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## **I. ISSUES RAISED BY RESPONDENT'S BRIEF**

1. Whether the Respondent Department of Health's Exhibits D3 and D4 were properly admitted into evidence?
2. Whether the Department correctly considered corroborating evidence of sexual abuse against RJ?
3. Whether the Department properly admitted the opinion testimony of Dr. Kathleen O'Shaunessey?

## **II. ARGUMENT**

### **A. The Department's Exhibits D3 And D4 Were Improperly Admitted Into Evidence.**

The Department of Health erred during the hearing in allowing the Department's Exhibits D-3 and D-4 and any testimony relating to the alleged abuse of Anita Jasso ("AJ"). This was a misapplication of ER 404(b). Although the Presiding Officer stated she was allowing AJ's testimony based upon the "common scheme or plan" exception, as her predecessor had rationalized in Pre-Hearing Order No. 2, it is clear that the testimony was allowed for the purposes of assessing the credibility of the reconstructed "memories" of the complainant, RJ. There was no analysis of similarities that would support a finding of commonality. Assessing

the credibility of RJ's reconstructed memories does not fall within the exception of ER 404(b).

**1. At Hearing, the Department's Exhibits D3 and D4, and Testimony Relating to Them, Were Erroneously Admitted Under the "Common Scheme Or Plan" Exception.**

As stated in Appellant Jasso's opening brief, on the first day of his hearing Mr. Jasso moved that the Presiding Officer exclude the Department's Exhibits D3 and D4 relating to the alleged abuse of his oldest daughter AJ. This motion was denied and those exhibits were admitted. The initial reasoning given by Judge Caner for allowing the evidence was that she was following the rationale of Judge Mitchell who admitted the exhibits at a prehearing conference under the "common scheme or plan" exception to ER 404(b).

A closer look at the hearing record, and the Findings of Fact, Conclusions of Law, and Final Order, however, reveal that Judge Caner allowed the exhibits and testimony for a different purpose. When ruling during the hearing, she stated that "the alleged sexual abuse of Mr. Jasso's first daughter, AJ, is admitted and will be considered in weighing the credibility of the second daughter, RJ. Therefore, that evidence remains in the record related to AJ and

will be used to assess credibility of the witnesses who testified in regards to alleged abuse of RJ.” (Bates No 1530: 21, 25 TR 565: 21, 25).

In its brief however, the Department claims that “the bolstering of the credibility of RJ was a subsequent result of the admission of Exhibits D3 and D4, not the reason for their admission.” (Resp. Brief. 25). This claim is made despite the language in the final order – also quoted in the Department’s brief – which stated “[t]he evidence was admitted to help the Presiding Officer assess the credibility of the testimony regarding the alleged sexual abuse of RJ.” (Resp. Brief. 21, citing AR 598-599).

Not only did Judge Caner directly state on more than one occasion that the exhibits in question were admitted for credibility purposes, but she also made no reference to any similarities between the alleged abuses, as would be required under a “common scheme or plan” analysis. This shows that regardless of her reference to the prehearing conference and Prehearing Order No. 2, the Presiding Officer clearly admitted Exhibits D3 and D4 for an improper purpose.

ER 404(b) serves to bar evidence of prior misconduct by a defendant that is offered to suggest that the defendant is a “bad

guy” and thus likely committed the acts for which he is currently accused. Allowing the evidence of the alleged abuse of AJ for the purpose of bolstering the credibility of the testimony regarding alleged abuse of RJ directly negates the protections provided by the rule. The only way this type of evidence can aid in assessing witness credibility is if it is assumed to be true and then one makes the assumption that because the defendant has done wrong in the past, he must have done wrong this time, so therefore the witness must be telling the truth. This is a clear-cut case of using Mr. Jasso’s alleged prior act to prove that he acted in conformity therewith in this instance.

**2. Even if ER 404(b) Had Been Properly Used, the Department’s Exhibits D3 and D4 Would Not Have Been Admissable.**

Although the primary purpose for admitting the Department’s Exhibits D3 and D4 at the hearing was to bolster credibility, the Presiding Officer at the prehearing conference initially used the “common scheme or plan” exception to ER 404(b) to justify admission. This was an erroneous use of that exception.

The case law in this area of evidence has been clearly laid out by both parties in their initial briefing. *State v. Lough* gives us the four-part test which requires the court to (a) find that a

preponderance of the evidence shows that the prior act occurred, (b) identify the purpose for which the evidence is being introduced, (c) determine that the evidence is relevant, and (d) find that its probative value outweighs its prejudicial effect. *State v. Lough*, 125 Wn. 2d 847, 852 (1995).

The first problem the court had under this analysis was identifying the purpose of the evidence (b). As stated above, the primary purpose for using Exhibits D3 and D4 was to bolster witness credibility, not to show a “common scheme or plan.”

Second, a careful analysis of the case law in comparison to the facts at issue shows that the relevancy prong of the *Lough* test has not been met here. *State v. DeVincentis* and *State v. Sexsmith* have shown that the existence of a common scheme can establish the relevancy of a previous act. These cases also establish the degree of similarity between acts that is required before a court will find the existence of a common scheme or plan.

In *DeVincentis*, the court stated that “[w]e emphasize that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” *State v. DeVincentis*, 150 Wn.2d 11, 20 (2003). As mentioned in Appellant Jasso’s opening brief, the trial court in that case had already rejected the use of

evidence of several prior acts of sexual misconduct by the defendant because they did not meet the necessary level of similarity. The one act that was allowed by the trial court, and affirmed by the Supreme Court, contained a level of similarity that is simply not found in the case at hand.

Likewise in *Sexsmith*, the Division 3 court reiterated that “[t]he past act and charged act must be substantially similar to be relevant and, therefore, admissible under this exception.” *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901, 905 (2007). There, the court upheld admission of evidence of prior sexual acts where in both cases the defendant isolated the victims, at his mother’s home where he resided, molested both victims in the basement, forced both to take nude photographs, forced both to watch pornography, forced both to fondle him, and both victims were of similar ages when the abuse occurred.

In this case, because the acts alleged by AJ and RJ do not reach the level of similarity and specificity required by *DeVincentis* and *Sexsmith*, the Department resorted to using broad generalities in an attempt to create an appearance of similarity required to show a common scheme or plan. The Department claims that the alleged acts are similar because RJ and AJ allege they occurred

while they lived with Appellant Jasso<sup>1</sup>, while they were in his care, and while he had a position of authority over them. (Resp. Brief at 23). A careful analysis of the case law clearly demonstrates that these generalities do not rise to the level of “substantial similarity” required in order to find the existence of a “common scheme or plan.” RJ and AJ were different ages when the alleged abuse would have occurred, the alleged acts of abuse were considerably different, the modus operandi of the accused was different, and the alleged acts would have occurred in different settings. Therefore, the relevance prong of the *Lough* test has clearly not been met.

Finally, due to the lack of similarity between the acts alleged by AJ and RJ, the prejudicial nature of AJ’s allegations must outweigh any probative value they might have. Without the similarities necessary to establish a “common scheme or plan,” allowing AJ’s testimony represents using prior bad acts to show conformity therewith in this instance. This is clearly prejudicial and violates both ER 404(b) and ER 403.

The Department points to *State v. Krause* to argue the probative value of the disputed evidence. *State v. Krause*, 82 Wn. App. 688 (1996). While the court in *Krause* identified the unique

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<sup>1</sup> Actually, RJ never lived with Appellant after the age of two and one half or so.

nature of child sex abuse cases and explained why prior similar acts of abuse can be probative, that court's analysis, does not apply to the current case. Among the reasons the *Krause* court found prior acts probative was because of the "unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of the witnesses." *Id.* at 696. Here, the alleged victim did indeed testify, and she was an adult, not a child. Any comparison between the two situations is highly tenuous.

Additionally, the Department specifically points to the fact that the hearing was conducted by a Presiding Officer and not a jury, so as to argue that the Presiding Officer "was able to limit her consideration of the evidence to the purpose of showing a common scheme or plan." (Resp. Brief. 26). As mentioned previously, however, there was no such evidence and the Presiding Officer never offered an analysis of commonality that is essential to application of ER 404(b). Rather, the Presiding Officer clearly stated that she considered the evidence to assess the credibility of RJ (meaning the credibility of RJ's reconstructed memories), clearly an improper use of ER 404(b).

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See chronology at Appendix to Appellant's Opening Brief.

Because of the lack of similarity of the alleged acts, the specific nature of the proceeding, and the improper use of Exhibits D3 and D4 by the Department and the Presiding Officer, the prejudice to Appellant Jasso, which already far outweighed any probative value of the evidence, was impermissibly disregarded.

**B. The Department Incorrectly Considered Corroborating Evidence Of Sexual Abuse Against RJ.**

In the Findings of Fact, Conclusions of Law, and Final Order, the Presiding Officer stated that corroborating evidence of AJ's and RJ's testimony was considered under *State v. Young*. (AR 599). As stated in Appellant's opening brief, *State v. Young* has no application to the current case. In *Young*, corroborating evidence was used to support the excited utterances of a child witness who later recanted her accusations of abuse. *State v. Young*, 160 Wn.2d 799 (2007). The circumstances present in *Young* are not present here. The accuser in our case was an adult when she filed her complaint and when she testified, not a child, and at no point had she recanted her accusations so as to trigger a need for the type of corroborating evidence used in *Young*.

Additionally, the Department cites *State v. Petrich*, and *State v. Kirkman* in support of the idea that the use of corroborating

evidence was appropriate. *State v. Petrich*, 101 Wn.2d 566 (1984); *State v. Kirkman*, 159 Wn.2d 918 (2007). Like *Young*, these cases are factually distinguishable from the instant case. *Petrich* and *Kirkman* both involved very young children who were witnesses in a criminal trial. Each court noted the special concern that arises over the credibility of child witnesses in criminal cases. Therefore, both cases held that corroborating evidence may be used to bolster the credibility of the child witness (emphasis supplied). Despite the Department's attempt to analogize those cases to RJ's testimony, there is no getting around the simple fact that the hearing in this case involved no question concerning the credibility of a child witness. Under the circumstances, no support can be found for the Presiding Officer's reliance on corroborating evidence when reaching her Conclusions of Law.

**C. The Department Incorrectly Admitted The Opinion Testimony Of Dr. O'Shaunessey.**

In its brief, the Department erroneously contends that the issue of expert testimony was raised for the first time on appeal. A careful review of the record of proceeding, however, establishes that Appellant Jasso made several objections below to the entirety

of Dr. O'Shaunessey's testimony, and is therefore properly before this Court now.

"I'm going to object... But, secondly, there's no foundation for a question like that" (RP 169).

"There's no foundation for that, and that's my objection." (RP 170).

"I'm going to object and move to strike this... There's no connection to this case. There's speculation. There's no foundation for it..." (RP 172).

"Your honor, may I have a continuing objection to all of this testimony on the grounds I have already asserted?" (RP 184).

These objections were clearly made on the record and thus preserved for review.

### **III. CONCLUSION**

Appellant Jasso respectfully requests that this Court rule that the Department of Health failed to follow lawful procedures, and incorrectly interpreted and applied the law, and reverse the Department's Order imposing sanctions on Mr. Jasso, dismiss the charges against him, and reinstate his credentials as a registered counselor.

Mr. Jasso also asks that this Court award him his costs and attorneys fees incurred in defending his credentials.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of November,  
2009.

A. STEPHEN ANDERSON, PS

A handwritten signature in black ink, appearing to read "A. Stephen Anderson", written over a horizontal line.

A. Stephen Anderson, WSBA #8369  
Attorney for Appellant Jasso

CERTIFICATE OF SERVICE

I, John F. Niggemeyer, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I served a true and correct copy of Appellant's Reply Brief, to which this Certificate is attached, concerning the above-entitled matter on:

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by placing it in the hands of a legal messenger, for delivery no later than November 19, 2009.

Dated at Seattle, Washington this 18<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
John F. Niggemeyer  
Legal Assistant