

NO. 68219-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RUBEN RUIZ-SORIA,

Appellant.

~~SEP 20 2017~~

FILED
CLERK OF COURT
SEP 20 2017
K2

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. MCCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	13
EVIDENCE THAT THE DEFENDANT SEXUALLY ASSAULTED BC WAS PROPERLY ADMITTED IN HIS TRIAL FOR HAVING SEXUALLY ASSAULTED ARC AND WMC	13
1. The Legislature Violated The Separation Of Powers Doctrine In Enacting RCW 10.58.090	15
2. The Evidence Was Properly Admitted Under ER 404(b)	16
3. Any Error In Admitting The Evidence Was Harmless	23
4. The Jury Instruction Pertaining To The Sexual Assault Of BC	24
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Personal Restraint of Tortorelli,
149 Wn.2d 82, 66 P.3d 606 (2003) 27

State v. Baker, 89 Wn. App. 726,
950 P.2d 486 (1997), rev. denied,
135 Wn.2d 1011 (1998)..... 20

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 22

State v. Carleton, 82 Wn. App. 680,
919 P.2d 128 (1996)..... 20

State v. DeVincentis, 150 Wn.2d 11,
74 P.3d 119 (2003)..... 16, 17, 20, 21, 22

State v. Gresham, 173 Wn.2d 405,
269 P.3d 207 (2012)..... 14, 15, 25, 27, 28, 29

State v. Krause, 82 Wn. App. 688,
919 P.2d 123 (1996), rev. denied,
131 Wn.2d 1007 (1997)..... 20

State v. Lough, 125 Wn.2d 847,
889 P.2d 487 (1995)..... 16, 17, 22

State v. Robtoy, 98 Wn.2d 30,
653 P.2d 284 (1982)..... 22

State v. Russell, 171 Wn.2d 118,
249 P.3d 604 (2011)..... 27

State v. Salas, 74 Wn. App. 400,
873 P.2d 578 (1994), rev. on other grounds,
127 Wn.2d 544 (1995)..... 27

<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	28
<u>State v. Sims</u> , 171 Wn.2d 436, 256 P.3d 285 (2011).....	27
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.3d 951 (1986).....	28
<u>State v. Thamert</u> , 45 Wn. App. 143, 723 P.2d 1204, <u>rev. denied</u> , 107 Wn.2d 1014 (1986).....	23
<u>State v. Willis</u> , 151 Wn.2d 255, 87 P.3d 1164 (2004).....	22

Statutes

Washington State:

Laws of 2008, ch. 90, §§ 1, 2	14
RCW 10.58.090.....	1, 13, 14, 15, 25

Rules and Regulations

Washington State:

ER 403	14
ER 404	1, 13, 14, 16, 17, 23, 25, 27, 29
RAP 2.5.....	27, 28

A. ISSUES PRESENTED

The defendant was convicted of sexually assaulting two of his daughters, ARC and WMC. Years earlier, the defendant had sexually assaulted his wife's sister, BC, when she was a similar age to his daughters. The trial court admitted evidence of the defendant's sexual assault of BC pursuant to RCW 10.58.090 and ER 404(b). There are three issues raised related to the admission of this evidence.

(1) Subsequent to the trial in this case, the Supreme Court ruled that the legislature exceeded its authority in enacting RCW 10.58.090. Thus, the State concedes that the court should not have admitted the evidence under the statute.

(2) Under 404(b), prior bad acts are admissible if they show a common scheme or plan to commit the charged crime. Did the trial court properly admit evidence of the defendant's rape of BC under ER 404(b)?

(3) Is the defendant entitled to a reversal of his conviction because of the jury instruction given that pertains to evidence of uncharged acts of sexual assault—an instruction he agreed to?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged in count I with Rape of a Child in the Second Degree for acts committed against ARC, and in count II with Child Molestation in the First Degree for acts committed against WMC. CP 9-10. A jury found the defendant guilty as charged. CP 22-23. The defendant received an indeterminate minimum term sentence of 117 months on count I, and 78 months on count II. CP 37.

2. SUBSTANTIVE FACTS

One of eight children, Maximina Cortes was born in Oaxaca, Mexico. 2RP¹ 158. Maximina was 34 years old at the time of trial. 2RP 158. The youngest child in the family is BC, eight years Maximina's junior. 2RP 158. Their father died when BC was just three years old. 2RP 159. Maximina has four daughters, RRC, born in 1994, ARC, born in 1996, WMC, born in 1997, and SC, born in 2006. 2RP 159. The defendant is the father of all of Maximina's children. 2RP 160.

¹ The verbatim report of proceedings is cited as follows: 1RP—10/31/11, 11/1/11 & 11/2/11; 2RP—1/3/11; 3RP—11/7/11, and 4RP—11/8/11, 11/9/11 & 12/16/11.

Maximina met the defendant when she was only 15 years old. 2RP 161. The defendant was five years her senior. 3RP 320. The defendant told Maximina that he liked her and the two began dating, with Maximina believing that the defendant was someone she could live with and have a home with. 2RP 160-61.

Three months later, one of Maximina's sisters sent her some money so that she could come to the United States. 2RP 161. The defendant told her that they had to have sex so that she would come back to him. 2RP 161. They did, and Maximina became pregnant. 2RP 161-62. Ultimately, Maximina moved in with the defendant and his family, where she became pregnant again. 2RP 162-63. Maximina and the defendant did not have a good relationship. 2RP 164. While Maximina toiled in the fields, the defendant did not work at all. 2RP 164-65. The two argued a lot, and the defendant began to beat Maximina, with the worst beatings occurring while she was pregnant. 2RP 164-65. At home, Maximina was forced to eat her meals alone in her bedroom while the defendant ate with his family. 2RP 164-65.

BC witnessed many of these beatings. 2RP 165. Maximina left the defendant many times, going home to her mother's house, only to have the defendant come and get her and beat her, and

with her own mother telling her she had to go back because the defendant was the father of her children. 2RP 165-66.

When Maximina got pregnant a third time, the defendant left for the United States and told Maximina that she needed to stay with his family. 2RP 164. After approximately four years, the defendant sent for Maximina—but not his children. 2RP 168-69. So in 2001, Maximina came to the United States and moved into an apartment with the defendant on 9th Avenue and Cherry in Seattle. 2RP 169. Seven months later, Maximina went back to Mexico and retrieved her three daughters. 2RP 170.

Shortly after returning to the United States, Maximina discovered that the defendant was involved with another woman, and, in fact, that he had two children with the other woman. 2RP 170-71. Not knowing anyone else in America, Maximina accepted the situation and continued to live with the defendant. 2RP 171. As Maximina put it, in Oaxaca, you are a person of no value if you separate from the father of your children. 2RP 173.

When Maximina first arrived in the United States with the children, the defendant treated the children well. 2RP 173. However, after about six months, things turned ugly and the

defendant would angrily scold the kids on various occasions.

2RP 173.

In 2006, when SC was born, the family moved into a three-bedroom apartment on Virginia Street. 2RP 174. Maximina was working an 8 to 4 job at a hotel, while the defendant worked a restaurant job. 2RP 176-77. Many times the defendant would be home alone with the children. 2RP 176-77.

At times, the defendant would come home angry and drunk. 2RP 177. If Maximina asked him where he had been, the defendant would beat her and tell her that it was none of her business. 2RP 178. Many of these beatings occurred in front of the children. 2RP 179. The children were very afraid for their mother's safety. 2RP 179. Each day, when they would come home from school, they would ask her if she was okay. 2RP 179. The police were never called in regards to any of the assaults. 2RP 179.

One day, in October or November of 2006, when Maximina came home from work, her daughters told her that they wanted to talk to her in their bedroom. 2RP 180, 189. ARC then disclosed that she had been raped. 2RP 180. Maximina angrily confronted the defendant and told him to leave the apartment. 2RP 181. The

defendant responded by telling her she was crazy. 2RP 181. Maximina then had ARC come out and repeat what she had disclosed to her. 2RP 181. ARC repeated that on one occasion the defendant was about to take a shower when he told her to take her pants off and then he raped her. 2RP 181. The defendant admitted that ARC was telling the truth. 2RP 181.

Maximina then gathered the girls and took them to a nearby park where they talked about how they were going to be able to survive without the defendant. 2RP 182. The girls did not want Maximina to call the police. 2RP 183. When they returned to the apartment, the defendant was gone.² 2RP 184.

On July 11, 2007, when RRC turned 15, a mass was held for her Quinceanera. 2RP 191-93. The defendant showed up—uninvited. 2RP 194. Two days later, on July 13th, Maximina, her daughters, and some other family members drove down to the Rose Garden in Portland. 2RP 195. Luz, Maximina's sister-in-law said that she needed to talk with her. 2RP 195. Maximina was then informed that WMC had also been raped by the defendant. 2RP 196.

² Maximina subsequently learned that at some point in 2007, the defendant returned to Mexico. 2RP 211.

Maximina then met with a social worker who told her to call the police. 2RP 197. Officers came and took a statement from ARC and WMC, with BC present at the time. 2RP 200-01. After the officers left, BC started crying and disclosed to Maximina that the defendant had raped her too when she was a child back in Mexico. 2RP 201.

ARC's testimony: ARC was 15 years old at the time of trial. 3RP 223. She came to the United States when she was five. 3RP 225. She was excited to see her father because she did not know him. 3RP 226-27.

At first, the two were very close, but things soon changed. 3RP 231. The defendant was gone much of the time and he would argue and beat Maximina in front of the children. 3RP 232-34. There were also times when the defendant would hit the children—sometimes with a wire cord. 3RP 295. ARC was scared of the defendant but there was never talk about calling the police because she always hoped that the defendant would change. 3RP 235-36. ARC testified that she loved her father and did not want him to be taken away. 3RP 236.

One day, in 2005, when the family was living at the Virginia Avenue apartment, ARC was home babysitting SC and cleaning

the apartment. 3RP 240-41, 297. Maximina was at work, while WMC and RRC were at the movies. 3RP 241. The defendant came home from work and told ARC that he was going to take a shower. 3RP 242. Instead, while ARC was making his bed, the defendant came out of the bathroom and instructed ARC to pull her pants down. 3RP 243-45. Scared, and not knowing what to do, ARC complied with the defendant's demand. 3RP 245, 245. The defendant then laid ARC on the carpet, took out his penis, and put it inside her. 3RP 245.

Tears flowed from ARC's eyes as she lay there in fear and pain. 3RP 247. When the defendant saw ARC's tears, he stopped raping her, told her that he did not want to hurt her, and got up. 3RP 247-49. He then threatened ARC, telling her that if she told anyone about what he had done, "something" would happen to her mother. 3RP 249-50. ARC believed this meant the defendant would beat her mother again. 3RP 251. The defendant then left the apartment, leaving ARC home crying. 3RP 252. When her sisters came home, in fear, ARC said nothing. 3RP 252.

Approximately a year later, while crying uncontrollably one night, ARC disclosed to RRC, that the defendant had raped her. 3RP 253-54; 4RP 375-78. When Maximina got home from work

the next day, the girls brought her into their bedroom and told her what the defendant had done. 3RP 257; 4RP 378-80. ARC testified that she never told her mother before that time because she was afraid of what the defendant would do to her mother. 3RP 255. ARC said that when the defendant admitted in front of Maximina that he had raped her, he also made a comment that she liked it. 3RP 259.

ARC testified that she never wanted the defendant to go to jail, she just wanted him to change and come back to the family. 3RP 261. She said that she saw the defendant on multiple occasions after he left, and that she had forgiven him for what he had done to her. 3RP 263-64, 269. ARC also said that she felt it was all her fault. 3RP 264.

WMC's Testimony: WMC was 13 years old at the time of trial. 4RP 403. She described being very confused about the defendant after all he had done to the family. 4RP 412. She testified that she really cared about the defendant but that she also wanted to know how it "feels to have a dad that actually cares about you and loves you and takes care of you." 4RP 413.

She described how the defendant started drinking a lot and that he would come home, start screaming and then beat her

mother. 4RP 413. She described how the defendant would pull Maximina's hair and slap her. 4RP 414. WMC would cry and ask RRC to call the police, but RRC wouldn't because she too was scared of the defendant. 4RP 413. WMC also described how the defendant would hit her and her sisters, sometimes with a belt. 4RP 416.

One day, when their mother was at work, all the girls were in the defendant's bedroom watching television. 4RP 417. WMC was eight years old at the time. 4RP 418. At one point WMC left the room and upon her return, her three sisters were sound asleep on the bed. 4RP 419. The defendant, who was on the floor, had WMC come lay down beside him. 4RP 420. The defendant then started rubbing WMC's vagina—over her pajamas. 4RP 421-23. In shock, WMC just laid there on the floor, letting the defendant molest her for approximately 5 to 10 minutes. 4RP 423-24. Finally, WMC was able to get up off the floor and flee into the bathroom, shutting the door behind her. 4RP 424-25. WMC testified that she then just stood there, staring at herself in the mirror, not knowing why. 4RP 425.

A while later, WMC tried to go to her bedroom, but the defendant came up to her and threatened her that if she told

anyone what he had done, something was going to happen to her mother. 4RP 425. Having already witnessed what the defendant had done to her mother in the past, WMC realized he could do a lot worse. 4RP 425. In fear, WMC “kept my mouth shut.” 4RP 425.

WMC was present when ARC told her mother what had happened to her. 4RP 427-28. She was also present when her mother confronted the defendant. 4RP 428. Still, in fear for her mother, WMC kept her secret about having been molested by the defendant. 4RP 430. Also in fear that she was going to be molested again, WMC would hide in the closet when the defendant would come home from work. 4RP 431.

After RRC's Quinceanera, WMC's Godmother, Luz, approached her at the Rose Garden in Oregon. 4RP 434-35. Luz was concerned because she had noticed that WMC had been acting differently around the defendant and appeared to be trying to avoid him. 4RP 436. She asked WMC if anything had happened to her. 4RP 437. For the first time, WMC disclosed her secret. 4RP 437. This is when Maximina first found out that WMC had also been sexually assaulted by the defendant. 2RP 195-96.

The Sexual Assault of BC: Maximina's youngest sister, BC, grew up in Oaxaca, Mexico, living in a two-room house with

just her mother. 3RP 326-27. Her mother worked in the fields and washed clothes for a living. 3RP 327. She was gone a good portion of each day. 3RP 327.

BC testified that she remembered Maximina living with the defendant and that their relationship was troubled. 3RP 329-30. She described seeing the defendant beat and kick her sister. 3RP 330-31.

BC was between 10 and 12 years old when the defendant first raped her. 3RP 332. Her mother was at work and BC was outside doing the laundry when the defendant walked by on the way to his family's property. 3RP 332-34. He took BC into the house, took off her clothing from the waist down, and put his penis inside her. 3RP 333-34. BC testified that she really did not know what was happening because nobody ever talked about sex. 3RP 334. The defendant raped her in the same manner six to eight times over a two to three month period. 3RP 335-36. The defendant threatened BC that if she ever told anyone, her sister, Maximina, would pay the consequences. 3RP 335. BC believed the defendant meant to beat Maximina even worse than he already had. 3RP 335. As a result of her fear, BC kept her secret until she

finally disclosed the abuse to Maximina after she found out the defendant had raped her nieces. 3RP 337-39; 4RP 356-57.

The defendant did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

EVIDENCE THAT THE DEFENDANT SEXUALLY ASSAULTED BC WAS PROPERLY ADMITTED IN HIS TRIAL FOR HAVING SEXUALLY ASSAULTED ARC AND WMC.

In the defendant's trial for sexually assaulting ARC and WMC, evidence was admitted that he had also sexually assaulted BC—an uncharged victim. The court admitted the evidence pursuant to both ER 404(b) and RCW 10.58.090. See CP 122-24; 1RP 98-99, 118-24.

Evidence Rule 404(b) provides that:

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

ER 404(b) allows for the admission of prior criminal acts or prior bad acts to prove such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." ER 404(b). At the same time, ER 404(b) 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).

In 2008, the legislature enacted RCW 10.58.090, a more expansive rule than ER 404(b), that was designed "to ensure that juries receive the necessary evidence to reach a just and fair verdict" in cases in which the defendant is accused of a sex offense. Gresham, 173 Wn.2d at 427 (citing Laws of 2008, ch. 90, §§ 1, 2). In pertinent part, the rule provides as follows:

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

.....

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;

- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090.

1. The Legislature Violated The Separation Of Powers Doctrine In Enacting RCW 10.58.090.

Post-trial, the Supreme Court issued an opinion on the constitutionality of RCW 10.58.090. In Gresham, supra, the Court did not hold that the substance of RCW 10.58.090 was unconstitutional, i.e., that the admission of this type of evidence violated any constitutional provision. However, the Court did hold that by the legislature enacting RCW 10.58.090—as opposed to the Court creating the rule, the legislature violated the separation of powers doctrine and thus the rule is unconstitutional. Gresham, at 428-32. Based on Gresham, the State concedes that one of the two independent bases relied on by the trial court for admission of

evidence that BC had been sexually assaulted by the defendant cannot be supported.

2. The Evidence Was Properly Admitted Under ER 404(b).

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

To admit common scheme or plan evidence, the prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

In regards to step number three, our Supreme Court has held that, “the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case

before it.” DeVincentis, 150 Wn.2d at 13. If, the Court said, the trial court finds the existence of a prior similar plan, this past behavior is probative as to the issue of whether the crime occurred. DeVincentis, at 17-18.

In setting the standard that there need only be marked similarities between the prior acts and current crime sufficient to demonstrate a common scheme or plan, the Court rejected the argument that the similarities between the prior acts and the current acts must be unique or uncommon. DeVincentis, at 13. As the Court has previously stated, while the purpose of ER 404(b) is to prohibit admission of evidence designed to prove bad character, “it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case.” Lough, at 859. Thus, if the prior bad acts are similar enough to be naturally explained as individual manifestations of an identifiable plan, the acts are admissible. DeVincentis, at 18.

The facts of DeVincentis illustrate well the type of similarity the Court is looking for to show a common plan, despite the substantial dissimilarities of individual facts that can exist.

In the summer of 1998, DeVincentis offered KS (age 12), the friend of a neighbor, money to mow his lawn. In September, he

asked if she would also clean his house. While KS would be cleaning, DeVinentis would be present dressed in either a G-string or bikini underwear. In October, DeVinentis asked KS to give him a massage and then told her not to tell anyone or she would get in trouble. Two weeks later, DeVinentis again asked for a massage and this time had KS massage his penis, after which, he massaged her breasts and touched inside her vagina. After one other similar incident, KS disclosed the abuse to her mother.

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

One time, after his daughter's birthday party, DeVinentis showed VC photos of naked people and asked if she had ever seen a penis before. On another occasion, he had VC sit on a rowing machine with him. VC could feel DeVinentis' erect penis on her back and he touched her private areas. On other occasions,

DeVincentis demanded that VC try on transparent mesh-like clothing, he offered her \$10 to pose nude, and he would leave magazines with pictures of nude people throughout the house where VC could find them. VC also recalled DeVincentis asking for a back massage and having VC put his penis in her mouth.

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

Despite these many dissimilarities, the Supreme Court upheld the trial court's determination that the prior acts committed against VC demonstrated a plan to get to know young people

through a safe channel, create a familiarity in his own home, bring the children into “an apparently safe but actually unsafe and isolated environment,” so that he could pursue his compulsion to have sexual contact with pubescent girls. DeVincentis, at 22. In short, despite the many factual differences, there were enough similarities to demonstrate DeVincentis had an overarching plan to gain access to and molest young girls.³ Although not including acts of grooming, this is exactly the type of situation that exists here.

This is not a case of grooming type activity on the part of the defendant. It is just the opposite. The defendant committed brazen acts of sexual assault on family members (not strangers) —his sister-in-law and two of his daughters. Each victim was of a similar age. Each victim was of the same sex. Each victim was sexually assaulted when the defendant knew their mother was not at home. Also, the defendant did not employ physical force to commit his

³ See also State v. Carleton, 82 Wn. App. 680, 919 P.2d 128 (1996) (pattern of meeting teenage boys through youth organizations and engaging in sex acts after describing himself as having an alternate homosexual personality found to be a common scheme or plan); State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997) (accessing young boys through his relationship with his girlfriends, playing games with the children, taking them on outings, and molesting them in isolated locations found to be a common scheme or plan); State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997), rev. denied, 135 Wn.2d 1011 (1998) (allowing young girls at slumber parties to sleep with him and then touching them as they slept found to be a common scheme or plan).

sexual assaults. Rather, in each case the defendant relied upon intimidation to avoid the disclosure of his criminal acts.

In each case, the defendant threatened his victim to avoid disclosure, but he did so in an interesting and unusual manner. The defendant did not threaten to physically harm his actual victims. Rather, he threatened to harm a single person—Maximina Cortes—a person he had unfettered access to. In each case, the defendant knew that his victim had seen him beat Maximina in the past. In each case, the defendant knew that his victim loved and cared for Maximina. In each case, the defendant knew that his prior beating of Maximina—and future beating of Maximina, would go unreported and unpunished. And in each case, the defendant relied upon the victim's love for Maximina, and fear of what further and greater harm the defendant could inflict upon her, to ensure his victim's silence.

The only obvious large difference between the defendant's acts of sexual assault is timing. The sexual assault of BC happened many years prior to the sexual assault of ARC and WMC. But this is not a critical factor. It is the common plan, not the timing that is critical. After all, the time between the acts of sexual assault in DeVincentis was 15 years. As the trial court put

it, “the similarities between the instances outweigh the dissimilarities.” CP 123. Once the court identified the purpose for admitting the evidence and found by a preponderance of the evidence that the defendant actually committed the sexual assault upon BC, the court ruled that the probative value of the evidence “greatly outweighs any prejudicial effect.” CP 124.

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

3. Any Error In Admitting The Evidence Was Harmless.

Even assuming the defendant can meet his burden of proving the trial court abused its discretion, reversal is not required if the error is harmless. Error under ER 404(b) is not of constitutional magnitude and therefore, to prevail, the defendant must prove that, within reasonable probabilities, the outcome of trial would have been different but for the error. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986). To determine the probable outcome, the appellate court must focus on the evidence that remains after excluding the tainted evidence. Thamert, 45 Wn. App. at 151.

The evidence that remains consists of young girls with no motive to lie, who testified that they simply wanted a father, a father who they had forgiven and missed, and a father who they hoped would get better and return home to them. These young girls were willing to testify at trial, even after the defendant's acts were finally disclosed, he left the family and was ultimately apprehended. Moreover, it is one thing to challenge the credibility of a single victim—that the victim had a motive to lie, but it is quite another to argue that an entire family was lying, that the entire family was

acting in concert to convict an innocent man, a man who long before he was arrested and long before trial had absented himself from their lives. The evidence in this case was overwhelming. The defendant cannot show there is a reasonable probability the outcome of trial would have been different if the evidence pertaining to BC had not been admitted.

4. The Jury Instruction Pertaining To The Sexual Assault Of BC.

Two types of prior bad act evidence were admitted at trial—the defendant's physical assaults perpetrated upon Maximina, and the defendant's sexual assaults perpetrated upon BC. 1RP 23, 123. Evidence of the defendant's physical assaults on Maximina was admitted for the limited purpose of explaining why ARC, WMC, and BC delayed reporting the sexual abuse perpetrated upon them—that they were fearful the defendant would further harm Maximina if they did not heed his threat not to disclose the abuse. 1RP 48-49. Evidence of the defendant's sexual assault of BC was admitted for the limited purpose of showing the defendant's common scheme to sexually assault prepubescent girls—his family members. 1RP 122-23. In ruling that the prior bad act evidence

was admissible, the court indicated it wanted the parties to propose limiting instructions. 1RP 50.

A limiting instruction should inform the jury of the purpose for which the evidence is admitted and inform the jury 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.

In regards to the jury instructions as a whole, it appears that the parties were working together to create a full set of agreed upon instructions. Before a set of proposed instructions was provided to the court, the defendant indicated that he was not likely to have any objections to the State's instructions, but that the parties still needed to work on the 404(b) and 10.58 limiting instructions. 3RP 304-05. The court asked defense counsel if he wanted a limiting instruction read to the jury before BC testified. 3RP 305. Defense counsel responded that he did not, stating, "I prefer the conclusion of the case, that's a strategic decision where I don't want to emphasis her testimony." 3RP 305.

Subsequently, the State filed a copy of proposed jury instructions to the court, sans any limiting instructions. 3RP 277; CP ___, sub # 60. Later, the State submitted two proposed limiting

instructions. CP 119-21. The court then provided copies of a full set of proposed instructions to the parties that included two limiting instructions. 4RP 451. The court then went through the instructions one by one, asking each party if they had any objections to the proposed instructions. The defendant did not have any objection to the two limiting instructions. 4RP 415-57. Thus, the following two limiting instructions were read to the jury.

Instruction number 16 read as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of physical violence allegedly committed by the defendant against Maximina Cortes in the presence of ARC, WMC, or BC. This evidence may be considered by you only for the purpose of evaluating the credibility of these witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations may be consistent with this limitation.

CP 31.

Instruction number 17 read as follows:

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 crime charged in the Information. 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 the case. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.

CP 31.

A trial court is not required to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011). A failure to object to the giving of a particular instruction given generally bars the issue from being raised for the first time on appeal. State v. Salas, 74 Wn. App. 400, 407, 873 P.2d 578 (1994), rev. on other grounds, 127 Wn.2d 544 (1995); RAP 2.5. In addition, the “invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal.” State v. Sims, 171 Wn.2d 436, 448, 256 P.3d 285 (2011) (citing In re Personal Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003)).

The defendant cites to Gresham, supra, for the proposition that no matter what defense counsel does, it is the trial court’s sole responsibility to give a proper limiting instruction. But this flies in the face of the long history and policies behind the waiver doctrine and invited error doctrine. Such a rule would be diametrically

opposed to the very policies behind the rules—permitting, if not encouraging a defense attorney to shirk his or her duty, if not encouraging the intentional setting up of trial court error as a safety net to a later conviction. The error complained of is not a manifest error affecting a constitutional right. See State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); RAP 2.5. The defendant's failure to object and apparent complicity in creating the instruction constitutes invited error and waiver of the issue on appeal.

Nonetheless, any error in the wording of the limiting instruction here is harmless. Gresham dictates that a reviewing court apply the lesser nonconstitutional harmless error standard to such a situation. Gresham, at 433. As such, the defendant must prove that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, at 433 (quoting State v. Smith, 106 Wn.2d 772, 725 P.3d 951 (1986)).

Had a different limiting instruction been given, the jury would have been instructed that they could not consider the evidence of the defendant's prior sexual assault for the purpose of showing his character and action in conformity with that character. See Gresham, at 425. But what the jury could consider is that the

evidence of the defendant's prior sexual assault of BC demonstrated a common scheme or plan to sexually assault young girls ARC and WMC, that his "conduct in this case conformed with the conduct alleged in the prior allegation." Gresham, at 424. "Showing conformity between the charged conduct and a common scheme or plan, as evidenced by prior conduct, is precisely what makes the evidence relevant." Id.

It is a fine line indeed, and a difficult one to distinguish, between a jury being able to find that the defendant's character as a child rapist (evidenced by his rape of BC) showed he raped ARC and WMC, and that the defendant's rape of BC showed he had a common scheme or plan to rape ARC and WMC. In other words, in a case like this, the proper use of the evidence for 404(b) purposes, and the improper use of the evidence, is almost indistinguishable. Thus, the defendant cannot show that the possibility that the jury used the evidence for an improper purpose, "within reasonable probabilities" materially affected the outcome of trial.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 5 day of September, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Bouchey, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RUIZ-SORIA, Cause No. 68219-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

9/5/12
Date