 417-22. Johnson did it while she was at work while they lived in Seattle and it happened too many times to count. 1RP 421. M.D. testified it happened the same way every time. 1RP 481, 492. Johnson would come out in his boxers from his room, would say "let's wrestle," and tackle M.D. to the ground. 1RP 476-79. Johnson got on top of him, with M.D. facing

[1] This brief cites to the verbatim report of proceedings as follows: 1RP - five consecutively paginated volumes consisting of 3/28/16, 3/29/16, 3/31/16, 4/4/16, 4/5/16, 4/6/16, 5/27/16; 2RP - two consecutively paginated volumes consisting of 9/29/15, 3/29/16, 3/30/16.

forward on the floor, whereupon he felt pain in his butt from Johnson's "body part." 1RP 477-79.

Johnson testified at trial in his own defense, denying M.D.'s accusations. 1RP 641, 661. During Johnson's testimony, his attorney asked him about a conversation that he and Vanskike had with M.D. regarding something that M.D. had said to his father about Johnson. 1RP 635. The prosecutor objected on grounds of hearsay, foundation and relevance. 1RP 635. Defense counsel said the testimony "goes to the relationship" between Johnson and M.D and that it was not for the truth of the matter asserted. 1RP 635. After the jury was excused, counsel explained M.D. "said to his father that he was being physically abused by Mr. Johnson, and then there was, of course, a conversation between [M.D.] and [his mother] and Mr. Johnson about why he would say that, and [M.D.] agreed that he -- that that hadn't happened." 1RP 636. The court refused to admit the evidence, ruling what M.D. said to his father was hearsay and what Vanskike said to Johnson was hearsay. 1RP 636-37. Counsel attempted to clarify for the court that Johnson was present when M.D. talked about what he had earlier told his father, but to no avail. 1RP 637. The court ruled "There was no questioning of [M.D.] about that, so you're not doing this for impeachment, so the testimony is not admissible." 1RP 637.

Before trial, the State moved to admit evidence of prior sexual misconduct against two other children, M.G. and P.P.J., as a common scheme or plan under ER 404(b). CP 103-20; 1RP 165-70. Over defense objection, the trial court granted the State's motion, ruling an act of anal rape against M.G. and sexual contact with P.P.J. during play wrestling were relevant to show a common scheme or plan. CP 58-61; 1RP 174-76.

As a child, Johnson lived with his mother, during which time there were frequent family gatherings at the home. 1RP 259-60, 262, 548-49. P.P.J., Johnson's male cousin, is seven years younger than Johnson. 1RP 544, 547, 619-20. P.P.J.'s mother had Johnson babysit P.P.J. when the latter was younger than 10 years old. 1RP 265, 553, 568. This meant Johnson would be in the house when the adults went to the store and the like. 1RP 568. On one occasion, P.P.J. and Johnson play wrestled, practicing the moves of professional wrestlers on television. 1RP 554-55. Some of Johnson's wrestling moves turned into touching P.P.J.'s genitalia and buttocks over his clothing. 1RP 556-63. P.P.J. reacted by brushing him off, telling him it's not supposed to be that way. 1RP 562. Johnson would respond by saying sorry or whoops, then do it again. 1RP 562. This happened during a single instance of wrestling, when P.P.J. was in

the third grade.[2] 1RP 563-64, 569. The record does not show this happened while Johnson was babysitting P.P.J.[3]

M.G., Johnson's female cousin, is roughly seven and a half years younger than Johnson. 1RP 757, 580. M.G. lived in Johnson's home off and on beginning when she was nine years old. 1RP 260-61, 576-80. When Johnson's mother could not watch her, "Little James" (Johnson) would provide child care and supervision if he was around. 1RP 262, 583. M.G. did not like Johnson's babysitting. 1RP 583-84. She was expected to follow his rules. 1RP 584. If she got in trouble, he would yell or push or punch her. 1RP 584. On one occasion, M.G. and Johnson were home alone. 1RP 585, 587. According to M.G., Johnson shoved her onto the living room couch, bent her over, pulled down her pants, and slightly penetrated her anus with his penis. 1RP 585, 587-88. He stopped when she started crying, offering her a pepperoni stick.[4] 1RP 585, 588-89. This incident happened sometime between when M.G. was in first and third

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[2] In a pre-trial interview, P.P.J. said he was six years old and in second grade at the time. Pre-trial Ex. 9, p. 26.
[3] In a pre-trial interview, P.P.J. said he was not sure if other people were home at the time. Pre-trial Ex. 9, p. 6.
[4] In a pre-trial interview, M.G. said the peperoni offering was an attempt to bribe her. Pre-trial Ex. 5, p. 29.

grade. 1RP 586.[5] She did not tell anyone what happened because she was afraid Johnson would threaten or hit her. 1RP 590.

After hearing this evidence, the jury found Johnson guilty as charged. CP 23-24. On appeal, Johnson argued the court erred in admitting the evidence of prior acts under ER 404(b). In a Statement of Additional Grounds, Johnson further argued (1) the court violated his right to present a defense in excluding M.D.'s prior statement that he initially told his father that Johnson abused him but then recanted the statement; and (2) counsel was ineffective in failing to use the proper procedure to impeach M.D. Statement of Additional Grounds at 1. The Court of Appeals rejected these arguments. Slip op. at 7-10, 14-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT ERRED IN ADMITTING PRIOR ACTS OF SEXUAL MISCONDUCT AGAINST CHILDREN TO SHOW A COMMON SCHEME OR PLAN UNDER ER 404(b) BECAUSE THE REQUIREMENT OF SUBSTANTIAL SIMILARITY IS UNMET AND THE PRIOR MISCONDUCT REFLECTS OPPORTUNISTIC ACTIVITY RATHER THAN A DEVISED PLAN.

This case provides an opportunity for this Court to weigh in, and reign in, the Court of Appeals' seemingly inexorable march towards authorizing the admission of inflammatory evidence in charged sex

[5] In a pre-trial interview, M.G. said Johnson was either in middle school or "on his way to high school." Pre-Trial Ex. 5, p. 28.

offense cases involving children under the rubric of ER 404(b). Evidence of prior sex offenses should not be admitted under a common scheme or plan rationale when the facts show opportunistic behavior rather than design. The decision in this case erases the distinction. Review is warranted because this is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of prior misconduct "*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Id. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

To be admissible, evidence of a defendant's prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time. State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). A common scheme or plan exists where the accused devises a

plan and repeats it to perpetrate separate but very similar crimes. Id. at 855. The commonalities with a prior occurrence need not be unique, but they must be "markedly and substantially similar," indicating "the defendant has developed a plan and has again put that particular plan into action." Gresham, 173 Wn.2d at 422. Prior opportunistic crimes do not qualify. State v. Slocum, 183 Wn. App. 438, 442, 456, 333 P.3d 541 (2014).

The trial court abused its discretion in determining allegations of prior sexual misconduct with other children were admissible to show the existence of a common scheme or plan to sexually abuse children. The similarities between the earlier incidents and the incidents involving M.D. nearly nine years later are not substantial. The prior incidents involving M.G. and P.P.J. represent random acts of opportunity rather than conduct created by design.

In DeVincentis, the defendant "devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door neighbor girl," which led to "greater familiarity occurring in his own home." State v. DeVincentis, 150 Wn.2d 11, 22, 74 P.3d 119 (2003) (quoting trial court). "This plan allowed DeVincentis 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 these . . . prepubescent or pubescent girls.'" Id. (quoting trial court).

The evidence does not show Johnson devised such a plan. In upholding the trial court's decision, the Court of Appeals said the "development of the trust relationships with M.D.'s, M.G.'s, and P.P.J.'s mothers were each intended to create the opportunity to sexually assault the children." Slip op. at 9. But in relation to M.G. and P.P.J., the evidence does not show he cultivated trust relationships with their mothers. Johnson himself was a kid in a household where other kids lived or visited. The evidence does not show Johnson took affirmative steps to arrange situations where he could sexually abuse them, such as by volunteering to babysit. The incident with P.P.J. did not even involve babysitting. P.P.J. could not even say that he was alone in the house. The record shows opportunistic behavior, which is insufficient under the common scheme or plan standard. Slocum, 183 Wn. App. at 442, 456.

The State argued "[t]here is no evidence in the record one way or another regarding whether Johnson volunteered to watch his victims or was placed in that role without his input." Brief of Respondent at 24 n.12. The State, as the proponent of the evidence, has the burden of demonstrating a proper purpose for the admission of prior misconduct under ER 404(b). Gresham, 173 Wn.2d at 420. If a fact needed to support

the State's position is missing in the record, the omission is held against the State because it bears the burden of proof on the issue.

The alleged acts involving M.G. and P.P.J. happened at least nine years before the charged rapes of M.D. 1RP 544, 563-64, 575, 586. Prior acts must not be too remote in time because "the lapse of time between instances may slowly erode the commonality between acts." Lough, 125 Wn.2d at 860. "Substantial" similarity is required between the prior acts and the charge act. DeVincentis, 150 Wn.2d at 23. The prior acts at issue do not reach to the level of substantial similarity and are too remote in time to be admitted under ER 404(b).

"The fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan." Slocum, 183 Wn. App. at 455. Simply seizing opportunities when no one is watching is not evidence of a plan. Id. at 455. As in Slocum, there is no evidence that Johnson's conduct was anything but opportunistic. Nothing in the record demonstrates Johnson took specific steps to isolate M.G. or P.P.J. from possible witnesses. He took advantage of moments when he was alone with these children. That is not enough. The similarities between the incidents are not marked enough to establish a common scheme or plan.

ER 404(b) is not a license to inject all manner of prejudicial evidence into a case. In sex offense cases, however, the Court of Appeals has expanded the reach of allowable ER 404(b) evidence in such cases over the years to the point where nearly any such evidence is admissible as a matter of routine. Johnson's case is the latest in this line of cases. Such evidence tends to inflame and distract jurors from simply deciding whether the State has proven the elements of its case beyond a reasonable doubt. Evidence of other bad acts, by inviting the jury to believe the defendant deserves to be punished for a series of immoral acts, "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

In determining whether improper admission of ER 404(b) evidence requires reversal, the question is whether there is a reasonably probability the outcome of the trial would have been different without the inadmissible evidence. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). The improperly admitted evidence formed a cornerstone of the State's case against Johnson. The State argued to the jury that the acts committed against M.G. and P.P.J. showed Johnson had a common

scheme or plan to molest children, which he perpetrated on M.D. as well. 1RP 689. According to the State, the similarities were striking and abundant, and the evidence could be used to determine whether Johnson had sexual intercourse with M.D. 1RP 690-91. There were no eyewitnesses to the alleged incidents involving M.D. In that circumstance, the highly prejudicial evidence of prior sex offenses impermissibly bolsters the alleged victim's credibility. Gower, 179 Wn.2d at 858. Because credibility was the main issue in this case, the error cannot be deemed harmless.

2. THE COURT VIOLATED JOHNSON'S RIGHT TO PRESENT A DEFENSE IN EXCLUDING TESTIMONY THAT IMPEACHED HIS ACCUSER'S CREDIBILITY OR, IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE IN FAILING TO USE A PROPER IMPEACHMENT METHOD.

a. Johnson's right to present a defense encompassed his right to impeach his accuser with evidence that he rescinded the abuse allegation.

The Sixth Amendment and due process require the accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. Defendants have the right to present evidence that might influence the determination

of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The trial court violated Johnson's right to present a defense in excluding evidence that impeached M.D.'s credibility. [6] Johnson's case presents a significant question of constitutional law, warranting review under RAP 13.4(b)(3).

"Generally, evidence is relevant to attack a witness' credibility or to show bias or prejudice." State v. Lee, 188 Wn.2d 473, 488, 396 P.3d 316 (2017). Credibility evidence is particularly relevant where, as here, the witness is central to the prosecution's case. Id. at 488. Johnson's case is no exception. It was M.D.'s word against Johnson's, with no eyewitnesses to the alleged abuse and no physical evidence corroborating the allegation. "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness's credibility or motive

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[6] The Court of Appeals did not reach the merits of this claim, made in Johnson's Statement of Additional Grounds (SAG), on the ground that Johnson did not "present facts sufficient to support his assignment of error," citing a case and standard that does not apply to SAGs. Slip op. at 14. Under RAP 10.10(c), there is no requirement that Johnson reference the record or cite to authority. It is sufficient that he informed the court of the nature and occurrence of the alleged error. Johnson did this by arguing it was error for the court to exclude evidence of M.D.'s prior statement in which he told his biological father that Johnson abused him but then later admitted he did not know why he said those things. See SAG at 1. The Court of Appeals' resolution of the issue is especially disconcerting because, in addressing Johnson's alternative ineffective assistance claim based on the same set of facts, the court showed it knew exactly what Johnson was talking about. Slip op. at 14.

must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

M.D.'s prior statements were admissible to show bias. "Bias is a term used in the 'common law of evidence' *to describe the relationship between a party and a witness* which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (emphasis added). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." Id. at 52. Defense counsel argued he was not offering the out-of-court statements for the truth of the matter asserted but rather to show the relationship between M.D. and Johnson. 1RP 635. This fits squarely within the realm of bias evidence. To show bias, counsel did not need to give M.D. a chance to explain the prior statement: "no foundation is needed to impeach a witness's testimony with a prior statement as extrinsic evidence of bias." State v. Spencer, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003).

Johnson's testimony about what M.D. said would not have been hearsay because it was not being offered for the truth of the matter

asserted, but rather to show M.D.'s willingness to lie. "[T]o the extent that a witness' *own* prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible 'to impeach.'" State v. Allen S., 98 Wn. App. 452, 467, 989 P.2d 1222 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000) (quoting State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995)). "To say that a witness' prior statement is 'inconsistent' is to say it has been compared with, and found different from, the witness' trial testimony. This comparison, *without regard to the truth of either statement,* tends to cast doubt on the witness' credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not." Williams, 79 Wn. App. at 26. M.D.'s willingness to fabricate showed his bias toward Johnson. Accusing Johnson of abuse to his father and then later rescinding the accusation shows that M.D. harbored ill-will toward Johnson, i.e., he was willing to lie to put Johnson in a bad light or get him into trouble.

Alternatively, the testimony was relevant to show M.D.'s state of mind, i.e., his bias, against Johnson, as shown by his willingness to give inconsistent statements. State of mind is an exception to the hearsay rule. ER 803(a)(3). "Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not

hearsay." State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, 21 P.3d 1150 (2001). M.D.'s initial accusation made to his father, and subsequent recantation, is circumstantial evidence of M.D.'s willingness to fabricate. Circumstantial evidence of state of mind is not hearsay. Id. at 26-27; Betts v. Betts, 3 Wn. App. 53, 59, 473 P.2d 403, review denied, 78 Wn.2d 994 (1970) (statements offered to indirectly and inferentially show the mental state of a witness are not hearsay).

Violation of the right to present a defense is constitutional error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). "[A]ny error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). As in most sexual abuse cases, credibility was a crucial issue here because the testimony of M.D. and Johnson directly conflicted. State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Exclusion of testimony showing M.D. initially accused Johnson of abuse but then recanted deprived the jury of information by which to accurately judge M.D.'s credibility. The error was not harmless beyond a reasonable doubt because the excluded

evidence damaged M.D.'s credibility in a case that hinged on whether the jury believed this single witness.

b. In the alternative, counsel provided ineffective assistance in failing to use the proper procedure to implement the impeachment.

Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

The court ruled the testimony about M.D. rescinding the accusation was inadmissible for impeachment purposes because counsel did not question M.D. about it. 1RP 637. In context, the court probably meant to refer to ER 613(b), which provides "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." Under that rule, "it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence." State v.

Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003) (quoting Johnson, 90 Wn. App. at 70). Counsel did not need to first confront M.D. with this statement during cross-examination for it to be admissible for impeachment purposes, and to the extent the court's ruling suggests he did, then it represents a mistaken view of the law. The deficiency in counsel's performance, however, is that he did not arrange for M.D. to be recalled as a witness to address the statement.

Horton is instructive. That, too, was a child rape case. Horton, 116 Wn. App. at 910. Counsel wanted to impeach the child with a prior statement to show, contrary to her trial testimony, that she had engaged in sexual activity with another person, which would rebut evidence that the accused was the only possible source of trauma to the child's hymen. Id. at 913-14, 922. But counsel did not cross-examine the child on the issue and, in attempting to elicit the prior statement through another witness, did not arrange for the child to be remain in attendance to testify on the matter. Id. The trial court excluded the prior statement because counsel did not comply with ER 613(b). Id. at 914. Defense counsel was ineffective: "The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been *only* to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests." Id. at 916-17.

Similarly, in this case, defense counsel wanted to impeach M.D.'s trial testimony that Johnson abused him. Counsel wanted to do that by using Johnson as an extrinsic witness, who was prepared to testify that M.D. rescinded his abuse allegation. In order for that mode of impeachment to be executed, however, counsel had to give M.D. an opportunity to explain or deny his out-of-court statement by calling it to M.D.'s attention during cross-examination or by arranging for M.D. to be recalled as a witness. Counsel failed to do either. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The relevant law is that the witness must be given an opportunity to address the prior statement at some point. Counsel failed to lay the proper foundation for impeachment.

The Court of Appeals held there was no deficiency because "the trial court record shows a lengthy cross-examination of M.D., a child witness. Therefore, counsel's choice not to use Johnson's preferred strategy for impeachment is insufficient to overcome the strong presumption of effective representation." Slip op. at 14. The flaw in that reasoning is that the record shows counsel wanted to and attempted to impeach the child with the prior inconsistent statement, but failed to execute the proper method for doing so. This is not a case where counsel

chose to use one impeachment tactic in lieu of another. This is a case where counsel did not follow the law on how to successfully impeach the witness. Counsel sabotaged his own attempt. Counsel blundered in getting the testimony into evidence by failing to lay a proper foundation for it. Because the victim's credibility was the major factor in the case, it was crucial for the defense to admit evidence of recantation.

Prejudice is a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. The State's entire case depended on the trier-of-fact finding M.D.'s testimony credible that Johnson abused him. Evidence that he gave inconsistent statements on the matter would have undermined his credibility but for counsel's failure to establish the foundation for this evidence. Johnson's case presents a significant question of constitutional law, warranting review under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Johnson requests review.

DATED this 5th day of March 2018.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JAMES LARRY JOHNSON, III, Appellant.	)	No. 75429-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 26, 2017

APPELWICK, J. — A jury convicted Johnson of two counts of rape of a child. Johnson argues that the trial court erred in admitting into evidence other alleged sexual assaults against children under ER 404(b). He also challenges his community custody conditions on various grounds, and alleges numerous errors in a SAG. We remand for the trial court to strike four community custody conditions and modify another. We affirm in all other respects.

FACTS

In 2013, James Johnson began dating a woman. Johnson was the exclusive child care provider for the woman's eight year old son, M.D., while she was at work. It was normal for Johnson and M.D. to wrestle together at home. According to M.D., Johnson, while in his boxers, would wrestle M.D. to the ground, position himself behind M.D., and insert his penis into M.D.'s anus. These assaults would happen this same way each time.

M.D. told his mother that Johnson had "put something in his butt." Johnson was charged with two counts of rape of a child in the first degree for his acts against M.D.

The State sought to introduce at trial evidence of similar assaults against two other children as a common scheme or plan. First, Johnson had also been accused of raping his female cousin, M.G.[1] M.G. is seven and a half years younger than Johnson. Johnson would babysit her. M.G. was expected to follow Johnson's instructions while he was watching her.

M.G. alleged that, while she was between nine and 12 years old, Johnson repeatedly molested and raped her. On one occasion, M.G. and Johnson were home alone, sitting on a couch. Johnson bent M.G. over on the couch, pulled down her pants, and attempted to put his penis inside of her anus. Johnson's penis slightly penetrated her, but Johnson stopped once M.G. started crying. The trial court admitted this act as evidence of a common scheme or plan, but excluded other instances of alleged molestation of M.G. as not sufficiently similar to the facts alleged by M.D.

Second, Johnson was accused of raping another cousin, P.P.J.[2] P.P.J. is eight years younger than Johnson. Like M.G., Johnson would also look after P.P.J. P.P.J. alleged that he and Johnson would "fake wrestle" emulating wrestlers that

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[1] The evidence regarding M.G. was reported to police after the charges were filed against Johnson. The investigation therefore took place after the investigation into M.D.'s allegations had begun.

[2] P.P.J.'s mother spoke to a detective about the accusations. But, the record does not indicate that Johnson was ever prosecuted for these accusations.

they saw on television. Some of Johnson's wrestling moves turned into touching P.P.J.'s genitalia and buttocks. The wrestling lasted ten minutes and the touching occurred the entire time.

In an 11 page written findings of fact and conclusions of law, the trial court explained that it would admit only some of the evidence:

> The Court is only finding that certain, specific acts of sexual misconduct against M.G. and P.P.J. are admissible to demonstrate the defendant's common scheme or plan. These acts include the following: (1) the defendant anally raping M.G, when he was babysitting her and no other adults were present, and (2) the defendant repeatedly fondling P.P.J.'s genitalia during an incident of play-wrestling. The other acts, referenced above, are not admissible because they do not contain sufficient similarities to be considered part of the same common scheme or plan. However, these two specific prior acts demonstrate substantial degrees of similarity such that they can be explained as individual manifestations of a common plan.
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> The Court is very mindful about not admitting propensity evidence. This case is based on the testimony of a young child, M.D., who delayed reporting the alleged abuse. There is no physical evidence to corroborate M.D.'s testimony. The defendant allegedly raped M.D. in secrecy so no other adults could bear witness to the abuse or protect M.D. Evidence of prior bad acts is highly probative because it tends to prove material issues of the charged crime: whether the defendant had sexual contact with M.D. The Court has conducted an ER 403 balancing test and finds that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The evidence is highly probative for all the reasons discussed above. Finally, to cure any potential prejudice, the Court will provide the jury with a limiting instruction, which will specifically tell the jury that they shall evaluate the prior sexual misconduct evidence only for the limited purpose of assessing common scheme or plan.

A jury found Johnson guilty of both counts of rape of a child in the second degree. Johnson appeals.

DISCUSSION

Johnson argues that the trial court erred in admitting the common scheme or plan evidence. He challenges the community custody conditions on various grounds. He also makes numerous arguments in a statement of additional grounds (SAG).

I. Common Scheme or Plan Evidence

Johnson first argues that the trial court abused its discretion in admitting the acts against M.G. and P.P.J. as part of a common scheme or plan under ER 404(b). When, as here, a trial court interprets an evidentiary rule correctly,[3] this court reviews the trial court's determination to admit or exclude evidence for an abuse of discretion. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

ER 404(b) provides that

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

Proof of a "plan" is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

There are two instances when evidence is admissible to prove a common scheme or plan: (1) where several crimes constitute constituent parts of a plan in

[3] Johnson does not contend that the trial court misinterpreted ER 404(b).

which each crime is but a piece of the larger plan and (2) where an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. Gresham, 173 Wn.2d at 421-22. This case involves the second category. Evidence of this second type of common scheme or plan is admissible because it is not an effort to prove the character of the defendant. Id. at 422. Instead, it is offered to show that the defendant has developed a plan and has again put that particular plan into action. Id.

To introduce evidence of this type of common scheme or plan, the prior misconduct and the charged crime must demonstrate common features such that they are naturally explained as a general plan of which the two are simply individual manifestations. Id. Mere similarity in results is insufficient. Id. While the prior act and charged crime must be markedly and substantially similar, the commonality need not be a unique method of committing the crime. Id.

A handful of cases illustrate the bounds of a trial court's discretion regarding common scheme or plan evidence. First, in Lough, our Supreme Court allowed common plan evidence where the defendant was alleged to have drugged and raped several women and he warned the women not to report the rape because no one would believe them. 125 Wn.2d at 864-65. The court noted that the common plan victims were all strangers to the victim, Lough surreptitiously drugged them, and raped them while unconscious. Id. at 865. The court stated, "Far from being inadmissible 'character' evidence, it is powerful, convincing, reliable and relevant evidence." Id.

Shortly after Lough, this Court found no abuse of discretion in State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996). There, Krause was convicted of child molestation and child rape. Id. at 690. He had repeatedly fondled and had sexual contact with two charged victims: J., a member of his girlfriend's family, and B., a boy who frequently visited their residence. Id. at 690-91. The trial court admitted common plan evidence of molestation of four previous victims. Id. at 692. Krause became acquainted with these victims in different ways. Id. One victim was a son of a friend's girlfriend. Id. at 691. A second victim was a son of one of Krause's friends. Id. at 692. A third victim was the young stepbrother of one of Krause's friends. Id. The fourth victim he befriended in the course of his employment as a hotel manager. Id. However, this court found it important that Krause gained the children's affection through games and outings, and eventually placed himself in a position where molestation would occur. Id. at 691-92, 695. We therefore held that a rational trier of fact could find that these similarities showed an overarching plan. Id. at 695.

Johnson argues that this case is more like State v. Slocum, 183 Wn. App. 438, 333 P.3d 541 (2014). Slocum was charged with child molestation and rape of a child for the alleged inappropriate sexual contact with his 15 year old stepgranddaughter. Id. at 443. The alleged molestation occurred while the granddaughter was between ages three and 14. Id. The abuse typically occurred when Slocum would be sitting in a recliner chair, and would ask the victim to sit on his lap. Id. at 444. He would then rub the victim's genitals. Id. On another

instance, Slocum locked the victim in a family trailer, pushed her onto a couch, and inserted his fingers into her vagina. Id.

The State moved to admit common plan evidence of Slocum sexually abusing the alleged victim's mother and aunt many years earlier. Id. at 443-44. The mother testified that when she was 12 years old, around 1981, Slocum had rubbed her vagina while she sat on Slocum's lap in a recliner chair. Id. at 445. In another instance, Slocum had fondled her breasts while she was lying on the floor. Id. The aunt testified that in 1996 or 1997, when she was about 12, Slocum briefly placed his hands on her breasts after she granted his request to apply sunscreen on her. Id. at 446. The trial court admitted the allegations of both the mother and the aunt. Id.

The Court of Appeals found no abuse of discretion in admitting the mother's abuse on the recliner, given that the granddaughter also alleged abuse on a recliner, and involved "grandfatherly behavior." Id. at 455. But, it found an abuse of discretion in admitting the evidence of fondling the mother on the floor, and fondling the aunt while applying sunscreen. Id. at 455-56. These instances appeared to be nothing more than opportunistic and therefore were not a common scheme or plan. Id.

A. M.G.

Here, the common plan evidence shares similarities with Johnson's molestation of the charged victim, M.D. M.G. was between ages 9 and 12 during the assault. M.D. was age 8 or 9 during the assault. The assaults of M.G. and

M.D. occurred while Johnson was babysitting alone. Like M.D., Johnson had gained the trust of M.G.'s and M.D.'s mothers to babysit the children when the mothers were gone. And, prior to the assaults of M.G. and M.D., Johnson used physical violence to dominate both children—he hit both M.G. and M.D. prior to the assault. The assaults of M.G. and M.D. occurred in a similar physical position. With both M.G. and M.D., Johnson pulled down their underwear and inserted his penis into their anus from behind. He took specific steps to make sure the victims did not see his penis. When the victims expressed their pain and distress, Johnson took steps to calm them. Given these similarities, the trial court acted within its discretion in deciding that the incidents involving M.D. and M.G. were part of a common scheme or plan.

B. P.P.J.

While the acts against P.P.J. did not involve anal penetration, they too developed out of a similar pattern. P.P.J. is Johnson's cousin, and is eight years younger than Johnson. The assaults occurred when he was six years old, and at Johnson's home. He had frequently spent time with Johnson growing up. They would play video games together. Johnson had a position of trust over P.P.J., and P.P.J.'s mother trusted Johnson to watch over him. Johnson and P.P.J. would occasionally "fake wrestle" imitating moves of professional wrestlers. But, some of Johnson's wrestling "moves" involved touching P.P.J.'s genitals and buttocks. Johnson would say "whoops" and "sorry" when the touching occurred. But, it happened repeatedly over the course of about ten minutes.

The similarities with the assault of M.D. are numerous. Johnson developed trust with the both children's mothers so that he could look after the child. P.P.J. was six, while M.D. was eight or nine years old. Both assaults began with wrestling,[4] a physical but playful activity. Johnson then made sexual advances. The trial court also acted within its discretion in finding the assaults of P.P.J. and M.G. were part of a common scheme or plan.

Johnson argues that, despite these similarities, there is no evidence that Johnson deliberately isolated M.G. and P.P.J. to prey upon them. Rather, he contends that the evidence showed he took advantage of a mere opportunity and that does not amount to a common scheme. But, a rational trier of fact could easily conclude that development of the trust relationships with M.D.'s, M.G.'s, and P.P.J.'s mothers were each intended to create the opportunity to sexually assault the children.

Johnson also argues that the molestation of P.P.J. is critically different than M.D. because the assault on P.P.J. did not involve anal penetration. But, in State v. DeVincentis, 150 Wn.2d 11, 14-15, 16, 25, 74 P.3d 119 (2003), our Supreme Court affirmed the admission of common scheme or plan evidence involving oral sex, where the charged crime did not involve oral sex. Johnson's goal in both

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[4] The common thread of wrestling is comparable to the common thread of the recliner chair in Slocum, 183 Wn. App. at 444. It is a key precipitating factual circumstance that evidences the similarities in the defendant's design. Similarly, in Lough, the assaults would start with Lough drugging the victims. 125 Wn.2d at 865. Here, the assaults against M.D. and P.P.J. began as playful wrestling with unassuming children.

circumstances was sexual stimulation involving a child of similar age, over whom Johnson had a position of authority.

The lengthy findings and conclusions illustrate the trial court understood and properly applied the rule to exclude other acts the state sought to admit. The carefully reasoned decision properly admitted the challenged evidence under ER 404(b). The trial court did not abuse its discretion.[5]

II. Community Custody Conditions

Johnson challenges various community custody conditions. He challenges conditions regarding curfew, alcohol, sexual materials, sex related businesses, contact with children, and dating relationships.

Trial courts may impose crime-related prohibitions while a defendant is in community custody. RCW 9.94A.505(9), .703(3)(f). A "crime-related prohibition" prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). "Directly related" includes conditions that are reasonably related to the crime. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). " '[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-

[5] Johnson's ER 404(b) challenge is primarily that the acts are insufficiently similar. But, his brief also includes a single sentence that argues that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. But, the probative value of the evidence was very high, because the facts aligned closely with the alleged crime. And, while the evidence surely created prejudice, numerous cases have found that the prejudicial effect of prior similar molestations that are offered as common plan evidence does not substantially outweigh the probative value. See, e.g., DeVincentis, 150 Wn.2d at 23-24. And, the trial court explicitly noted its balancing of the probative value and prejudicial effect, and for that reason gave a limiting instruction that the jury was to use the evidence only for assessing the common scheme or plan.

person appraisal of the trial and the offender,' the appropriate standard of review is abuse of discretion." State v. Norris, 1 Wn. App. 2d 87, 97, ____ P.3d ___ (2017) (quoting In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010)). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. Irwin, 191 Wn. App. at 656.

A. Curfew and Alcohol

Johnson challenges community custody conditions 7 and 12, which impose a curfew and prohibit alcohol use, respectively. The State concedes that these conditions should be stricken, because they are unrelated to the crime. We accept the State's concession and remand with instructions to strike the conditions that impose a curfew and prohibit alcohol use.

B. Sexually Explicit Materials and Sex Related Businesses

Johnson next challenges the community custody conditions that prohibit possession of sexually explicit materials and prohibit him from patronizing sex related businesses. He argues that (1) they are not crime related, and (2) even if they are crime related, they violate his First Amendment rights to free speech.

1. Sexually Explicit Materials

Condition 11 states,

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

Johnson notes that this court accepted the State's concession on a similar argument in State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). There Kinzle was convicted of two counts of first degree child molestation. Id. at 777. This court accepted the State's concession on whether a prohibition on sexually explicit materials condition was reasonably related to the crime. Id. at 785.

However, a recent opinion resulted in a different outcome. See Norris, 1 Wn. App. 2d at 90. The Norris court found a prohibition on sexually explicit materials to be sufficiently related to second degree child molestation. Id. It emphasized that the relationship of a community custody condition to the crime must be based on the facts of the crime, rather than the class of the crime. See id. at 96-97. For example, the Norris court upheld a prohibition on sexual materials, because the crime involved exchanging sexually explicit text messages and images with the child victim. Id. at 99. Here, besides the fact that the crime is sexual in nature, there are no facts that pertain specifically to sexually explicit materials or images. This is insufficient to connect the crime to the condition. We remand with instructions that the trial court strike condition 11. Because we find that condition 11 is insufficiently related to the crime, we need not address whether the sexually explicit materials restriction violates Johnson's First Amendment rights.

2. Sex Related Businesses

Condition 10 states, "Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary

source of business is related to sexually explicit material." In Norris a prohibition on entering sex related business was insufficiently related to a sexual crime against children, when the record does not show that frequenting sex related business was in any way related to the crime. Norris, 1 Wn. App. 2d at 98. Here, as in Norris, the only relationship between the crime and sex related business is that they are both sexual in nature. Id.

We remand with instructions to strike condition 10, and therefore decline to address Johnson's First Amendment arguments with respect to sex related businesses.

C. Contact with Children

Johnson next argues that condition 16, which prohibits contact with minors, infringes on his constitutional right to parent his child. Johnson requests only that he have the opportunity for supervised contact with his child. The State concedes that the condition should be modified to prohibit only contact with minors without the supervision of a responsible adult with knowledge of this conviction. We accept this concession and remand with instructions to modify the condition to allow Johnson to have contact with his child under the supervision of a responsible adult that has knowledge of this conviction.

D. Dating Relationship

Johnson next contends that the community custody condition that requires him to disclose a dating relationship is unconstitutionally vague. But, in Norris, we rejected an identical argument and held that the term is sufficiently specific. Id. at

95. The "dating relationship" community custody provision is not unconstitutionally vague.

III. Statement of Additional Grounds for Review

Johnson makes numerous arguments in his SAG.

A. Right to Present a Complete Defense

In additional grounds one and six, Johnson first argues that he was denied a right to present a complete defense. He claims that he wanted to present evidence that M.D. rescinded his accusation, but he was prevented from doing so. It is Johnson's burden on appeal to present facts sufficient to support his assignment of error. State v. Holbrook, 66 Wn.2d 278, 280, 401 P.2d 971 (1965). He has not.

B. Ineffective Assistance of Counsel

Johnson argues that his trial counsel was ineffective for failing to impeach or cross-examine M.D. and other state witnesses, and by issuing an inadequate subpoena during investigation of the case.

As to the impeachment and cross-examination issue, this court employs a strong presumption that counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Johnson claims that counsel should have confronted M.D. about rescinding his accusation. But, the trial court record shows a lengthy cross-examination of M.D., a child witness. Therefore, counsel's choice not to use Johnson's preferred strategy for impeachment is insufficient to overcome the strong presumption of effective representation. See In Re Det. of

Hatfield, 191 Wn. App. 378, 398, 362 P.3d 997 (2015) ("The array of trial tactics and strategy available to the attorney as a means of achieving the client's goals is considerable, including decisions as to who to call and how to question a witness.").

Johnson also claims that counsel was ineffective in impeaching and cross-examining other witnesses. But, he fails to identify who those witnesses are, and why counsel should have employed a different strategy. He does note that the trial court once asked counsel not to repeat direct examination. But, this is also insufficient to overcome the presumption of effective representation.

As to the subpoena, Johnson claims that counsel's subpoena of school records contained language that inadequately described the records sought. But, the defendant bears the burden of showing ineffective assistance based on the record. Id. at 337. The subpoena he describes is not in the record, nor does he point to any portion of the record that discusses the circumstances of that subpoena. This argument therefore fails.

C. Jury Instructions

Johnson also claims that the jury was improperly instructed on the definition of sexual intercourse. But, this argument was not raised below, and it is therefore waived under RAP 2.5(a) (stating that appellate courts need not address issues raised for the first time on appeal).

D. Expert Testimony

Johnson argues that the opinions of the State's expert on child abuse and psychology are not based on a recognized scientific principle, and are not generally accepted in the field. But, nothing in the record shows that Johnson objected to the expert's testimony on this ground. Therefore, this argument is also waived under RAP 2.5(a) (stating that appellate courts need not address issues raised for the first time on appeal).

E. Sufficiency of Evidence

Johnson next claims that the evidence was insufficient to show (1) that he committed two distinct acts that would support the two counts he was charged with, and (2) that he penetrated the victim's anus. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Johnson was charged with two counts of rape of a child in the first degree. The only grounds he gives for this sufficiency challenge is that the evidence did not delineate between specific incidents of rape. But, when asked how many times Johnson had penetrated him, the victim, M.D., testified that it happened more than once, and occurred on both weekends and weekdays. Viewed in the light most favorable to the State, this testimony alone establishes that multiple rapes occurred.

Johnson also argues that, because M.D. testified only that Johnson penetrated his "butt," the evidence was insufficient to show that Johnson penetrated M.D.'s anus. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. M.D. testified that Johnson would come out of his room in his boxers, get on top of M.D., use his "boy body part," and M.D. would feel pain in his "butt." It is a reasonable inference to determine that M.D. was referring to penetration of his anus.

The evidence was sufficient to prove two counts of rape of a child in the first degree.

F. Pretrial Rulings

Johnson's next SAG argument claims that the "trial court abused its discretion in basing pre-trial rulings on erroneous views of the law." He then cites to a case regarding the proper remedy when charging information is insufficient. He makes no further argument on this issue, and it fails to identify any ground for reversal.

G. Racial Bias

Finally, Johnson argues that the trial court was required to inquire into possible racial bias of jurors. But, our Supreme Court has clearly stated that a trial court has "no obligation to raise the question of racial prejudice when it was not requested by the defendant or his counsel." State v. Davis, 141 Wn.2d 798, 834,

10 P.3d 977 (2000). Johnson does not point to any part of the record where he or his attorney made any such request. This argument fails.

We remand for the trial court to strike condition 7 (curfew), condition 10 (sex related businesses), condition 11 (sexually explicit materials), and condition 12 (alcohol), and modify condition 16 (contact with minors). We affirm in all other respects.

WE CONCUR:

APPENDIX B

FILED
2/1/2018
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. JAMES LARRY JOHNSON, III, Appellant.	)	No. 75429-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, James Johnson, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

March 05, 2018 - 1:13 PM

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Superior Court Case Number:	15-1-02018-4

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