

NO. 67111-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JOHN BETTYS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

John Bettys seeks reversal of his conviction for Child Molestation in the First Degree contending the admission of the evidence of Bettys' prior acts of child rape and molestation were improperly admitted due to unconstitutionality of RCW 10.58.090. The State agrees the statute has been held unconstitutional. The trial court had also precluded admission under ER 404(b).

The State contends the trial court improperly applied ER 404(b) to exclude the admission of the admitted prior sexual acts with minor male relatives at his residence where the trial court had ruled that the prior sexual activity constituted common scheme or plan and where the evidence at trial focused on family member's awareness of Bettys' past sexual history to protect children and Bettys from allegations.

Given the trial court's incorrect interpretation of an evidentiary rule, this Court must review the application de novo. As a result this Court should hold there was a common scheme or plan and that the prior acts or sexual misconduct should have been admissible under ER 404(b) resulting in harmless error for the application of RCW 10.58.090.

II. ISSUES

1. Is RCW 10.58.090 unconstitutional?

2. Where the trial court held the prior acts of sexual misconduct was a common scheme or plan to the charged child molestation, did the trial court erroneously apply the law in excluding the evidence under ER 404(b)?
3. Reviewing the admitted acts of prior child sexual misconduct de novo, was the prior misconduct admissible under ER 404(b) as a common scheme or plan?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On February 19, 2010, John Bettys was charged with two counts of Child Molestation in the First Degree alleged to have occurred between March 1, 2007, and July 12, 2009. CP 1-2. Bettys was alleged to have touched a five-year-old male relative in his private area. CP 4, 6. The information was later amended to narrow the time frame to December 1, 2008, to July 12, 2009. CP 52-3.

On December 16, 2010, the trial court conducted pretrial motions.
12/16/10 RP 2-¹

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

10/1/10 RP	Pretrial motions – hearing continued
12/16/10 RP	Motions; child competency, and child hearsay
12/22/10 RP	Motions; child competency, hearsay and prior conduct
1/6/11 RP	Trial continuance at trial confirmation

On May 4, 2011, the case proceeded to trial. 5/4/11 RP 3. Testimony was taken from twenty-four witnesses over the course of three days. 5/6/11 RP 21 to 5/10/11 RP 102.

On May 11, 2011, the jury returned a verdict finding Bettys guilty of Child Molestation in the First Degree as charged in Count 1. CP 214. The jury returned a not guilty finding as to Count 2 as well as the lesser charge of Assault in the Fourth Degree as to Count 2. CP 215, 217.

On July 20, 2011, the trial court conducted a sentencing hearing. 7/20/11 RP 2-60. The trial court denied a motion to challenge the validity of Bettys' 1993 conviction for two counts of Rape of a Child in the First Degree. 7/20/11 RP 26. Bettys was sentenced to life imprisonment as a persistent offender. 7/20/11 RP 54-5, CP 446-455.

On July 26, 2011, Bettys timely filed a notice of appeal. CP 457-469.

2/16/11 RP	3.5 Hearing and Motions in Limine
2/18/11 RP	3.5 Hearing conclusion
3/3/11 RP	Trial continuance at trial confirmation
3/25/11 RP	Pretrial motions
4/28/11 RP	Trial confirmation and Brady motion
5/4/11 RP	Trial Volume 1
5/5/11 RP	Trial Volume 1
5/5/11 RP	Material Witness Warrant hearing Re Michael Bettys
5/6/11 RP	Trial Volume 1
5/6/11 RP	Material Witness Warrant hearing Re Michael Bettys
5/9/11 RP	Trial Volume 2
5/10/11 RP	Trial Volume 3
5/11/11 RP	Trial Volume 3 (Jury instructions and closing argument)
6/9/11 RP	Motion regarding representation status
7/20/11 RP	Sentencing.

2. Summary of Proceedings Regarding Past Sexual Conduct

On March 25, 2010, a month after the case was filed, the State filed an intent to rely on evidence under ER 404(b) and RCW 10.58.090. CP __ (Sub. No. 20, State's Notice of Intent to rely on ER 404(b) and RCW 10.58.090 Evidence, Supplemental Designation of Clerk's Papers Pending).

That notice indicated:

The State intends to present evidence of defendant's prior commission of sex offenses, including those he obtained convictions for Indecent Liberties, Skagit County Cause No. 89-8-00066-5,

On June 8, 2010, Bettys filed a brief in opposition. CP 35-45. The brief argued unconstitutionality of RCW 10.58.090 and against admission under the provisions of the statute. CP 37-44. The brief only briefly touched on the analysis under ER 404(b). CP 43-4. Bettys acknowledged that he had the prior convictions of indecent liberties for a younger female relative and two counts of rape of a child in the first degree for oral intercourse with two younger nephews. CP 35-6. He had not been charged with a crime related to a second female relative. CP 35.

On June 18, 2010, the State filed a declaration which included the police reports from Bettys prior offenses. CP __ (Sub. No. 42, Certification/Declaration of Counsel in Response to Defendant's Knapstad Motion to Dismiss, Supplemental Designation of Clerk's Papers Pending). The declaration indicated the attached police reports were of Bettys' prior

incidents of sexual misconduct in which Bettys admitted the acts of oral sexual intercourse with his two nephews at his residence on Padilla Heights road.

On September 27, 2010, the State filed a response brief regarding admission of prior misconduct under ER 404(b) and RCW 10.58.090. CP ___, (Sub No. 59, State's Response to Defendant's Opposition to State's Supplemental Designation of Clerk's Papers Pending). The State argued specifically for admission under ER 404(b). CP ___, State's Response at pages 8-16.

On December 22, 2010, the trial court heard argument on the admission of prior acts of sexual misconduct of Bettys. 12/22/10 RP 81-96. The trial court considered the motion based upon the police reports which had previously been provided. 12/22/10 RP 82.

The State contended the prior acts involved sexual abuse of children at a young age involving grooming behavior. 12/22/10 RP 82. The conduct with one male victim began at age five and the other at age six to seven. 12/22/10 RP 82. The prior conduct with the females occurred in preteen years. 12/22/10 RP 82. All of the children were related by marriage to the defendant and all allegations occurred at the Bettys property on Padilla Heights. 12/22/10 RP 83. The victims delayed disclosure based upon threats by the defendant. 12/22/10 RP 83. The prior acts of abuse were

extended acts over a substantial period of time which began with touching over the clothing. 12/22/10 RP 83-4. The alleged victim in the charged abuse came forward before the persistent abuse occurred. 12/22/10 RP 84. Three of the four prior victim's cases ended in convictions after the defendant admitted the conduct. 12/22/10 RP 85, 87. The State contended the admission under ER 404(b) was not to show propensity but to show common scheme or plan. 12/22/10 RP 86-7. The allegation also rebutted a material assertion which the defendant contended the touching of the child was not for a sexual purpose. 12/22/10 RP 87.

The trial court noted there were clear differences due to gender in the cases involving the minor females and excluded admission of those victims on that basis. With respect to the minor boys, the trial court found that the two prior victims were accessible to the defendant through family connections on the Bettys property. 12/22/10 RP 93. This was similar to the placement of the charged victim, step-nephew, on Bettys' property. 12/22/10 RP 93. The similarities were striking in that they involved the next generation of children in the same age coming into contact with the defendant. 12/22/10 RP 93. Despite the extreme prejudice, the evidence was found to be very probative to rebut the general denial given the age of the child. 12/22/10 RP 94. Despite finding the information was extremely probative and finding the court's determination that there was evidence of a

common scheme or plan, the trial court excluded the admission of the evidence under ER 404(b). 12/22/10 RP 94.

3. Summary of Trial Testimony

Laurie Ferrell² was the mother to four children including Andree King. 5/6/11 RP 22 Andree³ King had three children including a son M.F. born March 24, 2004. 5/6/11 RP 23. At the time of trial M.F. was seven. 5/6/11 RP 23. Andree was out of M.F.'s life from age of 7 months to age 4 while he was in foster care. 5/6/11 RP 24. Laurie said M.F.'s disposition changed over the last year and a half-before trial when the allegations arose. 5/6/11 RP 26. Andree was living with M.F. on Stevenson Road in Anacortes on July 12, 2009. 5/6/11 RP 27-8. Laurie testified she was aware of Bettys' past history of sexual abuse of children. 5/6/11 RP 29. Laurie ran into Kathy Tjeerdsma while her mother was in the hospital. 5/6/11 RP 31, 50. Tjeerdsma, John Bettys' sister, told Laurie that she was concerned about M.F.'s well-being and safety at the Bettys house. 5/6/11 RP 31-2. Tjeerdsma told Laurie that you don't leave a person with an addiction with a drug of choice and that M.F. was John Bettys' drug of choice. 5/6/11 RP 32. Tjeerdsma had already taken steps to try to get M.F. out of the house. 5/6/11 RP 33.

² Due to the multiple same last names, witness will be referred to by their first names.

³ Some witnesses identified Andree as Annie. 5/6/11 RP 125.

Laurie's mother had been in the hospital for surgery on July 12, 2009, and she wanted to see M.F. when she got back home. 5/6/11 RP 31, 36. John Bettys came over to the house. 5/6/11 RP 37. Laurie grabbed M.F. to bring him back inside and M.F. grabbed Laurie's private area and started laughing. 5/6/11 RP 38-9. Laurie told M.F. that it was not okay to touch her there. 5/6/11 RP 39. She asked M.F. if anyone had ever done anything like that to him. 5/6/11 RP 39. M.F. went into a rage throwing things in the kitchen, yelling and screaming and stormed off outside to play ball. 5/6/11 RP 39. Laurie went outside to talk to him and played ball with him and talking to him. 5/6/11 RP 40. Laurie asked if M.F. was all right. 5/6/11 RP 40. M.F. told Laurie John poked me in my penis. 5/6/11 RP 40. Laurie asked if M.F. had told his parents and he said no. 5/6/11 RP 41. Laurie didn't ask him follow-up questions. 5/6/11 RP 41. Laurie said that M.F. also told his Grandpa Kurt. 5/6/11 RP 42.

Laurie alerted Andree King and her husband Danny King. 5/6/11 RP 42. They brought M.F. into the kitchen and Danny King began yelling at M.F., telling him he was a liar and he was going to jail. 5/6/11 RP 42. Danny asked M.F. when did this happen, and M.F. said at Grandma Sylvia's. 5/6/11 RP 42. Danny and Andree took M.F. out of the house and down to the police department to talk to Detective Hanson. 5/6/11 RP 43.

On cross-examination defense elicited that Laurie was aware from Child Protective Services that John Bettys had past a past sex offense history. 5/6/11 RP 48.

Laurie testified that about a year after the initial statement, M.F. had volunteered to Laurie that Bettys had put cream on his privates. 5/6/11 RP 65. At the time M.F. was visiting and had a rash on his upper thigh that needed cream. 5/6/11 RP 65-6. Laurie put cream on a swab for M.F. to apply. 5/6/11 RP 66. M.F. went on to state he didn't know why John was in trouble because all he did was put cream on M.F. 5/6/11 RP 66. It came across to Laurie as if M.F. had been told to say that. 5/6/11 RP 66.

Kurt Gratias was Laurie Ferrell's boyfriend since September of 2007. 5/6/11 RP 70. Laurie's grandson, M.F., calls Kurt grandpa. 5/6/11 RP 71. M.F. did confide in things to Kurt. 5/6/11 RP 72. Kurt recalled an incident while in Anacortes visiting Laurie's mother in the hospital when M.F. confided to Kurt. 5/6/11 RP 73-4. After Laurie had told Kurt that M.F. had grabbed her in the crotch, M.F. approached Kurt and said he wanted to talk to him. 5/6/11 RP 77. M.F. told Kurt that John was touching him down there and took his finger and touched his private area with it and said poke, poke, poke. 5/6/11 RP 77-8. Kurt told Laurie and together they told Andree. 5/6/11 RP 79. M.F. was taken inside and Kurt did not observe any of the

conversation inside. 5/6/11 RP 79. About fifteen minutes later, Andree, Danny and M.F. went to the police department. 5/6/11 RP 79.

Deeann Thomas is Laurie Ferrell's mother. 5/6/11 RP 88. Her granddaughter, Andree King, was living with her when Andree gave birth to M.F. 5/6/11 RP 89. Andree, her husband Danny and M.F. were living with Deeann in July of 2009. 5/6/11 RP 91. They had moved in March of 2009. 5/6/11 RP 91. Deeann knew John Bettys and was raised around his family. 5/6/11 RP 91. Deeann was close to John's mother Sylvia. 5/6/11 RP 92. Sylvia lived on Padilla Heights Road about a mile from Deeann's house. 5/6/11 RP 92. Deeann identified a photograph of the property. 5/6/11 RP 92-3. Deeann identified a repair shop that Sylvia's husband had on the property as well. 5/6/11 RP 94. Deeann identified the house that Sylvia resided in as well as the trailer John Bettys lived in. 5/6/11 RP 94-5.

When M.F. resided with Deeann, he attended Whitney Elementary in Anacortes. 5/6/11 RP 95, 97. Deeann testified that when M.F. was residing with her, he would take the bus and on some occasions get rides from John Bettys. 5/6/11 RP 97. Sometimes Bettys was alone with M.F. and sometimes he would have someone with him. 5/6/11 RP 98. Deeann was aware that John Bettys had been hired to drive M.F. to and from school even though other adults were available. 5/6/11 RP 107. Deeann was aware that on occasion M.F. would spend the night at the Bettys property. 5/6/11 RP

100-1. Deeann was aware of Bettys' history of sexually abusing children. 5/6/11 RP 100.⁴ Deeann observed that Danny King treated his step-son M.F. differently from his two children. 5/6/11 RP 112. He was very strict with M.F. but the other children were allowed to do whatever they chose and allowed to push around M.F. 5/6/11 RP 112-3. At the time of trial, M.F. was living with foster parents in Kennewick. 5/6/11 RP 113.

Lea Latimer was Andree King's friend. 5/6/11 RP 115-6. Lea knew the Bettys family for two-and-a-half years. 5/6/11 RP 117. Lea testified she would talk to John when he would go over to his mother's property. 5/6/11 RP 118. Lea also lived on the Bettys property for six months. 5/6/11 RP 118. John Bettys lived in a trailer on the property. 5/6/11 RP 119. Later Lea lived at Deeann Thomas' house. 5/6/11 RP 121. At the time she lived with Deeann, M.F. was going to school in Anacortes. 5/6/11 RP 121. John Bettys would take M.F. to school every day as far as Lea recalled. 5/6/11 RP 122. Most often Andree was with them, but once or twice Bettys took M.F. alone. 5/6/11 RP 122. M.F. would also go over to the Bettys property after school some times. 5/6/11 RP 122.

Sherry Veatch was another one of Deeann Thomas's daughters. 5/6/11 RP 124. She testified that she knew the Bettys family a long time and

⁴ The State referred to Bettys' history of abusing children. 5/6/11 RP 100. Defense referred to Bettys' history for sexual offenses. 5/6/11 RP 48

worked with Kathy Tjeerdsma, the defendant's sister at Island Hospital. 5/6/11 RP 125-6. In July of 2009, Deeann was receiving cancer treatment at the hospital. 5/6/11 RP 126. While Sherry was there, Kathy approached her to see if she knew that M.F. was out at Kathy's. 5/6/11 RP 127. Kathy was concerned that her mother was not able to take care of M.F. and that M.F.'s care would be left to John. 5/6/11 RP 128. Sherry picked up M.F. from the Bettys property. 5/6/11 RP 129.

M.F. testified. 5/6/11 RP 131. He testified he was seven years old at time of trial. 5/6/11 RP 131. M.F. was in first grade. 5/6/11 RP 131. M.F. testified he lived in Kennewick with a foster father named Gary. 5/6/11 RP 132-4. He testified that his mother was Annie⁵. 5/6/11 RP 134. One of his other fathers was Danny. 5/6/11 RP 134. He also identified his grandmother Laure and Grandma D. 5/6/11 RP 134-5. When he lived with Grandma D, he went to Whitney Elementary. 5/6/11 RP 135. M.F. took the bus to school and got rides from John Bettys. 5/6/11 RP 136. M.F. had been to John's house. 5/6/11 RP 136. Grandma Sylvia was his other grandma who lived next to John's house. 5/6/11 RP 137.

M.F. testified that John touched him. 5/6/11 RP 138. M.F. identified on a drawing that Bettys had touched him in his private area by drawing an

⁵ Andree (see prior footnote).

X on a diagram of a body. 5/6/11 RP 139. M.F. identified on two pictures he had drawn that John had touched him. 5/6/11 RP 139-40. M.F. testified Bettys touched him with his hand. 5/6/11 RP 141-2. M.F. drew thumbs down showing he was sad. 5/6/11 RP 142.

On cross-examination, M.F. testified Bettys lived at his house alone. 5/6/11 RP 144. The last time had been at the house he was visiting. 5/6/11 RP 144-5. M.F. said he was tired of talking to people about it. 5/6/11 RP 149. M.F. said things happened when it was just John in the room with him. 5/6/11 RP 152. Things did not occur outside. 5/6/11 RP 152. M.F. said that Bacca⁶ was there but was out of the house for two minutes when he came back M.F. was crying because of Uncle John. 5/6/11 RP 152-3. M.F. had been playing video games and when Bacca stepped out to have a smoke John poked and touched M.F. 5/6/11 RP 156. M.F. told Bacca, his grandma and Grandpa Kurt. 5/6/11 RP 157. M.F. testified he did not tell his grandma about John putting lotion on him. 5/6/11 RP 158. On cross-examination, M.F. again testified that he had been touched in the private area being poked. 5/6/11 RP 160. He was not wearing diapers at the time and was wearing pull-ups. 5/6/11 RP 160.

⁶ Michael Bettys is also known as Bacca. 5/10/11 RP 67.

Kari Cook was a social worker for Child Protective Service. 5/6/11 RP 177. Kari was assigned to a referral of neglect of M.F. in March of 2010. 5/6/11 RP 178. Kari was unable to arrange an interview of M.F. at that time, but later interviewed him in September of 2010 after a second referral. 5/6/11 RP 178. M.F. was five years old at the time. 5/6/11 RP 182. M.F. was interviewed at the Discovery School when his teacher Ms. Heart was present. 5/6/11 RP 179. Kari was talking to M.F. about dangerous situations and the playground. 5/6/11 RP 180. M.F. said he felt unsafe around Mr. Bettys. 5/6/11 RP 180. M.F. told Kari that John was in jail. 5/6/11 RP 181. When Kari asked why, M.F. stated he touched my privates. 5/6/11 RP 181. Kari asked M.F. if he had told anyone and M.F. said he had. 5/6/11 RP 181. M.F. then told Kari that he was not supposed to talk about it. 5/6/11 RP 181. When Kari asked M.F. what happened if he did talk about it, M.F.'s facial expression changed, he frowned, became tearful and said he would get in trouble with his mom. 5/6/11 RP 182.

Kari did not follow up with a safety plan because Bettys was in jail at the time and did not pose an imminent risk to M.F. 5/6/11 RP 183.

A videotaped deposition of Lisa Wolff was played for the jury. 5/6/11 RP 189. In the deposition Wolff described her treatment of M.F. and that his statements during counseling were similar to those previously provided.

Nicol Hinde was a child interview specialist with the Skagit County Prosecutor's Office. 5/9/11 RP 5-6. Nicol interviewed M.F. on July 16, 2009, when M.F. was five years old. 5/9/11 RP 13, 19. Before M.F. would talk to Nicol, he wanted to talk to police first and Detective Hansen came in and showed his badge. 5/9/11 RP 24. Nicol testified that in the interview M.F. was able to distinguish truth from lies. 5/9/11 RP 14. M.F. told Nicol that he was living at his Grandma Dee's house. 5/9/11 RP 17. M.F. disclosed that John had touched him two times and that John had told him not to tell anyone. 5/9/11 RP 19. John had snuck over to him, and told him he wanted to do something to him. 5/9/11 RP 20. M.F. told him no but John did it anyway. 5/9/11 RP 20. M.F. said that John had touched him and pointed to his genital area and later identified it as his penis. 5/9/11 RP 20. The touching occurred over the clothing while in the living room at Grandma Sylvia's house. 5/9/11 RP 20. John told M.F. not to tell or he would be in trouble. 5/9/11 RP 20. At the time, Michael was in the kitchen. 5/9/11 RP 20. M.F. said he was watching Sponge Bob. 5/9/11 RP 20. M.F. told Nicol the touch felt warm and soft and that it occurred in the daytime when grandma was in the hospital. 5/9/11 RP 21. M.F. had just moved to grandma's house. 5/9/11 RP 21. M.F. told Nicol he was touched twice and that the touching made him feel mad and made his body feel angry. 5/9/11 RP 22. M.F. told Nicol he was mad at John and did not want to see him

again because he did not want it to happen again. 5/9/11 RP 23. M.F. told Nicol that no one had told him what to say. 5/9/11 RP 24.

Kevin Schwartz was the principal of the Whitney Early Childhood Center in Anacortes. 5/9/11 RP 32. Kevin was aware of M.F. as being a student in preschool and kindergarten from 2008 to part of the 2009 to 2010 school year. 5/9/11 RP 33. Kevin became aware that John Bettys was a registered sex offender and found out that John was picking up M.F. 5/9/11 RP 34. He checked the emergency card and found out that John was allowed to drop off and pick up M.F. 5/9/11 RP 35, 37.

John Dumas was the parent of a child who went to preschool through first grade at Whitney Elementary School. 5/9/11 RP 41-2. John Dumas became aware there was an issue of a registered sex offender on school property and looked up the sex offender registry. 5/9/11 RP 42. John Dumas realized he had seen John Bettys picking up a child from school property. 5/9/11 RP 42-3. John Dumas saw him picking up the child and never saw anyone else with them. 5/9/11 RP 44. At the time of trial, Bettys looked different because he was clean shaven, with short hair and much thinner. 5/9/11 RP 45.

Lindsay Koegel was another parent of a child at Whitney Elementary. 5/9/11 RP 50. She recognized John Bettys as a person she had seen on the school grounds at Whitney Elementary. 5/9/11 RP 50. Lindsay

sometimes saw John on the property and sometimes in his car waiting to pick up a little boy. 5/9/11 RP 51. Sometimes, John would wait at the gate to pick up the child and sometimes he would wait in the car. 5/9/11 RP 52. Lindsay remembered seeing John picking up the child in the whole school year 2008 to 2009. 5/9/11 RP 53. Lindsay also saw John waiting and watching by the designated area where little kids play. 5/9/11 RP 54.

Matt Koegel was Lindsay's husband. 5/9/11 RP 59. Matt said that when he dropped off his daughter, he would see John picking up a young boy. 5/9/11 RP 61. Matt would park in the same vicinity as John to keep an eye on him. 5/9/11 RP 61-2. Matt testified that at times there was a lady with John and other times John would be by himself. 5/9/11 RP 62. Matt picked his daughter up every day and saw this on a daily basis. 5/9/11 RP 63.

Catherine Thomas was a nursing student who had two children going to Whitney Elementary. 5/9/11 RP 64. Catherine saw John on one incident walking from the classroom. 5/9/11 RP 65. Catherine also saw John waiting in his car on the street. 5/9/11 RP 66. Sometimes John was alone and sometimes he had someone with him. 5/9/11 RP 66.

Scott Betts was a trooper with the Washington State Patrol who lived in Anacortes. 5/9/11 RP 67-8. Scott had a son who attended Whitney Elementary and he was very active at the school volunteering. 5/9/11 RP 68.

Scott had a child in kindergarten starting in 2008. 5/9/11 RP 68. Scott became aware of John Bettys was on school property from another parent. 5/9/11 RP 69. Scott saw John on a round amphitheater with benches with a young boy running around. 5/9/11 RP 69. Scott made a few calls to see if there were restrictions on John. 5/9/11 RP 70. Scott made note of John after it was brought to his attention and saw John walking in with a boy and at times walking out. 5/9/11 RP 71.

Michael Hansen was a detective with the city of Anacortes. 5/9/11 RP 74. Officer Hansen was referred the case from patrol for follow-up. 5/9/11 RP 75. Officer Hansen found out the initial report had been made to Officer Jacobson on July 12, 2009. 5/9/11 RP 75. Officer Hansen reviewed the report and arranged a child interview for M.F. on July 16, 2009. 5/9/11 RP 76. Officer Hansen was present during the interview on the other side of a one-way mirror. 5/9/11 RP 76. Officer Hansen later interviewed Laurie Ferrell, as well as the defendant on July 22, 2009. 5/9/11 RP 78. The interview occurred around noon on July 22, 2009. 5/9/11 RP 78. The interview was audio and video recorded. 5/9/11 RP 79.

John Bettys was interviewed and told Officer Hansen his date of birth was September 12, 1974. 5/9/11 RP 79. John said he was living at 9492A Padilla Heights Road in Anacortes. 5/9/11 RP 80. Officer Hansen had John complete an interview packet which took about two hours. 5/9/11

RP 81. After the packet was completed, Officer Hansen talked with John about his contact with M.F. 5/9/11 RP 82. John characterized his relationship with M.F. as distant and no physical contact with him. 5/9/11 RP 82. John said he knew M.F. in a passing fashion and no real connection between the two that would lead to the allegations made by M.F. 5/9/11 RP 82. John claimed never to be alone with M.F. and that his family made sure there was always one adult family member around whenever he was around. 5/9/11 RP 82. John claimed M.F. had body issues and that on one occasion John had seen M.F. undressing for a bath or shower and M.F. closed the door. 5/9/11 RP 83. Officer Hansen spoke with John for about twenty or thirty minutes and never disclosed any physical contact with M.F. 5/9/11 RP 83. Officer Hansen arranged to have Glen Hutchings, the assistant chief of the Swinomish Tribal Police Department conduct a supplemental interview of John. 5/9/11 RP 84.

Glen Hutchings was the assistant chief of the Swinomish Tribal Police Department who had been a detective with the Bellingham Police Department for 31 years. 5/9/11 RP 85. He conducted the supplemental interview of John on July 22, 2009. 5/9/11 RP 86. When told the allegation was of touching by M.F., John claimed it was the first time he had heard of that. 5/9/11 RP 87. He tried to suggest to John that the touching could have occurred in a playful manner such as an inadvertent or accidental touching

without a wrong intent. 5/9/11 RP 88-9. He also suggested to John that the touching might have occurred in a supervised parental role to see if the youngster had wet pants. 5/9/11 RP 88-9. John denied that any touching like that had ever taken place. 5/9/11 RP 89. He addressed with John the fact the allegation had occurred when M.F. had been at the house watching television and John denied that ever occurred. 5/9/11 RP 89. He went on to ask John if M.F. had ever spent the night or had been in a parental role. 5/9/11 RP 90. John offered that there had been a time when M.F. had spent the night and had wet the bed and peed in his pants. 5/9/11 RP 90. John said the sheets of the bed were all wet so he had gone and drawn bath water for M.F. 5/9/11 RP 90. John said M.F. had expressed concern about people being present when he wasn't clothed. 5/9/11 RP 90. John said M.F. had asked John not to be in the bathroom and M.F. had gotten out of the tub, dried off and gotten himself redressed. 5/9/11 RP 90.

Assistant Chief Hutchings then went on to ask John three specific questions. 5/9/11 RP 90-1. The first one was if John had ever put his hand on the clothing or over the clothing of M.F.'s penis. 5/9/11 RP 91. John said he had not. 5/9/11 RP 91. He then asked John if he had ever touched the groin area of M.F. 5/9/11 RP 91. John said no. 5/9/11 RP 91. He then asked if John had ever touched M.F. for sexual purposes. 5/9/11 RP 91. John said no. 5/9/11 RP 91. After those questions, he confronted John with

the fact he did not believe John was being candid. 5/9/11 RP 91. After confronting John a number of times, John did say that on occasion Danny and M.F. were at his house watching television and M.F. had misbehaved but would not accept a time out. 5/9/11 RP 92. John said he put his hands on M.F.'s upper thighs and held him down on a timeout. 5/9/11 RP 92. John described having his hands on M.F.'s knees holding him still because he would not behave or take direction from Danny. 5/9/11 RP 95. John also described that he had been playing physically with M.F. wrestling with him and tickling. 5/9/11 RP 96. John described trying to tickle M.F. knees, upper thighs and under his arms. 5/9/11 RP 96. John also said he had received a hug from M.F. after one fishing trip. 5/9/11 RP 96. John also went on to describe the incident where M.F. had taken a bath and not wanting John to watch. 5/9/11 RP 98. John again denied any inappropriate touching of M.F. and said there would have been no chance for this to have occurred since his own family members watched to make sure he was never alone with children. 5/9/11 RP 98.

John went on to acknowledge that he had issues with children and that he still had a drive and desire for kids. 5/9/11 RP 98. When confronted with the fact he had earlier denied any physical contact with M.F., John just stated that his relationship with M.F. was distant. 5/9/11 RP 99.

John came back for another interview with Hansen on August 6, 2009. 5/9/11 RP 101. John said that M.F. had stayed at the residence on one night on a Sunday when Deeann Thomas had been in the hospital. 5/9/11 RP 100. John also said he had sold a vehicle to Danny and had paid court fines for Danny King so he could get his license back. 5/9/11 RP 101. John also said he still had a relationship with Danny and Annie King and had spoken with them about the allegations on several occasions. 5/9/11 RP 101.

Matthew Shope was a twenty-one year-old inmate who had been housed together with John Bettys at the Skagit County Jail. 5/9/11 RP 105-6. Matthew and John talked about their cases. 5/9/11 RP 106. Matthew told John that he did not want to talk about his case because he was innocent. 5/9/11 RP 106. John told Matthew that he wished he could say that about his case. 5/9/11 RP 106.

On cross-examination Matthew did not want to get anything for testifying against John. 5/9/11 RP 108-9. Matthew was also asked if he made complaints against John and he indicated he had. 5/9/11 RP 109.

On redirect examination, Matthew said the complaints were because John never took showers and stunk up the jail pod. 5/9/11 RP 110. Matthew said he did not have anything against John, but that he had children. 5/9/11 RP 111.

The State called three witnesses regarding John Bettys' prior allegations of sexual misconduct with minor boys.

Danny King testified his date of birth was October 15, 1985. 5/9/11 RP 116. He resided on the Bettys property at Padilla heights. 5/9/11 RP 116. Danny testified he was a prior victim of sexual contact of John. 5/9/11 RP 116. Danny could not recall when the abuse started, but recalled it ended around 1991 when he was age 6. 5/9/11 RP 116. Danny had suppressed the memories and made sure he didn't remember anything. 5/9/11 RP 117. He testified what he reported to Detective Coapstick was the truth. 5/9/11 RP 117-8.

Michael Bettys⁷ was thirty years old at the time of trial. 5/9/11 RP 118. His date of birth was February 18, 1981. 5/9/11 RP 119. Michael was John Bettys' nephew. 5/9/11 RP 119. To the best of Michael's recollection sexual abuse started with John beginning around age five to seven. 5/9/11 RP 119, 122. The abuse continued to age twelve. 5/9/11 RP 119. The incidents occurred at Grandma Sylvia's on Padilla Heights. 5/9/11 RP 119-20. Michael recalled that he would perform fellatio on John. 5/9/11 RP 120. The fellatio also included John performing fellatio on Michael. 5/9/11 RP 122. Michael also testified the touching started by touching over the

⁷ Aka Bacca (see prior footnote).

clothing. 5/9/11 RP 120. John would start rubbing him and things would lead on. 5/9/11 RP 121. It was difficult for Michael to talk about. 5/9/11 RP 121. Michael testified the incidents occurred in John's room, down at the shop and sometimes in a fort in the woods. 5/9/11 RP 121. Michael was present when his brother was abused. 5/9/11 RP 121. The incidents did not occur every time they went to the property but with some frequency. 5/9/11 RP 122.

James Coapstick was an officer and detective with the Skagit County Sheriff's Office. 5/10/11 RP 16. Coapstick was a detective in 1993 and assigned to investigate a case of sexual assault by John Bettys against Michael and Danny on April 28, 1993. 5/10/11 RP 17. As a result of the allegations by Michael, Detective Coapstick interviewed Michael Bettys on April 29, 1993. 5/10/11 RP 18. When Detective Coapstick told John his nephew had alleged sexual contact, John admitted that had happened. 5/10/11 RP 19. John admitted he had sucked on Michael's penis, Michael had sucked on his penis and he had Michael pee on him. 5/10/11 RP 19. John said it had happened on numerous occasions. 5/10/11 RP 19. John said it occurred at his house in the bedroom, in the bathroom, in a fort, in the shop and one time in his car. 5/10/11 RP 19. When asked if that occurred with Danny as well, Bettys admitted to doing the same things with Danny. 5/10/11 RP 19.

Detective Coapstick interviewed Danny later the same day. 5/10/11 RP 19. Danny was seven years-old at the time. 5/10/11 RP 20. Danny also said that he had sucked on John Bettys' penis and John sucked on his penis. 5/10/11 RP 19. Danny said this had occurred in John's bedroom, in the fort and in the bathroom. 5/10/11 RP 20. Danny also said they had touched penises. 5/10/11 RP 20. Danny said it occurred every time he went over to John's house. 5/10/11 RP 20. The fact that the cases resulted in convictions was not offered by the State.

Defense called family members as witnesses. Michael Bettys who had been called by the State was also called as a defense witness. 5/9/11 RP 123. Michael was aware of the allegations by M.F. but could not recall being present when the allegations came out. 5/9/11 RP 123-4. Michael lived in a little camper on the Bettys property in the spring of 2009. 5/9/11 RP 126-7, 129. Michael described that Sylvia's house was a three bedroom house and she did have television, but no video games at her house. 5/9/11 RP 125. John did have video games in his trailer. 5/9/11 RP 125-6, 129. Michael did recall playing video games with M.F. at John's once or twice. 5/9/11 RP 126. Michael also was careful about having John around children. 5/9/11 RP 131.

Amber Kerver is John Bettys' niece. 5/10/11 RP 42. Amber was eighteen at the time of trial. 5/10/11 RP 42. Amber watched the kids at

Sylvia's house. 5/10/11 RP 43. Because she was aware of John's prior criminal history, she kind of made sure that if John was in the same room with a child, other people were there. 5/10/11 RP 44. Amber said she had never seen John alone with children. 5/10/11 RP 45. Amber did say that M.F. did spend the night at John's house one time. 5/10/11 RP 45. Amber testified that M.F. wore pull-ups and was shy about it. 5/10/11 RP 47.

On cross-examination, Amber acknowledged she was interviewed by a defense investigator on August 24, 2009, before the case was filed. 5/10/11 RP 48. Amber had conversations with John about the facts of the case. 5/10/11 RP 48. When asked if they talked about what other witnesses say, she said "Just on our side not like what your witnesses would say." 5/10/11 RP 48. Amber affirmed that she took steps to make sure John was not alone with children. 5/10/11 RP 51. She said she became more lax over time. 5/10/11 RP 51. Amber could not recall if M.F. was wearing pull-ups in the spring of 2009. 5/10/11 RP 51. Amber said she recalled having a phone conversation with John in which she stated that M.F. was not wearing pull-ups during that period of time. 5/10/11 RP 52.

Kathy Tjeerdsma is John Bettys' sister. 5/10/11 RP 52-3. She worked at Island Hospital and recalled having conversation with Sherry Veach about her nephew being at John's house. 5/10/11 RP 54-5. Kathy was concerned because she did not allow a bunch of little children out there.

5/10/11 RP 55. The two reasons were because of Sylvia's ailing health and John's past history of abuse. 5/10/11 RP 56. The next day, Kathy talked to Laurie Ferrell. 5/10/11 RP 56. Laurie told Kathy that M.F. had been picked up from the house. 5/10/11 RP 56. Kathy said she had never seen M.F. unattended at Sylvia's place. 5/10/11 RP 60.

On cross-examination, Kathy said she was glad that M.F. had been picked up from Sylvia's. 5/10/11 RP 62.

On re-direct examination, Kathy said one reason she was concerned about children being left with John was because of John's prior criminal history that he might be vulnerable to accusations. 5/10/11 RP 63-4.

Marissa Bettys was John's wife. 5/10/11 RP 65. She had known him four years at the time of trial and had a child with him. 5/10/11 RP 66. Marissa knew M.F. 5/10/11 RP 66. At the time of the allegations of M.F. Marissa was living on the Bettys property. 5/10/11 RP 67. Marissa did see Danny, Annie and Micah out at the property frequently. 5/10/11 RP 68. Marissa, Sylvia and John were all involved in taking care of M.F. 5/10/11 RP 68. Marissa was also aware of John's past history of abusing children. 5/10/11 RP 68. Marissa did have video games and a television at the house. 5/10/11 RP 70. Marissa could not recall John being left alone with M.F. 5/10/11 RP 71. Marissa was M.F.'s caretaker when he spent the night at her

place. 5/10/11 RP 71. Marissa said that M.F. was potty trained and just needed pull-ups at night so he didn't have accidents. 5/10/11 RP 71.

Marissa was interviewed by the defense investigator on August 24, 2009, prior to charges being filed. 5/10/11 RP 74-5. Marissa was also the one who was to be taking M.F. to school, but she was not with them on every occasion. 5/10/11 RP 75. John always drove. 5/10/11 RP 75. Marissa testified there was a television in the living room at Sylvia's house and that M.F. often watched the show Sponge Bob because it was his favorite show. 5/10/11 RP 76. Marissa testified that on five occasions, M.F. spent the night. 5/10/11 RP 77. Marissa also affirmed that M.F. only wore pull-ups at night time and was able to use the bathroom alone. 5/10/11 RP 77-8. Marissa also said that Michael was also living on the property in the Spring of 2009. 5/10/11 RP 78.

M.F.'s mother Andree King testified. 5/10/11 RP 79. Andree said she had learning disabilities stating it was hard for her to comprehend what people were saying to her. 5/10/11 RP 81. Andree was married to Danny King and lived on Sylvia Bettys' property. 5/10/11 RP 82. John lived there as well. 5/10/11 RP 82. Andree was present when M.F. made the disclosure to Laurie. 5/10/11 RP 82. Andree claimed M.F. came excited and happy with a smile and stated that Uncle John poked my penis, let's go talk to the cops. 5/10/11 RP 83. Andree said Danny was there. 5/10/11 RP 84. They

sat M.F. down and talked to him. 5/10/11 RP 84. Laurie and Kurt were both there at the time. 5/10/11 RP 84. Andree said after M.F. made the comment that he poked my penis, Danny took the conversation all from there. 5/10/11 RP 84. Andree described the conversation as serious and that M.F. was told that Uncle John could get in a lot of trouble if this isn't true. 5/10/11 RP 84-5. After about ten minutes, they went to the police station to make a police report. 5/10/11 RP 85. M.F. did not go into the station. 5/10/11 RP 86. Andree testified she felt she had divided loyalty because the situation involved her mother, her son, and her husband's family. 5/10/11 RP 88. Andree did say her primary focus was her son. 5/10/11 RP 89. Andree did say M.F. would spend the night with John and Marissa, but stated at most it was a handful of times. 5/10/11 RP 89. M.F. would spend the night over at Sylvia's more frequently. 5/10/11 RP 89. When M.F. spent the night with John and Marissa, Marissa was to be the primary caretaker. 5/10/11 RP 90.

Andree said that when John drove M.F. to school, someone usually went with them. 5/10/11 RP 92. She claimed it was only a small handful of times that John went alone with M.F. 5/10/11 RP 92.

Andree confirmed that M.F. only used a pull-up at night when he was four to five years old but was fine during the day. 5/10/11 RP 91.

On cross-examination, Andree acknowledged she was aware of John's past history of sexually abusing children. 5/10/11 RP 93. She was

also aware of Bettys' pattern of offending. 5/10/11 RP 94. Andree was also aware that John drove M.F. to school on a daily basis for about four to six months. 5/10/11 RP 95. Andree testified in her written statement she had said M.F.'s initial disclosure was that Uncle John poked his pee pee. 5/10/11 RP 98. Andree said at that point, Danny took M.F. to the kitchen to have a conversation with him. 5/10/11 RP 98. Andree described that Danny did a detailed questioning of M.F. including asking M.F. if he was lying. 5/10/11 RP 98. M.F. told them he wasn't lying. 5/10/11 RP 98. At that point, they decided to take M.F. to the police station. 5/10/11 RP 98. Andree told M.F. that he is not allowed to talk about the incident and that if he did he would get in trouble. 5/10/11 RP 98-9.

The defendant did not testify.

IV. ARGUMENT

1. RCW 10.58.090 has been held unconstitutional.

In State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), the State Supreme Court determined in a consolidated appeal of two cases that RCW 10.58.090 was unconstitutional.

The admission of evidence in a criminal trial is generally a procedural matter. Definition of the crime and its punishment are substantive matters; admission of evidence is simply the means by which that substantive law is effectuated. *See id.* Moreover, we long ago suggested that the admission of evidence is a procedural matter to be controlled by the courts in State ex rel. Foster–Wyman Lumber Co. v.

Superior Court, 148 Wn. 1, 14, 267 P. 770 (1928), when we stated that “[i]t seems plain to us that the taking of depositions is an act in the procedure and practice before the courts. It involves the receiving of evidence before the courts, a matter for the courts to determine, and which in no way trespasses upon the substantive rights of parties.”

The legislature, in enacting RCW 10.58.090, expressed its understanding that evidentiary statutes are substantive law and take priority over conflicting court rules, citing to State v. Pavelich, 153 Wn. 379, 279 P. 1102 (1929). Laws of 2008, ch. 90, § 1. It is true that in Pavelich, this court stated that “[r]ules of evidence are substantive law.” 153 Wn. at 382, 279 P. 1102. However, that statement was plainly a dictum, as the holding of that case was that rules relating to a trial court’s responsibility to give jury instructions sua sponte are procedural. Id. at 385–86, 279 P. 1102. Moreover, context makes the intended meaning of that statement questionable. Another statement the Pavelich court approved of was that “[p]rocedure ... includes in its meaning whatever is embraced by the three technical terms, ‘pleading,’ ‘evidence’ and ‘practice.’ ” Id. at 381–82, 279 P. 1102 (citing Kring v. Missouri, 107 U.S. (17 Otto) 221, 231–32, 2 S.Ct. 443, 27 L.Ed. 506 (1883), *overruled on other grounds by* Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)). Pavelich also recognizes that rules of evidence are “found in the common law, chiefly, and grow[] out of the reasoning, experience and common sense of lawyers and courts.” Id. at 382, 279 P. 1102. One contemporary commentary noted that Pavelich “contains puzzling passages characterizing rules of evidence as part of the substantive law.” Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev.. 909, 934 n. 65 (1937). The assertion in Pavelich that rules of evidence are, categorically, substantive matters is an unpersuasive dictum.

In sum, RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.

State v. Gresham, 173 Wn. 2d 405, 431-32, 269 P.3d 207 (2012)

(emphasis added).

Gresham involved two consolidated cases. The State Supreme Court went on to address whether reversal was the appropriate remedy for the consolidated case of State v. Scherner. The Supreme Court held that as to Sherner, the trial court's decision to admit the prior sexual conduct as evidence of a common scheme or plan under ER 404(b) was not an abuse of discretion and the application of RCW 10.58.090 was harmless error as a result.

In sum, we hold that the trial court did not err in admitting evidence of Scherner's prior molestations of Williamson, Kahn, Spillane, and Oducado for the purpose of demonstrating that Scherner had developed a common plan or scheme, which he again put into action when he molested M.S.

State v. Gresham, 173 Wn. 2d 405, 423, 269 P.3d 207 (2012). This decision was based upon the trial court's decision to admit the prior molestations for the purpose of common scheme or plan.

In contrast, here the trial court had actually excluded the prior acts of sexual misconduct even though they were determined by the trial court to be common scheme or plan. 12/22/10 RP 94.

Thus, as explained below, the State contends the trial court's misapplication of the evidentiary rule should be reviewed and based upon

a de novo rule, this Court should find the evidence should have been admitted and as in Sherner the error under RCW 10.58.090 was harmless.

2. The trial court improperly applied ER 404(b).

The Supreme Court in State v. Gresham explained the application of ER 404(b) and the common scheme or plan exception therein. Common scheme or plan evidence is based upon either evidence of one large plan or the same plan used for similar crimes.

One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan. Id. There are two instances in which evidence is admissible to prove a common scheme or plan: (1) “where several crimes constitute constituent parts of a plan in 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.” Lough, 125 Wn.2d at 854–55, 889 P.2d 487.

State v. Gresham, 173 Wn.2d 405, 421-22, 269 P.3d 207, 214 (2012) (*citing also* State v. DeVincentes, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

In Gresham, the trial court had admitted evidence of Scherner's molestation of four other girls finding, by a preponderance of the evidence, that the alleged prior sex offenses actually occurred and that they exhibited such markedly similar conduct that it was “abundantly clear that they show ... an overarching plan.” State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). The Court went on to note in the abuse of two victims the implementation of the crime was markedly similar to the

charged crime; it occurred at night when other adults were asleep and Scherner fondled the girls' genitals. Id. The Court did note there were some differences involving the presence of oral sex but that those differences were not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as "individual manifestations" of the same plan. State v. Gresham, 173 Wn.2d at 423, 269 P.3d 207 (2012) *citing* State v. Lough, 125 Wn.2d, 847, 860, 889 P.2d 487 (1995). There was also a difference as to the other victim because they occurred in Scherner's home as opposed to a hotel. State v. Gresham, 173 Wn.2d at 423, 269 P.3d 207, 214 (2012)

In the present case, the trial court chose to exclude the evidence related to two of the female victims due to differences in gender. But, with respect to the minor boys, the trial court found that the two prior victims were accessible to the defendant through family connections on the Bettys property. 12/22/10 RP 93. This was similar to the placement of the charged victim, the step-nephew, on Bettys' property. 12/22/10 RP 93. The similarities were striking in that they involved the next generation of children in the same age coming into contact with the defendant. 12/22/10 RP 93. The trial court found the evidence was very probative to rebut the general denial given the similarities in ages of the child. 12/22/10 RP 94. The trial court was also specifically asked if the prior conduct alleged was of the same

scheme or plan. The trial court found that it was. 12/22/10 RP 94. Despite finding the information was extremely probative and the court's determination that there was evidence of a common scheme or plan, the trial court excluded the admission of the evidence under ER 404(b) as unduly prejudicial. 12/22/10 RP 94. However the extent of the prejudice was not explained. In the present case, the testimony at trial established family members trying to keep Bettys from being alone with minor children. That ended up being the focus of the defense and why it was claimed he did not have the contact complained of with M.F. Thus, the State contends the prejudice was not unfair and the trial court failed to adequately weigh prejudice versus probative value in choosing to exclude the evidence.

The State contends that the finding of a common scheme or plan by the trial court is inconsistent with the determination that the evidence was inadmissible.

Similarly, “[i]nterpretation of an evidentiary rule is a question of law, which we review de novo.” State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Provided the trial court has interpreted the rule correctly, we review the trial court's determination to admit or exclude evidence for an abuse of discretion. Id.

State v. Gresham, 173 Wn. 2d 405, 419, 269 P.3d 207, 212 (2012). Here the trial court interpreted ER 404(b) incorrectly in choosing to exclude the

evidence under the rule despite finding the prior sexual activity was a common scheme or plan.

A trial court may be affirmed on any correct ground. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012), *citing* Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

3. Given there was a determination the prior conduct was common scheme or plan, the prior conduct should have been admitted under ER 404(b).

Prior misconduct evidence can be admissible under ER 404(b). But the trial court must properly evaluate the four-part test.

To admit evidence of a person's prior misconduct, “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (*citing* State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively.

State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

The State contends that in the present case, all four parts of the test were established before the trial court.

First the prior misconduct was established by a preponderance of the evidence. Here both of the victims of the prior misconduct testified

about Bettys engaging in the sexual misconduct with them. 5/9/11 RP 116, 5/10-11 RP 19-20 (Danny King), 5/9/11 RP 118-22 (Michael Bettys). In addition the officer who took Bettys' confession testified to Bettys admission. 5/10/11 RP 17-19. The defense agreed the prior acts resulted in convictions. CP 35-6. Therefore the evidence was established by more than a preponderance.

Second, the evidence was being sought to establish the method by which Bettys approached and engaged in sexual activity with the young boys. This is where the trial court's determination of common scheme or plan applies.

In State v. Kennealy, 151 Wn. App. 861, 888, 214 P.3d 200 (2009), the defendant raped and molested three children between the ages of five and seven who all lived in the same apartment complex. State v. Kennealy, 151 Wn. App. at 868. The trial court admitted evidence of prior bad acts involving the defendant's daughter and three of his nieces, between the ages of 7 and 13. State v. Kennealy, 151 Wn. App. at 875-6. The defendant told one of the victims from the charged crimes and some of the previous victims not to tell anyone about what happened, and he committed the acts out of view of others or alone with the children. State v. Kennealy, 151 Wn. App. at 876. The children were related to him or lived and played close to him, and he committed the acts only after the

children trusted him. State v. Kennealy, 151 Wn. App. at 889. He touched the girls under and outside of their clothing on their vaginas, and committed sexual acts more than once with most of the girls. State v. Kennealy, 151 Wn. App. at 889. The Kennealy court recognized that the defendant's behavior was not identical in each case, but determined that the prior acts demonstrated a design to molest young children. State v. Kennealy, 151 Wn. App. at 888.

The facts of the present case are markedly similar to these factors considered significant in Kennealy. Here the prior misconduct as well as the charged offense were to male boys, beginning with conduct at around ages 5 to 7. The offenses were of male family members he came into contact with at his residence. He told both the charged victim and one of the prior victims not to tell. And the conduct started from the touching of the genital areas over the clothing. Here the prior acts demonstrated Bettys' design to molest young boys.

The trial court also found the third portion of the test. The trial court found the evidence was relevant to rebut the defendant's general denial. 12/22/10 RP 94. The State contends the prior misconduct was also relevant to prove the element of sexual intent where the defense claimed the alleged misconduct was a mere "diaper check" of the child. 12/22/10 RP 87, 5/11/11 RP 72-3, 5/11/11 RP 140, 145.

The fourth factor is where the trial court failed to adequately evaluate the evidence. There was no weighing of probative value against prejudicial effect. This is the sum total of the trial court's analysis:

And under the circumstances of the beginning with touching which probably almost every molestation does and progressing on, this case allegedly was stopped early on, so it did not progress, but the similarities are striking in terms of the next generation of children of that age coming in contact with the defendant. The court does believe that despite the very extreme prejudice that both of the cases and acts and conduct involving Danny and Michael King would be admissible under 10.58.090 and not inadmissible under 403. Therefore, should we get through all the other hoops necessary by the time we get to trial those incidents, convictions, and direct conduct of the defendant would be possibly placed before the jury in this current trial. Despite the extreme prejudice, the Court believes that it is extremely probative [proactive], and that it does rebut even just a general denial given the age of child is extremely important information.

...
I'm finding it's not excluded under 403. I believe under 404(b) the only real purpose would be to show that -- acted in conformity therewith, and I think that -- I will exclude it under 404(b).

12/22/10 RP 94.⁸

Just after finding the evidence was material to rebut the general denial and to address the age, the trial court found there was no other real purpose other than to show the defendant acted in conformity. This shows

⁸ There was slightly more analysis of probative value versus prejudice in the trial court's decision to deny admission of the sexual activity with the minor girls. 12/22/10 RP 95.

a failure to properly weigh the evidence and why there was a trial court failure to properly apply ER 404(b). A defendant's prior bad acts are admissible for the purpose of showing a "plan" when evidence shows that the person "committed markedly similar acts of misconduct against similar victims under similar circumstances." State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996); *quoting* State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995); *See also* State v. DeVincentis, 150 Wn.2d 11, 13, 74 P.3d 119 (2003). Here the trial court found that there was a common scheme or plan. 12/22/10 RP 94. Thus, the trial court's failure to recognize the two stated bases for probative value and the reliance on the statement shows the trial court's failure to properly apply ER 404(b).

Prior misconduct is allowed for the purpose of rebutting any material assertion by the defendant. In State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), the prosecution was allowed to have a witness testify about her encounters with the defendant that were similar to the victim in the prosecution for murder. She testified that she had been kidnapped, robbed, raped and tortured by the defendant similarly to the murder victim. The court found the evidence was admissible to rebut defendant's assertion that the murder was impulsive and his sexual relations with the victim were consensual. Likewise, in State v. Gakin, 24 Wn. App. 681, 603 P.2d 380 (1979), the prosecution was allowed to admit evidence of the defendant's

prior burglary conviction to rebut the assertion that he did not even know how to open a safe. In another case, State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), the court allowed the prosecutor in a rape case, where the defendant denied ever threatening to kill the victim or that victim was afraid of him, to call another witness to testify that the defendant had told her that he was going to kill the victim.

In the present case, in addition to general denial, the defendant has asserted a claim of mistake or accident. The trial court failed to weigh the probative value.

Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim. State v. Krause, 82 Wn. App. 688, 695-6, 919 P.2d 123 (1996). Prior similar acts are highly probative of common scheme or plan, particularly in child sex abuse cases, because of (1) the secrecy in which the acts occur, (2) the vulnerability of the victims, (3) the lack of physical proof of the crime, (4) the degree of public opprobrium associated with the accusation, (5) the unwillingness of victims to testify, and (6) the jury's general inability to assess the credibility of child witnesses. State v. Krause, 82 Wn. App. at 696.

In State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007), the Court of Appeals stated that based on the effect of the defendant's general

denial of the charges, which meant that every element of the offenses was at issue, and the fact that credibility was central to the outcome of the case, the trial court determined that the prior victim's testimony was clearly more probative than prejudicial.

Against the trial court's failure to properly apply ER 404(b) this Court should consider the prejudice as the case developed. The State put on the prior evidence not as propensity but as opportunity by a defendant who had an admitted drive and desire for young children as he expressed in his interview to law enforcement. 5/9/11 RP 98.

As the previous discussion of ER 404(b) makes clear, evidence of a criminal defendant's commission of other sex offenses was already admissible for proper purposes prior to the legislature's enactment of RCW 10.58.090. In this context, ER 404(b) only prohibits the admission of such evidence for the purpose of demonstrating the criminal defendant's character in order to show activity in conformity with that character.

State v. Gresham, 173 Wn.2d 405, 427, 269 P.3d 207 (2012).

Bettys argues the State had relied on the prior evidence to support the testimony of the child victim. Brief of Appellant at pages 15-16. In fact, as review of the statements of the prosecutor shows, the prosecutor was not using the prior acts as propensity evidence, but was relying on the evidence to show Bettys' common scheme or plan to develop a relationship with minor male relatives ages 5 to 7 and that he was able to obtain contact with

for the purpose of sexual contact and gratification at his residence at Padilla Heights.

The prior misconduct here was intimately tied to the case. The allegations arose because of the awareness of relatives of the prior misconduct. They sought to protect children by either not exposing Bettys to minor children or being present when he was around minor children. The victim's mother, called by defense, was aware of the defendant's pattern of offending and the age that the defendant was interested in. 5/10/12 RP 94. Family members were so concerned that they claimed to ride with him and the victim to school every time so he was not alone with the victim. 5/10/11 RP 71, 75. The prior misconduct was also used by defense to assert that the initial disclosure was based upon prodding questioning and not based upon a spontaneous disclosure and that because the defendant was never alone with the victim, he had no opportunity to commit the offense, even calling the prior victim to assert he had not played video games with M.F. which M.F. recalled occurring prior to the touching, 5/11/11 RP 126, and calling the prior victim to testify he was careful about having Bettys around children, 5/11/11 RP 131. The prior misconduct which the defendant admitted to and the prior victims testified about provided the full theory of both sides. The trial court's assertion of prejudice was an overstatement.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court find the trial court erred in its application of ER 404(b) to exclude the prior acts of sexual misconduct with like age minor boys and where it found the activity to be the same criminal conduct. Therefore, despite the admission of the evidence under RCW 10.58.090 which was subsequently held constitutional, the admission of the prior sexual conduct was properly provided to the jury and does not present reversible error.

DATED this 13 day of June, 2012.

SKAGIT COUNTY PROSECUTING ATTORNEY

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ERIK PEDERSEN, WSPA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew P. Zinner, addressed as Nielsen Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA 98122-2842. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of June, 2012.

Vickie Maurer
Vickie Maurer, DECLARANT