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King County Prosecutor
Appellate Unit

68219-9
NO. 68219-11

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

STATE OF WASHINGTON,

Respondent,

v.

RUBEN RUIZ-SORIA,

Appellant.

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

The Honorable Beth Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion to admit prior bad act testimony that should have been excluded under ER 404(b).

2. The trial court erred by finding that the dissimilar allegations of Blanca Cortes were admissible under ER 404(b) as a common scheme or plan.

3. The trial court erred by admitting Blanca Cortes' testimony under RCW 10.58.090, which has been held unconstitutional by the Supreme Court.

4. The trial court erred by failing to give a legally adequate limiting instruction for ER 404(b) evidence.

Issues Pertaining To Assignments of Error

1. Did the trial court commit reversible error when it admitted Blanca Cortes' testimony under RCW 10.58.090 where that statute has been declared unconstitutional?

2. Did the trial court commit reversible error when it found Blanca Cortes' testimony to prior bad acts admissible under ER 404(b) as evidence of a common scheme or plan where there was no evidence of a scheme or plan and where the allegations were dissimilar to the charged conduct?

3. Did the trial court commit reversible error by failing to give the jury a legally correct limiting instruction for ER 404(b) evidence?

B. STATEMENT OF THE CASE

Maximina Cortes and Ruben Ruiz-Soria have four daughters together: R.R.C., seventeen years old, A.R.C., fifteen years old, W.C., fourteen years old, and S.C., five years old. 2RP 159. On December 27, 2010, Mr. Ruiz-Soria was charged with one count of rape of a child in the second degree and child molestation in the first degree. CP 1-2. The charges arose from allegations made by his daughters, A.R.C. and W.C., about conduct that allegedly occurred four to five years previously. CP 1-2.

The State moved prior to trial for the admission of testimony of prior uncharged conduct by Mr. Ruiz-Soria. Specifically, under ER 404(b), the State sought to admit testimony that Mr. Ruiz-Soria had been physically abusive to Ms. Cortes, and that the girls knew about it. 1RP 19-21. The State argued this was relevant to the reason A.R.C. and W.C. had delayed reporting. 1RP 19-21. The defense objected to this evidence, arguing that the State had not proved the conduct by a preponderance of the evidence and that its admission was more prejudicial than probative. 1RP 22-23. The

Court ruled that this evidence was admissible under ER 404(b) for the limited purpose of explaining the delay in reporting. 1RP 48-50. The jury was given a limiting instruction on the purpose for which they could consider the evidence. CP 31.

In addition, under RCW 10.58.090 and ER 404(b), the State proposed to have Ms. Cortes' sister, Blanca Cortes, testify to unreported sexual contact with Mr. Ruiz-Soria fifteen years before when she was between the ages of ten and twelve. 1RP 100. Arguing primarily for the admissibility of the evidence under RCW 10.58.090, the prosecutor admitted that he wanted to use the evidence to make what amounted to a propensity argument. 1RP 107.

The defense objected to the use of this evidence, arguing that RCW 10.58.090 was unconstitutional, that it was not admissible under ER 404(b) to show propensity, and that the prejudicial effect of this evidence outweighed its probative value. 1RP 108-10.

The trial court ruled that Blanca Cortes' testimony was admissible under RCW 10.58. 1RP 123. The trial court also cursorily ruled that Blanca Cortes' testimony would be admissible under ER 404(b) to show a common scheme or plan, citing State v.

DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). 1RP 123. The jury was given an instruction that stated this evidence “may be considered for its bearing on any matter to which it is relevant,” limited only in that “evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in this case.” CP 31.

At trial, A.R.C. testified that sometime in the fall of 2006, she told her sister, R.R.C., that Mr. Ruiz-Soria had sexual contact with her once one year before. 2RP 180, 189; 3RP 254. This was the first time she reported sexual contact. 2RP 180. According to A.R.C., the incident occurred when she was approximately ten years old, in 2005 or 2006. 3RP 240, 286.

Specifically, A.R.C. testified she was home alone babysitting her baby sister when her father returned home from work. 3RP 240-41. A.R.C. said her father came to her while she was cleaning her parent’s bedroom, told her to pull down her pants and lay down, and then she felt something penetrate her vagina. 3RP 245. A.R.C. said he stopped when she cried, saying he did not want to hurt her. 3RP 246. According to A.R.C., her father found her after and asked her not to tell “because something could happen to your sisters” or mom. 3RP 249, 250. Then, he gave her candy for her

and her sisters, as he did everyday when he came home from work. 3RP 250. A.R.C. said she never told anyone about what happened until one year later when she told R.R.C. 3RP 253-254.

The afternoon after A.R.C.'s disclosure to R.R.C., R.R.C. told their mother. 2RP 181; 3RP 357; 4RP 380. Ms. Cortes confronted Mr. Ruiz-Soria, who denied the allegation. 2RP 181; 3RP 357; 4RP 380. W.C. knew about A.R.C.'s allegation, but did not report that she had been abused. 2RP 183-4; 4RP 430. Mr. Ruiz-Soria left that day when Ms. Cortes asked him to. 2RP 181; 3RP 258. No one called the police or reported the allegation. 2RP 183.

Mr. Ruiz-Soria returned home the next day and lived with the family until the next year, when he went back to Mexico for a visit.¹ 3RP 262, 268; 4RP 387, 388, 431. The girls and Ms. Cortes were angry with Mr. Ruiz-Soria that he was leaving them to go back to Mexico. 3RP 268; 4RP 400, 432.

Ms. Cortes and the girls next saw Mr. Ruiz-Soria when he returned from Mexico in July of 2009. 2RP 192-3; 4RP 433. There were two family events that month and Mr. Ruiz-Soria was at both.

¹ Although Ms. Cortes denied allowing him to move back, the girls confirmed that Ruiz-Soria lived with them for several months. 3RP 265, 267; 4RP 431.

2RP 192, 194. W.C. testified that they were all upset with her father that he showed up to these events after leaving and not helping the family for so long. 4RP 432-433. Ms. Cortes did not want Mr. Ruiz-Soria to live with the family anymore. 3RP 292-3; 4RP 390.

After R.R.C.'s 16th birthday celebration on July 11, 2009, the family discussed A.R.C.'s allegations and a family member asked W.C. if she was sure her father had never abused her. 2RP 194, 195; 4RP 436-37. W.C. then told her family for the first time that her father had "tried to" touch her years before. 4RP 437. Later, during counseling, W.C. expanded her allegation to say that Mr. Ruiz-Soria had touched her once. 4RP 438.

Ms. Cortes said she made a formal complaint to police and took out a restraining order against Mr. Ruiz-Soria in August of 2009. 2RP 197-198.

On October 5, 2010, Patrol officer Kayla Cockbain and her trainee officer, Officer Callow, went to Ms. Cortes' apartment to interview A.R.C. 3RP 308. For some reason, Officer Cockbain made the decision that trainee Officer Callow would interview the girls. 3RP 313-14. Officer Callow interviewed both A.R.C. and W.C. in front of their mother and aunt. 3RP 315, 318. They made

no attempt to interview the girls alone. 3RP 321. Neither Callow nor Cockbain were trained or certified to conduct child interviews. 3RP 321-22.

Thirteen-year-old W.C. also testified. 4RP 403. W.C. said that when she was eight years old, she, her three sisters, and her father were all home watching TV in their parents' room on a Saturday afternoon.² 4RP 417-18. The other three girls were on the bed and her father was laying on the floor at the foot of the bed. 4RP 420-21. W.C. said she left the room and when she returned, her father motioned to her to lay on the floor with him, which she did. 4RP 420-21. According to W.C. as she lay next to him, with her sisters on the bed beside them, her father rubbed her vagina over her clothing for five to ten minutes. 4RP 422-23. W.C. said she eventually got up and left the room. 4RP 425. Later, she said that Mr. Ruiz-Soria came to talk with her in her room and told her not to tell anyone or something would happen to her mother. 4RP 425.

W.C. said she talked with A.R.C. about what happened, but never told anyone else. 4RP 442. W.C. also reported that A.R.C.

² W.C. was born in November of 1997 and would have been eight in the summer of 2005. See 2RP 159.

told her at the same time about what she said their father did to her. 4RP 442. W.C. did not remember which incident occurred first. 4RP 440.

Blanca Cortes testified that Mr. Ruiz-Soria had sex with her when she was a child when she lived Mexico over fifteen years before. 3RP 332, 336. According to Blanca, Mr. Ruiz-Soria walked by her house on the way to the fields during the day while her mother was working. 3RP 333. She said he would take her inside the house, take off her clothes below the waist and have vaginal intercourse with her. 3RP 334. She said it was always “wet” after—presuming ejaculation. 3RP 334. Describing only one incident, Blanca testified that the exact same thing happened six to eight times over a two-month period when she was around ten to twelve years old. 3RP 335-336. Based on her age, that would mean the acts occurred sometime between 1995 and 1997. 3RP 326, 332. She never reported this alleged abuse or told anyone until she told her sister on the day the police came to interview A.R.C. in 2010. 2RP 201; 3RP 337. She said that Mr. Ruiz-Soria told her if she told anyone about it, he would deny it and that her sister would “pay the consequences.” 3RP 335.

Several witnesses testified to the rocky relationship between Ms. Cortes and Mr. Ruiz-Soria. They often argued loudly, which the girls and Blanca Cortes testified they heard and sometimes saw. 3RP 233-34, 331; 4RP 372, 374, 414. Ms. Cortes testified that Mr. Ruiz-Soria hit her often, from the beginning of their relationship, but that she never reported the abuse or tried to leave. 2RP 165, 179.

At the conclusion of the jury trial, Mr. Ruiz-Soria was convicted of both counts. 4RP 501. The court sentenced him to a standard range indeterminate sentence of a minimum of 117 months on count one, a minimum of 78 months on count two, with a maximum sentence of life for both. 4RP 520; CP 24-32. Mr. Ruiz-Soria timely appealed. CP 45.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ADMITTED BLANCA CORTES' TESTIMONY OF PRIOR UNCHARGED CONDUCT UNDER RCW 10.58.090.

The Supreme Court held in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine. Id. at 432. Therefore, RCW 10.58.090 cannot be used in this case to justify the admission of Blanca Cortes' testimony.

2. THE TRIAL COURT ERRED WHEN IT FOUND BLANCA CORTES' TESTIMONY ADMISSIBLE UNDER ER 404(B) AS EVIDENCE OF A COMMON SCHEME OR PLAN.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The prosecution's attempts to use evidence of other crimes must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts.

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

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in this case.

Although ER 404(b) allows the admission of evidence of a “common scheme or plan,” this is not an exception to the ban on propensity evidence. Gresham, 173 Wn.2d at 429. “Even when evidence of a person’s prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person’s character and action in conformity with that character.” Id. at 429.

Before evidence can be admitted under ER 404(b) for the purpose of proving a “common scheme or plan,” it must satisfy four requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the 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). The State’s burden to demonstrate admissibility is “substantial.” State v. DeVincendis, 150 Wn.2d at 17, 20.

Blanca Cortes’ testimony fails to satisfy the second and fourth prongs of the test.

- a. Blanca Cortes' allegations do not demonstrate a common scheme or plan because they are dissimilar to A.R.C. and W.C.'s allegations.

To prove a common scheme or plan, the other crime evidence must demonstrate "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 Lough, 125 Wn.2d at 852). Stated another way, the "prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Id. at 684 (quoting Lough, 125 Wn.2d at 860).

The Supreme Court has recognized two types of evidence of a common scheme or plan admissible under ER 404(b):

The first type involves multiple crimes that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. An example of this type is a prior theft of a tool or weapon, which is used to perpetrate the subsequent charged crime, such as a burglary. . . . a second type of common scheme or plan . . . involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes.

DeVincentis, 150 Wn.2d at 19. To show the second type of “plan,” the “degree of similarity” between the prior bad acts and the charged crimes “must be substantial.” Id. at 20.

It is clear from the trial court’s ruling on ER 404(b) that the primary grounds for admission of the evidence was RCW 10.58.090. The court conducted a lengthy analysis of the evidence under the statute, but when looking at its admissibility under ER 404(b), the court did not go through the test, but rather cursorily stated that “Basically, the fact that the alleged incidents were committed in a similar way under similar circumstances is sufficient under Devincentis [sic] case to be admissible under ER 404(b).” In addressing admissibility under the statute, the court did analyze the similarity of the prior bad acts and the charged conduct, finding that there were some similarities, including age, that the mother was not home, and the threat to keep them quiet. 1RP 119. But the court also noted dissimilarities, including that Blanca was not related, and the frequency alleged by Blanca. 1RP 119.

In DeVincentis, the case cited by the trial court, the court noted that the proposed evidence showed “that the defendant had 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” and used that familiarity to lure the children into an isolated environment in which he proceeded to groom them through wearing little clothing and asking for massages. Id., 150 Wn.2d at 22. The conclusion of this scheme was the actual criminal behavior—sexual contact. Id., 150 Wn.2d at 22. The trial court in that case very carefully analyzed the similarity of the prior bad act evidence and excluded some of the acts, finding them dissimilar. Id. at 23.

In contrast to DeVincentis, Blanca Cortes’ allegations do not describe any “plan” or “scheme.” In fact, the primary similarity between the story told by Blanca Cortes and those of A.R.C. and W.C., is the clear lack of “plan” or “scheme” on Mr. Ruiz-Soria’s part, rather than a common one. According to Blanca Cortes, Mr. Ruiz-Soria took advantage of an opportunity to molest her as he walked by her house on the way to the field during the day. 3RP 333. He did not arrange for her to be alone. He did not groom her. Likewise, both A.R.C. and W.C. describe no planning or grooming, both describing something that happened on the spur of the moment of everyday life without preamble or build-up.

While there are superficial similarities between the prior bad acts and the charged crimes, the only similarities common to all

three allegations are the ages of the girls and the alleged threats to Maximina Cortes. These similarities are not “significant” enough to become relevant as a common scheme or plan rather than merely propensity evidence. There are also marked dissimilarities as noted by the trial court: Blanca Cortes was not related, unlike A.R.C. and W.C.; there was a fifteen year gap between allegations; W.C. did not describe intercourse and Blanca Cortes did not describe touching; and Blanca Cortes describes multiple incidents, while A.R.C. and W.C. describe single acts only; and Blanca Cortes’ testimony indicates that there was ejaculation each time, unlike A.R.C. or W.C.

The prior bad act evidence in this case does not bear the “marked similarities” such that it demonstrates “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” DeVincentis, 150 Wn.2d at 19 (quoting Lough, 125 Wn.2d at 860). Consequently, it was an abuse of discretion for the trial court to admit Blanca Cortes’ testimony under ER 404(b).

b. Admission of this highly inflammatory evidence unfairly prejudiced Mr. Ruiz-Soria.

Prior bad act evidence can be admitted only where “its probative value clearly outweighs its prejudicial effect.” Lough, 125 Wn.2d at 862. The trial court erred by finding that Blanca Cortes’ testimony met this stringent standard.

DeVincentis notes several relevant considerations to consider in making this determination, such as the age of the victim, the need for the evidence, the absence of physical proof, and the absence of corroborating evidence. Id. at 23. In this case, there were already two complaining witnesses for the charged crimes, who could corroborate each other to the extent that was relevant. Both girls were old enough to clearly testify on their own behalf. And, although there was no physical evidence, this does not outweigh the highly prejudicial nature of the evidence itself.

Mr. Ruiz-Soria was unfairly prejudiced because the jurors were presented with inflammatory and disturbing testimony of alleged sexual intercourse, which they would have been naturally inclined to treat as evidence of criminal propensity. The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. This is so because, as the Washington Supreme Court has

recognized, "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citations omitted).

This is a classic credibility case and thus the jury is exceptionally likely to be persuaded by propensity arguments. Moreover, the prosecutor compounded this problem by making a propensity argument to the jury, arguing that Blanca's testimony is about "understanding that the defendant likes young girls." 4RP 497. Thus, the prejudicial effect of Blanca's testimony was very high in this case.

The prejudicial impact of Blanca Cortes' testimony must be weighed against the probative value of this evidence. The Supreme Court's decision in Lough**Error! Bookmark not defined.** is instructive on this point. In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce evidence from four other women that over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the women's testimony as

evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. These factors were discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. That is not true in Mr. Ruiz-Soria's case. As discussed above, there is no "plan" or "scheme" described by the witnesses in this case, much less a "common" one. Thus, unlike Lough, the allegations here lack the "marked" similarities that would increase the probative value of the prior bad act evidence.

The second factor identified by the Lough court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge. Krause, 82 Wn. App. at 696. Again, this is not true in Mr. Ruiz-

Soria's case. A.R.C. was fifteen and W.C. thirteen at the time of trial and both were fully able to testify for themselves. Compare Kennealy, 151 Wn. App. at 890 (noting young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. In this case, as set forth in detail below, the instruction given the jury was not a proper limiting instruction for ER 404(b) evidence and did not limit the purpose for which the jury could consider the evidence. Moreover, even if a proper instruction had been given, “[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction.” Krause, 82 Wn. App. at 696 (citing cases).

Thus, application of the Lough factors shows the evidence in this case was not more probative than prejudicial

- c. The erroneous admission of Blanca Cortes' testimony without limitation as to the purpose for which it could be considered requires reversal.

Where prior misconduct evidence is erroneously admitted, reversal is required if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not

occurred.” Carleton, 82 Wn. App. at 686. Blanca Cortes’ testimony muddied the waters of this trial, which were already murky with credibility issues. The crimes charged allegedly occurred many years before they were reported, and the actions of the family after the alleged allegations were made do not support the truth of the allegations. The admission of Blanca Cortes’ story about sexual misconduct that happened, allegedly, fifteen years before, added to the confusion and made it impossible for Mr. Ruiz-Soria to receive a fair trial. Therefore, reversal is required.

3. THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY A LEGALLY CORRECT LIMITING INSTRUCTION FOR ER 404(B) EVIDENCE.

The prosecution proposed and the court gave a jury instruction for Blanca Cortes’ testimony that did not properly limit the purpose of the testimony to finding a common scheme or plan rather than propensity or other improper purpose. CP 31. The instruction given to the jury in this case stated:

In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes

charged in this case. Bear in mind as you consider this evidence at all times the State has the burden of proving that the defendant committed each of the elements of the offenses charged in this case. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in this case.

CP 31.

Because RCW 10.58.090 permitted the consideration of the evidence for any purpose, the defense did not object to this instruction. 4RP 457. In holding that a similar instruction given under RCW 10.58.090 was inadequate, the Supreme Court reasoned:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24. The instruction given in this case is legally insufficient because it did not tell the jury the limited purpose of the ER 404(b) evidence and did not inform them that it could not be used to show that the defendant acted in conformity. Although the defense did not object to the State's flawed instruction, Gresham held that "the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." Gresham, at 424.

The error in this case was not harmless. Failure to give an ER 404(b) limiting instruction is harmless “unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Gresham, at 425, citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). In Gresham, the Court held that the error was harmless for the companion case because the remaining evidence, including the victim’s detailed testimony and a recorded phone conversation of the defendant admitting the charged molestation, persuaded the court that the result was not materially affected. Gresham, at 425.

That is not true in this case. There was no physical evidence in this case and the allegations were of conduct that occurred years before trial. Credibility was the primary issue in this case, which left jurors particularly vulnerable to an instruction that failed to prevent them from using the prior evidence for propensity purposes. Thus, this error also requires the reversal of the convictions in this case.

D. CONCLUSION

The trial court erred by permitting the admission of unfairly prejudicial prior bad act evidence through the testimony of Blanca Cortes. This evidence was improperly admitted under an unconstitutional statute, RCW 10.58.090. And, this evidence did not meet the requirements of a common scheme or plan under ER 404(b) and therefore was subject to the general exclusion of propensity evidence.

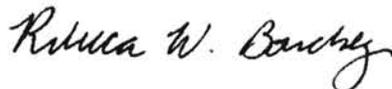
Furthermore, even if the court holds that the evidence may have been admissible under ER 404(b), the trial court erred by failing to properly instruct the jury on the limited purpose of this evidence, which prejudiced the verdicts.

For these reasons, Mr. Ruiz-Soria respectfully asks the Court to reverse his convictions and remand for a new trial.

DATED: June 7, 2012

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 68219- ⁹ 1-1
)	
RUBEN RUIZ-SORIA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JUNE, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RUBEN RUIZ-SORIA
DOC NO. 354026
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JUNE, 2012.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN -7 PM 4:24