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ARGUMENT

I. THE ADMISSION OF PROPENSITY EVIDENCE VIOLATED MR. KENNEALY'S RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

ER 404(b) is designed to exclude propensity evidence, and trial courts must presume that prior bad acts are inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). The state bears a "substantial burden" of proving an exception to the rule. ER 404(b); *DeVincentis*, at 18-19.

The common scheme or plan exception requires the state to (1) prove the prior acts by a preponderance of the evidence, (2) offer the prior acts to establish a common scheme or plan, (3) show that the prior acts are relevant to prove an element (or to rebut a defense), and (4) establish that the evidence is more probative than prejudicial. *DeVincentis*, at 18-19, citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). To show a common scheme or plan in this case, the state was required to demonstrate that Mr. Kennealy used a single plan "repeatedly to commit separate, but very similar, crimes." *DeVincentis*, at 19.

The exception must be applied with caution, and close cases require exclusion of the evidence. *DeVincentis*, at 18-19; *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). Reversal is required

whenever there is a reasonable probability that the outcome of trial was materially affected by erroneous admission of prior bad acts. *Wilson*, at 178.

Here, the state failed to show “[a] high level of similarity... ‘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....’ [A substantial] degree of similarity” *DeVincentis*, at 19-20, quoting *Lough*, at 860. Rather than showing a “strong indication of a design (not a disposition),” the state did just the opposite, relying on a disposition with little proof of a particular design. *Lough*, at 858-859 quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335.

Respondent is unable to point to facts establishing a “high level” of similarity; instead, the common features outlined could describe almost any molestation case. Brief of Respondent, p. 5-6. Respondent seeks to explain and minimize differences by pointing out how and why these differences arose.¹ But the law does not allow differences to be ignored.

¹ For example, Respondent asserts that Mr. Kennealy “had no need” to offer his daughter and nieces enticements. Brief of Respondent, p. 7. Similarly, Respondent argues that Mr. Kennealy used different locations to molest children “only because of the accommodations available to him at the time.” Brief of Respondent, p. 7.

The Supreme Court requires a “high level” of similarity—not differences that can be explained. *DeVincentis, supra*.

Contrary to Respondent’s assertion, the probative value of evidence does not depend on the prosecution’s need for the evidence. *See* Brief of Respondent, p. 9 (quoting *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007)). Evidentiary value should be independent of need; otherwise, questionable 404(b) evidence would always be admissible to bolster an already weak case. The language Respondent quotes from *Sexsmith*² is based on a misreading of the Supreme Court’s opinion in *Lough, supra*. In that case, the Supreme Court did comment on the state’s need for certain evidence; however, it analyzed necessity and probative value separately, rather than conflating the two. *See Lough*, at 863-864 (“Because the Defendant drugged his victims, rendering them unconscious or unable to clearly remember everything that happened, the evidence of many prior similar episodes to prove a plan was necessary *and* probative of the facts of the charged crime.”) (Emphasis added).

Unfortunately for Respondent, the quoted passage (“...in cases where there is very little proof that sexual abuse has occurred, particularly

² And the case upon which it relies, *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (1996).

where the only other evidence is the testimony of the child victim...”) highlights the weakness of the state’s case, absent the improperly admitted 404(b) evidence, and eliminates any possibility that the error was harmless. This is also reflected in Respondent’s statement that “the evidence of the current crimes consisted almost entirely of the testimony of small children.” Brief of Respondent, pp. 9-10. Further, it serves to undercut Respondent’s assertion that the 404(b) evidence did not overwhelm the testimony about the charged crimes. Brief of Respondent, pp. 9-10.

The sheer volume of evidence submitted to establish prior bad acts—three adult witnesses testifying to six different kinds of sexual misconduct committed on multiple occasions—outweighed the testimony relating to the offenses Mr. Kennealy was charged with committing. RP 329-365.

Finally, “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.’ ” *State v. Babcock*, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (internal citations and quotation marks omitted) (quoting *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)). This applies to evidence that Mr. Kennealy repeatedly molested his own daughter and his nieces. The court’s oral

admonition and limiting instruction did not explain how the jury could consider evidence of a common scheme or plan without crossing the line to use the prior misconduct as propensity evidence. The prosecuting attorney compounded the problem by urging the jury to focus on the disposition rather than the design of the prior allegations. RP 330, 340, 348, 357, 457, 462, 469, 472, 514; Instruction No. 23, CP 61.

The admission of these allegations of prior sexual misconduct violated ER 404(b) and prejudiced Mr. Kennealy. The convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. *DeVincentis, supra*.

II. PROSECUTORIAL MISCONDUCT DENIED MR. KENNEALY HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

A conviction obtained through use of propensity evidence violates due process.³ *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Here, the prosecuting attorney violated Mr. Kennealy's right to due process by arguing that the jury could convict based on Mr. Kennealy's alleged propensity to commit sexual crimes against children.

³ The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

RP 457, 462, 465, 469, 472, 477-478, 502, 514. Respondent's argument—that the prosecutor permissibly focused on outcome rather than design—shows a misunderstanding of the Supreme Court's requirement that 404(b) evidence must show a “strong indication of a design (not a disposition).” *Lough*, at 858-859 quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335. It is true but irrelevant that “People have all sorts of plans...” Brief of Respondent, p. 14. The common scheme or plan exception does not encompass “all sorts of plans,” but only those that meet the requirements outlined by the Supreme Court.

Because the misconduct infringed Mr. Kennealy's constitutional right to due process, prejudice is presumed. *See, e.g., State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Respondent's assertion that “Mr. Kennealy has not shown that he was prejudiced” demonstrates a misunderstanding of the standard for review. Brief of Respondent, p. 15. Respondent's claim that the error should be reviewed under the “flagrant and ill-intentioned” standard is incorrect; the “flagrant and ill-intentioned” standard applies only in the absence of a manifest error affecting a constitutional right. RAP 2.5(a).

Here, prosecutorial misconduct violated Mr. Kennealy's right to a fair trial under the Fourteenth Amendment's due process clause.

Accordingly, prejudice is presumed, and Respondent has made no effort to overcome the presumption.

In addition, as Respondent has conceded, the evidence against Mr. Kennealy was not strong, consisting only of the testimony and hearsay statements of each child. Under these circumstances, the prosecutor's invitation to jurors to consider Mr. Kennealy's "lifetime of molesting children" as propensity evidence could not have been harmless beyond a reasonable doubt. RP 469; *State v. Gonzales Flores*, 64 Wn.2d 1, 186 P.3d 1038 (2008). The misconduct requires reversal and remand to the superior court for a new trial. *Garceau, supra*.

III. S.J. WAS NOT COMPETENT AND SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY AT TRIAL.

Mr. Kennealy stands on the argument set forth in his Opening Brief.

IV. THE TRIAL COURT ERRONEOUSLY ADMITTED CHILD HEARSAY IN VIOLATION OF *STATE V. RYAN* AND RCW 9A.44.120.

Admissibility of child hearsay under RCW 9A.44.120 is governed by nine factors. *State v. Ryan*, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984). Admission is only permitted if the factors are substantially satisfied. *State v. Woods*, 154 Wn.2d 613, 623-624, 114 P.3d 1174 (2005). The burden is on the state to establish reliability, and, in the absence of a

finding on a factual issue, the state is presumed to have failed to meet its burden. RCW 9A.44.120; *see State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259, 265, 39 P.3d 1010 (2002).

Here, the trial court addressed only some of the *Ryan* factors. The trial court's written findings, even when supplemented with its oral ruling, are insufficient for admission: they do not show that the *Ryan* factors were substantially satisfied by the evidence. *Woods, supra; Armenta, supra*. Without citation to authority, Respondent suggests that the court "considered" *Ryan*, but was not required to make a record regarding each factor. Brief of Respondent, p. 22. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Furthermore, where findings fail to address a factual issue, the court is presumed to have found against the party with the burden—in this case, the state.⁴ *Armenta, supra*.

⁴ Inexplicably, Respondent also seeks to avoid the third *Ryan* factor (more than one person heard the statement), arguing that "Kennealy does not explain why an initial disclosure made to a crowd is more reliable than that made to an audience of one." Brief of Respondent, p. 24-25. The Supreme Court undoubtedly had its reasons for adopting the third *Ryan* factor; the absence of a clear explanation does not permit lower courts to ignore the third factor. It may be that the Supreme Court thought a child less likely to lie to a group than to an individual, or it may be that the Court had other reasons for adopting the third *Ryan* factor. Regardless, the third factor is one that applies in all cases. *Woods, supra*.

Finally, Mr. Kennealy contested admission of the child hearsay in the trial court, and assigned error to the court's Findings of Fact and Conclusions of Law on appeal. This is sufficient to preserve any error relating to the admission of the child hearsay. Mr. Kennealy was not required to separately object to each of the written Findings and Conclusions after the trial judge had orally announced his ruling.

CONCLUSION

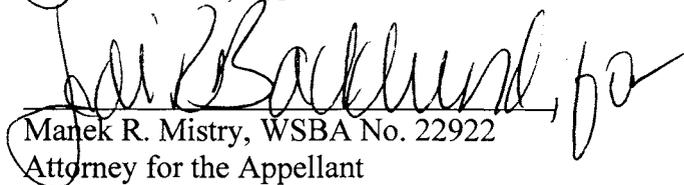
For the foregoing reasons, Mr. Kennealy's convictions must be reversed and his case remanded to the trial court for a new trial.

Respectfully submitted on February 18, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Dennis Kennealy, DOC #316308
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98526

and to:

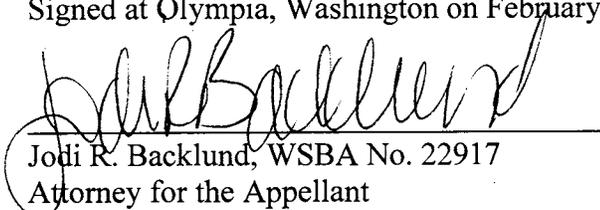
Thurston Co Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 18, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on February 18, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant