 74804-1

No. 74804-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAY ADAM SPEAR,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in refusing to sever the separate counts involving two different complaining witnesses for trial.

2. The trial court abused its discretion in admitting irrelevant and unduly prejudicial prior bad act evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Separate counts involving different complaining witnesses must be severed for separate trials if necessary to promote a fair determination of the defendant's guilt or innocence for either offense. Severance is particularly important in sexual abuse cases, where the jury is likely to use other misconduct evidence to infer the defendant has a general disposition to commit sex offenses. Here, the trial court refused to sever counts involving different complaining witnesses although evidence supporting one count would not have been admissible in a separate trial on the other count. The jury instructions permitted the jury to use evidence presented in support of one count to infer Spear's guilt for the other count and to infer his general propensity to molest children. Did the trial court abuse its discretion in refusing to sever the separate counts?

2. Other misconduct evidence is not admissible if it is relevant only to show the defendant's criminal propensities. Even if the evidence is relevant to a material issue, it must be excluded if the jury is likely to use the evidence to infer the defendant has a predisposition to commit sexual crimes. Did the trial court abuse its discretion in admitting other sexual misconduct evidence that was either not relevant to a material issue, or unfairly encouraged the jury to infer Spear had a predisposition to molest children?

C. STATEMENT OF THE CASE

1. Procedural history.

Jay Spear was charged with one count of rape of a child in the first degree of his daughter, J.N.S., and one count of child molestation in the first degree of his niece, C.S.[1] CP 23-24.

Before trial, defense counsel moved to sever the charge involving J.N.S. from the charge involving C.S. RP 159-63; CP 17-22. Counsel renewed the motion at the close of the State's evidence. RP 1886-90. The trial court denied the motion. RP 168-71, 1886-90.

[1] Spear was also charged with one additional count of rape of a child in the first degree involving J.N.S. CP 23-24. At the close of the State's evidence, the State moved to dismiss that count due to insufficiency of the evidence and the court granted the motion. RP 1888; CP 203.

The State moved to admit evidence of Spear's prior bad acts. RP 60-71. The State sought to admit evidence of a prior incident of sexual contact involving Spear, J.N.S., and Spear's son Jayson in California; evidence of a second incident of sexual contact between Spear and J.N.S. in California; and evidence that Spear initiated a "Truth or Dare" game involving J.N.S., Jayson and C.S. and encouraged them to take off their clothes. RP 60-71.

Defense objected to the evidence as either not relevant, unduly prejudicial, or both. RP 72-76, 105, 108-11. The court granted the motion to admit the proffered evidence. RP 82-86, 106-07, 118-24.

The jury found Spear guilty of both counts. CP 178-79.

2. Trial testimony.

a. Incident involving J.N.S.

Twelve-year-old J.N.S. testified she lived with her father Jay Spear and her two brothers Nathan and Jayson in a house in Maple Valley for two years when she was around nine or ten. RP 750, 1075. The house belonged to Spear's mother Sherrie Campbell and her husband Michael Sondreson, both of whom also lived there. RP 718-19. J.N.S.'s bedroom had two twin beds on opposite sides of the room. RP 1091.

J.N.S. said her father raped her one time in her room in the Maple Valley house but she could not remember it very well. RP 1111. She said she thought it happened more than once but she could not remember any other incident. RP 1112, 1115, 1119, 1180. She said one night, when she and Spear were on his bed, he took off her pajama bottoms and took off his own pajamas. RP 1112. He then lay on top of her and inserted his penis into her vagina. RP 1112-13. She remembers little else about the incident. RP 1181.

No one else who lived at the house witnessed any sexual contact between Spear and J.N.S. Campbell, Sondreson, and Jayson all said they saw Spear and J.N.S. in the same bed in J.N.S.'s room on occasion. RP 751, 802, 1676. Spear said sometimes J.N.S. would come and sleep with him because she wet the bed or had a nightmare. RP 1925. Sometimes they would lie in bed together under the blankets and watch the television set in J.N.S.'s bedroom. RP 753, 839, 1091, 1674. Sometimes they would close the door because the other televisions in the house were making too much noise for them to hear what they were watching. RP 991, 1676.

Spear explained that when he and his children first moved in to the Maple Valley house, his girlfriend Jennifer and her children were

also living there. RP 1096. Spear and Jennifer slept in a bed in the back room. RP 1096. When Jennifer moved out a few months later, Campbell removed the bed from the room and replaced it with a couch. RP 1920-21. Spear slept on the couch for a while but it became too painful for his back. RP 1920-21. He had injured his back while serving in the Army. RP 790-92. Because sleeping on the couch was too uncomfortable, he began sleeping in the other twin bed in J.N.S.'s bedroom. RP 1920-23.

Several witnesses testified about Spear's so-called preferential treatment of J.N.S. Spear's mother Sherrie Campbell said Spear would sometimes take J.N.S. places but would not take the boys. RP 754. He would buy things for her but not for the boys. RP 755. He allowed her to shave her legs when she was 10. RP 757. He did not make her do her chores. RP 761.

J.N.S. agreed her father spoiled her. RP 1107. He gave her things she liked and treated her differently from her brothers. RP 1107-08. He did not make her do her chores. RP 1106-07.

Jayson also agreed J.N.S. was their father's favorite, but he thought this made sense because she was the youngest and the only girl.

RP 1693-95. Jayson said Spear spoiled Jayson as well as J.N.S. RP 1689-90.

Spear admitted he was close to J.N.S. but this was because they enjoyed doing the same things together, like shopping, which the boys did not enjoy. RP 1926-27. He spoiled all of the children and bought them things. RP 1928-29. He helped J.N.S. do her chores and defended her when his mother nagged her about them. RP 1931.

Spear testified he never had any sexual contact with J.N.S. RP 1914.

J.N.S. was examined by a family nurse practitioner. RP 1871-73. Her exam was normal and she had no injures. RP 1881.

b. Incident involving C.S.

Spear's niece C.S. would sometimes spend the night at the Maple Valley house while Spear and his children were living there. RP 722, 1123-24, 1440, 1478. C.S. lived with her parents in Renton. RP 1223.

Sixteen-year-old C.S. testified that one time when she was five or six years old, she visited the Maple Valley house. RP 1484. She, Jayson and Spear were all sitting on the futon in the back room. Spear took off her jeans and her underwear, which were down around her

knees. RP 1484-86. He then pointed to her vagina and said things about it. RP 1486. He touched her clitoris lightly and said "When you're older this part, when you rub it, will feel good." RP 1487. C.S. could not remember much else about the incident. RP 1488.

Jayson said one time when he was in second or third grade, he walked in on Spear and C.S. in the back room at night. RP 1638-39. He saw C.S. with her pants down around her ankles; she had no underwear on. RP 1640, 1644. Spear showed Jayson C.S.'s vagina and breasts. RP 1650. Spear pointed to her clitoris and told him it was the sensitive part. RP 1654.

C.S. also said sometimes Spear would squeeze her breasts with one hand.[2] RP 1490. C.S. said that several times after her breasts started developing, Spear made comments to her about them. RP 1489. Jayson, C.S.'s mother, and her father all said they heard Spear make a comment about the size of C.S.'s breasts. RP 1230-31, 1368, 1665.

Spear testified he never had sexual contact with C.S. RP 1909. He never made a comment to C.S. about her breasts but he once made a joke about them to his brother, her father. He said his brother laughed in response. RP 1943-44.

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[2] The jury received a Petrich instruction in regard to the child molestation count involving C.S. CP 197.

c. Prior bad act evidence.

i. North Fork incident.

Spear's three children lived with their mother and aunt in a cabin in North Fork, California for several months in 2009 and 2010. RP 889, 896. Spear would come and visit about every other month and stay for about a week. RP 895. The children's mother would leave so that Spear could have some time alone with the children. RP 895.

Jayson testified that one day while Spear was visiting the North Fork house, when Jayson was 12 or 13, he went into a bedroom and saw that J.N.S. was naked and Spear had no pants or underwear on. RP 1706-07, 1711-12. According to Jayson, Spear said that if he told anyone what he was about to show him, he would kill him and everyone in his household, including his mother. RP 1710. Jayson saw Spear put his penis in J.N.S.'s mouth. RP 1718. Spear told Jayson to take his clothes off, which Jayson did. RP 1712. He told Jayson to put his finger in J.N.S.'s vagina and lick her clitoris, which he did. RP 1713. Spear then told him to put his penis inside J.N.S.'s vagina but he could not because he could not maintain an erection. RP 1713. Spear told Jayson it was normal for people to have sexual relationships with their siblings. RP 1715. According to Jayson, Spear said he had been

having sex with J.N.S. since she was little, although she was too young for him to put his penis in her vagina. RP 1716, 1724. Jayson said the incident ended with Spear again threatening him not to tell anyone. RP 1722-23.

J.N.S. did not remember anything about the alleged North Fork incident. RP 1098. Spear testified he never directed Jayson to have sexual contact with J.N.S. and never threatened Jayson in that manner. RP 1915.

The trial court admitted evidence of the alleged North Fork incident to show Spear's "lustful disposition" toward J.N.S. RP 82-83.

ii. Truck stop incident.

J.N.S. moved out of the Maple Valley house and in with her mother in Fresno, California in August 2013. RP 762-63. At that time, Spear had a job driving a big rig truck which had a sleeper compartment in the back. RP 918. Sometimes, J.N.S.'s mother would take her to visit Spear in his truck when he was parked at a nearby truck stop. She would leave J.N.S. alone with him. RP 917-18, 1125-27.

J.N.S. said that one time when she visited her father at the truck stop, he raped her in the sleeper bed. RP 1135-36. Spear denied ever having sexual contact with J.N.S. in the truck. RP 1963.

The court admitted evidence of the alleged truck stop incident to show Spear's "lustful disposition" toward J.N.S. RP 82-83.

iii. Truth or Dare incident.

Both C.S. and Jayson testified about a "Truth or Dare" incident that supposedly happened at the Maple Valley house when C.S. was around 11 or 12. RP 1492, 1656-62. They said Spear dared C.S., Jayson and J.N.S. to run around the room naked. RP 1492. They all did. RP 1492, 1656-62. C.S. said she stopped playing when Spear dared Jayson to pull on her pubic hair with his lips. RP 1495. C.S. also said Spear asked her to get naked several times when she was around that age. RP 1496-97.

Spear testified he never played Truth or Dare with the children or had them take off their clothing. RP 1935. He never dared Jayson to put his lips on C.S.'s pubic hair. RP 1936.

The trial court admitted evidence of the alleged "Truth or Dare incident" to show the family "dynamic." RP 106.

D. ARGUMENT

1. The trial court abused its discretion in refusing to sever the count involving J.N.S. from the count involving C.S.

By refusing to sever the counts involving the two complaining witnesses, the trial court permitted the jury to use inflammatory evidence supporting one count as evidence of Spear's guilt for the other, unrelated count. This prevented the jury from reaching a fair determination of Spear's guilt or innocence for either count. The potential for unfair prejudice was particularly high because this was a sex offense prosecution and the jury was likely to use the other misconduct evidence to infer Spear had a general predisposition to molest children. Spear was unfairly prejudiced by the single trial and is entitled to new, separate trials on each count.

When a defendant demonstrates the manifest prejudice of joining counts for trial outweighs concerns for judicial economy, severance should be granted. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). A trial court's failure to sever is reviewed for abuse of discretion. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

a. A trial court must sever separate charges for trial if necessary for a fair determination of the defendant's guilt or innocence for either charge.

Although CrR 4.3(a)[3] permits two or more offenses of similar character to be joined in a single charging document, "joinder must not be used in such a way as to prejudice a defendant." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Washington courts recognize that "joinder is inherently prejudicial." Id. Even if multiple charges are properly joined in a single charging document, they must be severed for separate trials whenever "the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense." CrR 4.4(b).

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." State v.

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[3] CrR 4.3(a) provides:

> **(a) Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Severance is particularly important when the alleged crimes are sexual in nature. Id. at 884. "In this context there is a recognized danger of prejudice to the defendant *even if the jury is properly instructed to consider the crimes separately*." Id. (emphasis added).

The factors the Court considers in determining whether failure to sever prejudiced a defendant are: (1) the admissibility of evidence of the other charges even if not joined for trial; (2) the court's instructions to the jury to consider each count separately; and (3) the strength of the State's evidence on each count.[4] Id. at 884-85.

A consideration of these factors shows the trial court's refusal to sever the charges unfairly prejudiced Spear.

b. Evidence supporting one charge would not have been admissible in a separate trial on the other charge, and the sexual nature of the evidence encouraged the jury to infer Spear had a general predisposition to molest children.

The evidence presented in support of one charge would not have been admissible in a separate trial on the other charge. The only

[4] An additional factor the Court considers is the clarity of defenses as to each count. Sutherby, 165 Wn.2d at 884-85. That factor is not at issue in this case given that Spear's defense to each charge was the same—general denial.

relevance of evidence regarding Spear's conduct toward one complaining witness, to his conduct toward the other complaining witness, was to show he had a general propensity to commit sex offenses against children. The evidence was unduly prejudicial. For these reasons, it was not cross-admissible.

Evidence of a defendant's "other crimes, wrongs or acts" is categorically excluded from trial if the only relevance of the evidence is to prove the defendant's character and to show he acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); ER 404(b).[5] Other bad act evidence is admissible only if it is logically relevant to a material issue other than propensity, and the probative value of the evidence outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). The rule is based on the fundamental notion that a defendant must be tried only for the offense charged. Sutherby, 165 Wn.2d at 886-87.

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[5] ER 404(b) provides:

> 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, or absence of mistake or accident.

Juries are particularly prone in sex offense cases to draw the impermissible inference from other bad act evidence that the defendant must be guilty because he has a predisposition toward criminality. See, e.g., Gresham, 173 Wn.2d at 433 (pointing out the potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases) (quoting Saltarelli, 98 Wn.2d at 363); Sutherby, 165 Wn.2d at 886-87; State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). That is because "[o]nce 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." Saltarelli, 98 Wn.2d at 363 (internal quotation marks and citation omitted).

Here, evidence presented to prove one charge would not have been admissible in a trial on the other charge because it was not relevant to a material issue. C.S.'s and Jayson's testimony that Spear touched C.S.'s clitoris when she was five or six years old, C.S.'s testimony that Spear touched her breasts, and the witnesses' testimonies that Spear made comments about C.S.'s breasts, would not have been admissible in a separate trial on the charge of child rape

involving J.N.S. Spear's conduct toward C.S. was simply not relevant or admissible to prove his conduct toward J.N.S.

Likewise, J.N.S.'s testimony that her father raped her in Washington and California, and Jayson's testimony about the alleged North Fork incident, which did not involve C.S., would not have been admissible in a separate trial on the charge of child molestation involving C.S. Whether or not Spear raped J.N.S. was simply not relevant to the question of whether he molested C.S.

Evidence of Spear's conduct toward one complaining witness would not have been admissible in a separate trial involving the other complaining witness because it was relevant only to show Spear had a general propensity to molest children. Gresham, 173 Wn.2d at 433; ER 404(b). The evidence was unduly prejudicial because it encouraged the jury to draw the impermissible inference that Spear was "a person of abnormal bent," driven to molest children. Saltarelli, 98 Wn.2d at 363. Due to this risk, severance of the charges was particularly important. Sutherby, 165 Wn.2d at 883-84. Thus, this factor strongly supports the conclusion that Spear was unfairly prejudiced by the trial court's failure to sever the charges.

c. The jury instructions permitted the jury to use evidence supporting one count as evidence of Spear's guilt for the other count.

The jury was not instructed they could not use evidence of one crime to decide guilt for a separate crime. The jury was provided the following instruction:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 190. This instruction was inadequate because it did not inform the jury that evidence of one crime could not be used to decide guilt for a separate crime. The jury was provided with no limiting instruction regarding the other bad act evidence.

The jury instruction provided in this case was identical to the one provided in Sutherby, which the Supreme Court held was insufficient.[6] Although the jury was instructed to decide each count separately, they were not told they could not use evidence supporting one charge to decide guilt for a separate charge. Sutherby, 165 Wn.2d at 885-86.

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[6] As in this case, the jury instruction in Sutherby provided: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Sutherby, 165 Wn.2d at 885 n.6.

The Supreme Court concluded this weighed in favor of finding the failure to sever the unrelated charges prejudiced Sutherby. Id.

Thus, the jury instructions permitted the jury to use evidence presented in support of one count to decide Spear's guilt for the other count. The instructions permitted the jury to infer Spear had a general disposition to offend sexually against children. This factor weighs in favor of a finding that Spear was unfairly prejudiced by the failure to sever the charges. Sutherby, 165 Wn.2d at 885-86.

d. The nature of the State's evidence on each count contributed to the unfair prejudice caused by the failure to sever the charges.

A defendant may be prejudiced by the failure to sever unrelated charges if the State's evidence on one of the counts was not strong. Sutherby, 165 Wn.2d at 885. In Sutherby, the defendant was prejudiced by the failure to sever child rape and molestation charges from possession of child pornography charges in part because the evidence of molestation and rape was weaker than the evidence of possession of child pornography. Id. To prove the rape and molestation charges, the State offered only the trial testimony and out-of-court statements of the six-year-old complainant, as well as medical evidence that was consistent with sexual abuse but did not alone

support the conclusion that abuse occurred. Id. In light of this evidence, it is likely the jury was influenced by the other misconduct evidence to find Sutherby guilty of rape and molestation. Id.

In determining whether a defendant was unduly prejudiced by other misconduct evidence, the question is not whether the untainted evidence was sufficient for the jury to convict. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Instead, the question is whether there is a reasonable probability the outcome of the trial would have been different without the other misconduct evidence. Id. As stated, "the potential for prejudice from admitting prior acts is at its highest in sex offense cases." Id. (internal quotation marks and citations omitted).

Consistent with Sutherby, courts generally hold that admission of other misconduct evidence in a sex offense case is overly prejudicial if the untainted evidence consists primarily of the complaining witness's statements. In Gower, for instance, the only evidence presented to corroborate the complaining witness's statements was a witness who corroborated details of the aftermath of one incident rather than the incident itself. Gower, 179 Wn.2d at 858. In other words, "'[t]here were no eyewitnesses to the alleged incidents of

molestation,'" and "credibility was the main issue in this case." Id. (quoting Gresham, 173 Wn.2d at 433). Thus, the erroneous admission of other misconduct evidence was prejudicial. Gower, 179 Wn.2d at 858.

Likewise, in Gresham, the untainted evidence consisted of the complaining witness's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Gresham, 173 Wn.2d at 433-34. This evidence was insufficient to overcome the prejudice caused by erroneous admission of other misconduct evidence, and reversal was required. Id.; see also Saltarelli, 98 Wn.2d at 367 (reversing conviction for rape based on erroneous admission of other bad act evidence, where untainted evidence consisted of complaining witness's testimony).

Under these authorities, the failure to sever unrelated charges in this case was unfairly prejudicial because it is reasonably probable the jury's verdict on either charge was materially affected by the other misconduct evidence. The untainted evidence presented to support the charge involving J.N.S. consisted primarily of her uncorroborated testimony. Spear disputed her account. There were no eyewitnesses to

the alleged incident and credibility was the main issue. See Gower, 179 Wn.2d at 858.

In regard to the alleged incident involving C.S., the only evidence presented to corroborate her account was Jayson's testimony. Spear denied that the incident ever occurred. No physical evidence was presented.

Thus, it is likely the jury was influenced by evidence that Spear committed sexual misconduct against one child to find he was guilty sexual misconduct against another child. See Sutherby, 165 Wn.2d at 885.

In sum, the evidence presented in support of one count would not have been admissible in a separate trial on the other count; the nature of the sexual misconduct evidence encouraged the jury to infer Spear had a general predisposition to molest children; and the jury instructions permitted the jury to use the evidence of one count to decide Spear's guilt for the other count, and to infer that Spear had a general criminal disposition. The potential for prejudice was particularly high because of the lack of corroborating evidence.

In light of these factors, Spear's ability to receive a fair trial on each count was impermissibly compromised. His convictions must be

reversed and remanded for separate trials. Sutherby, 165 Wn.2d at 883-85; CrR 4.4(b).

2. The trial court abused its discretion in admitting other bad act evidence that was either not relevant to a material issue, was overly prejudicial, or both.

ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing the person acted in conformity with that character. Gresham, 173 Wn.2d at 420. The purpose of the rule is to prevent the jury from concluding the defendant is a "criminal type" and therefore likely to have committed the crime charged. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

Evidence of other misconduct is admissible only if it is logically relevant to a material issue other than propensity. Saltarelli, 98 Wn.2d at 361-62. The evidence must be relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995).

Even if the court identifies a proper purpose for admitting the evidence, that is not a "magic password[] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its] name." Saltarelli, 98 Wn.2d at 364 (internal quotation marks and

citation omitted). The "other purposes" listed in ER 404(b) for which other act evidence may be admitted are not exceptions to the categorical bar on propensity evidence. Gresham, 173 Wn.2d at 420-21. For example, other bad act evidence is not admissible to prove "motive" if the only way the evidence is relevant to the issue of motive is by showing the defendant's character and action in conformity with that character. Id.

ER 404(b) must be read in conjunction ER 403. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). ER 403 requires the trial court to exercise its discretion in excluding relevant evidence that would be unfairly prejudicial.[7] Id. Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

[7] ER 403 provides: "Although relevant, evidence may be excluded if its 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."

The potential for prejudice from admitting "other acts" evidence is "at its highest" in sex offense cases. Slocum, 183 Wn. App. at 442. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363-64.

Evidence of prior bad acts is presumed inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. Fisher, 165 Wn.2d at 745. If the trial court interprets ER 404(b) correctly, the Court reviews the court's decision to admit misconduct evidence for an abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule's requirements. Id.

a. Evidence of the North Fork and truck stop incidents was not admissible because it was either not relevant to a material issue, or was overly prejudicial.

The trial court abused its discretion in admitting evidence of the North Fork and truck stop incidents to prove Spear's "lustful disposition" toward J.N.S. See RP 82-83. Much of the evidence was not relevant to demonstrate Spear's so-called "lustful disposition" toward J.N.S. Even if some of the evidence was relevant to a material

issue, it was overly prejudicial because it encouraged the jury to infer Spear must have committed the charged offenses because he engaged in sexual misconduct with J.N.S. in the past and had a predisposition to commit sexual offenses against children.

The only evidence presented of the alleged North Fork incident was Jayson's testimony. J.N.S. did remember any such incident. RP 1098. Jayson testified primarily about Spear's conduct toward him, not toward J.N.S. Jayson said Spear threatened him and coerced him to commit sexual acts against J.N.S. RP 1706-24. These alleged acts of misconduct were not admissible or relevant to show Spear's "lustful disposition" toward J.N.S.

Historically, evidence of a defendant's "lustful disposition" has been admissible in Washington only to show a lustful disposition toward the specific complaining witness. See, e.g., Sutherby, 165 Wn.2d at 886 (explaining that pornography evidence is admissible only to show sexual desire for particular victim; otherwise, such evidence "would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)"); State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (prior acts of sexual intercourse between parties admissible in rape prosecution to

show lustful disposition of defendant toward complaining witness); State v. Whyde, 30 Wn. App. 162, 168, 632 P.2d 913 (1981) (defendant's attempt to kiss one tenant of apartment building was not relevant or admissible to show his "lustful disposition" toward a different tenant of the building). Critically, the evidence must show a sexual desire for the particular victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence is arguably relevant to a legitimate issue because it is not offered to show a general propensity to commit sexual crimes, but to demonstrate the nature of the defendant's relationship to and feelings toward a specific individual, and is probative of the defendant's motivation and intent in subsequent situations with that same person. State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010).

In this case, J.N.S. was the complaining witness, not Jayson. Spear's alleged misconduct toward Jayson during the North Fork incident was not relevant to his "lustful disposition" toward J.N.S. It was therefore inadmissible under ER 404(b) because it was not logically relevant to a material issue other than propensity. Saltarelli, 98 Wn.2d at 361-62.

Even if evidence of the North Fork or California truck stop incidents was relevant to prove a material issue, it was overly prejudicial and should have been excluded. State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993). In Dawkins, the State offered evidence that Dawkins had touched the complaining witness's breasts on three prior occasions. Id. at 905. The Court of Appeals held the evidence was relevant to show Dawkins's "lustful disposition" toward the complaining witness. Id. at 909. But Dawkins's attorney was ineffective for failing to object to the evidence because it was overly prejudicial. Id. at 909-10. There were no eyewitnesses to the act of sexual touching that was the basis of the criminal charge, nor any physical evidence. Thus, the question of guilt turned on the relative credibility of the accused and the accuser. Id. The accuser's testimony that Dawkins had touched her on previous occasions cast him as "a person of abnormal bent, driven by biological inclination." Id. (quotation marks and citation omitted). "As such, it was relatively easy for the jury to believe Dawkins must be guilty because he could not help himself, and thus was more likely to be less credible in his recitation of events that morning than [the complainant] was." Id.

As in Dawkins, the testimony that Spear committed sexual misconduct against J.N.S. on two prior occasions in California should not have been admitted because it likely persuaded the jury to convict Spear on improper grounds. The only evidence presented of the sexual act that formed the basis of the charge involving J.N.S. was J.N.S.'s testimony. There were no eyewitnesses to the act. Spear disputed J.N.S.'s account. Thus, the question of guilt turned on the relative credibility of accuser and accused.

The evidence of prior acts of sexual misconduct unfairly tipped the balance of prejudice against Spear. The evidence cast him as "a person of abnormal bent, driven by biological inclination." Id. at 909-10. It was too easy for the jury to conclude he must be guilty of the charged offense because he could not help himself. The evidence was overly prejudicial and should have been excluded. Id.

b. Evidence of the Truth or Dare incident was not admissible because it was not relevant to a material issue.

The court admitted evidence that on one prior occasion, Spear played "Truth or Dare" with J.N.S., C.S., and Jayson. According to C.S. and Jayson, Spear dared the three children to run around the room naked. RP 1492, 1656-62. He then dared Jayson to pull on C.S.'s

pubic hair with his lips, which C.S. said no to. RP 1495. The trial court admitted this evidence to show the family "dynamic." RP 106.

The trial court's ruling was in error because the evidence was not admissible to show the family "dynamic." Prior bad act evidence must be relevant to prove an essential ingredient of the crime charged. Powell, 126 Wn.2d at 258-59. The family "dynamic" was not an element of the charged crimes of first degree rape of a child or first degree child molestation. It was not a necessary component of the State's burden of proof. Therefore, the evidence was not admissible under ER 404(b). Powell, 126 Wn.2d at 258-59; Saltarelli, 98 Wn.2d at 361-64.

c. The convictions must be reversed.

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Gresham, 173 Wn.2d at 433. Evidence of other sexual misconduct is particularly inflammatory and prejudicial in a prosecution for a sex offense. In most cases, where evidence of other sexual misconduct was erroneously admitted at trial, a sex offense conviction cannot stand.

See, e.g., Gresham, 173 Wn. 2d at 433-34; Sutherby, 165 Wn.2d at 887; Saltarelli, 98 Wn.2d at 367.

The erroneous admission of evidence of other sexual misconduct was not harmless in this case. The only evidence of the charged act of sexual misconduct against J.N.S. was her testimony. In regard to the charge involving C.S., the only evidence corroborating her account was Jayson's testimony. There was no physical or other corroborating evidence. The complainants' testimonies were disputed by Spear. The question of guilt therefore turned on the relative credibility of the accused and the accusers.

The evidence of prior sexual misconduct cast Spear as "a person of abnormal bent, driven by biological inclination." Saltarelli, 98 Wn.2d at 363. The jury likely concluded he must be guilty because he could not help himself and was compelled to commit sex crimes against children. The erroneous admission of the prior misconduct evidence likely influenced the outcome of the case. The error is not harmless and the convictions must be reversed.

E. CONCLUSION

The trial court abused its discretion in refusing to sever the two charges involving different complaining witnesses. The court also

abused its discretion in admitting unfairly prejudicial prior sexual misconduct evidence. The convictions should be reversed and remanded for separate trials.

Respectfully submitted this 10th day of October, 2016.

/s/ Maureen M. Cyr

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

STATE OF WASHINGTON, Respondent, v. JAY SPEAR, Appellant.	)))))))))	NO. 74804-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2016.

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