

NO. 42848-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD NEWMILLER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-00102-2

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BRIEF OF RESPONDENT

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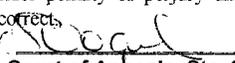
RUSSELL D. HAUGE  
Prosecuting Attorney

RANDALL AVERY SUTTON  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

Jodi Backlund  
P.O. Box 6490  
Olympia, WA 98507

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED July 9, 2012, Port Orchard, WA.   
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly weighed the probative value versus the prejudicial effect of evidence that Newmiller had previously been convicted of molesting the same victim and did not abuse its discretion in finding it admissible to show his lustful disposition and a common plan or scheme?

2. Whether Newmiller may not claim that the properly admitted ER 404(b) evidence rendered his trial unfair due to a limiting instruction that he requested?

3. Whether Newmiller fails to show that trial counsel was ineffective for not requesting a limiting instruction that would have highlighted his lustful disposition and limited the use to which Newmiller could make of the ER 404(b) evidence?

4. Whether the record fails to show that the court excluded the public from discussions on further instruction to the jury, and whether, moreover, even if it did, this Court has concluded that such discussions are part of jury deliberations and as such are not part of the right to an open trial?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Ronald Newmiller was charged by first amended information filed in

Kitsap County Superior Court with two counts of the first-degree rape of a child of his daughter, LN. Count I was alleged to have occurred between August 19, 2002, and August 18, 2005. Count II was alleged to have occurred between August 19, 2005 to August 17, 2008. Both counts included domestic violence allegations. CP 1-5.

Before trial the State sought to admit evidence of Newmiller's prior conviction of child molestation and the underlying circumstances of that charge, which also involved LN. The State argued that the evidence was admissible to show lustful disposition and a common scheme or plan under ER 404(b).<sup>1</sup> CP 23. At the pretrial hearing on the issue, Newmiller primarily opposed the evidence on the grounds that it was more prejudicial than probative. RP (6/14) 8.<sup>2</sup> The trial court disagreed and admitted the evidence:

THE COURT: ... And four, under 403, whether the probative value is outweighed by unfair prejudice, the court would find this is very probative, and the probative value does outweigh unfair prejudice. Any of this type of evidence is prejudicial, but in this case it's not unfairly prejudicial given the strong probative value of the evidence, so the court will allow the 404(b) evidence to be admitted at trial.

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<sup>1</sup> The State specifically declined to proceed under RCW 10.58.090, which has since been held unconstitutional in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d (2012). RP (6/14) 2.

<sup>2</sup> There are three separately paginated reports of proceedings that were prepared for this appeal. The first, pertaining to the ER 404(b) hearing held on June 14, 2011, will be referred to as "RP (6/14)." The second which transcribes the trial that was held on October 11-13, 2011, will be referred to simply as "RP." The final report, of the November 18, 2011, sentencing hearing, has no bearing on the issues Newmiller raises, and is not referenced in this brief.

RP (6/14) 10-12; CP 6.

The case proceeded to trial, and the jury found Newmiller guilty as charged. RP 124.

**B. FACTS**

LN was the primary witness at trial. She was born on August 19, 1996. RP 55. LN moved to Port Orchard with her father, Newmiller, and his then-girlfriend, Valerie Starrett, when she was six year old. RP 55-56.

During the time she lived in Port Orchard with Starrett, her father began to touch her, kiss her body parts, and caress her in a sexual way. RP 58. The caressing involved her “pelvic” area and her breasts. RP 60.

He touched her vagina a few times. RP 58. Newmiller began touching her vagina when she was around six years old. RP 59. He would slowly try to put his fingers inside her and ask her if it hurt. RP 58. If she said it did, he would stop; if it did not hurt, he would keep going until it hurt. RP 58. He touched her both over and under her clothes. RP 60.

When she was younger, Newmiller would take her clothes off, but as she got older she began doing it herself. RP 60-61. He also kissed her and put his tongue in her mouth and performed oral sex on her. RP 61. He did not have her perform oral sex on him because he said it did not arouse him. RP 61.

Newmiller told LN that she aroused him more than his girlfriends. RP 62. He told her that he found her smell and the feel of her body arousing. RP 62. The contact would begin by either him asking, or sometimes LN initiated it. RP 63. LN began initiating it more after she reached puberty and her hormones were “raging.” RP 64. It felt good to her sometimes. RP 64.

They moved out of Starrett’s house a few months after LN turned nine. RP 64. Before they moved, he did not put his fingers in her vagina that often. RP 64. The oral contact was less than the fingers. RP 64. They moved into a duplex on Sedgwick Road in Port Orchard. RP 65. It was just Newmiller and LN in the duplex. RP 65. The touching became much more frequent after they moved. RP 66.

LN recalled a specific incident that occurred at the duplex. RP 66. She was not wanting to sleep in her room, so she went into Newmiller’s room. RP 66. She asked if he was awake, and then started kissing him. RP 67. He kissed her back, and then they “kind of had slight intercourse but not completely.” RP 67. He also touched her vagina with his fingers. RP 67. They also had oral sex about once a month during the six months they lived at the duplex. RP 67.

She felt “50/50” about the contact. RP 68. She began to learn that it was “in some ways kind of bad,” but did not want to tell anyone because she

did not want to lose her dad. RP 68.

In February 2010, they had their last sexual contact. RP 70. They were living with Newmiller's girlfriend at the time. RP 69. She missed the school bus, and asked Newmiller to drive her. RP 69-70. She could not get him to get up, so she went back to bed. RP 70. Newmiller came in and used the bathroom in her room, and then came and lay down next to her. RP 71. They started talking. RP 71. Eventually, Newmiller started getting a little aggressive, and told her that he missed her and wanted to make love to her. RP 71. She told him no, repeatedly. RP 71. He became angry and tried to pull off her underwear. RP 72. She managed to keep them on. RP 72. Finally he gave up and left the room. RP 71. That was the first time she had ever refused him. RP 74.

Later that day, Newmiller came to her, and said: "We have two choices now. You either tell someone and I go to jail, or I kill myself." RP 73. She ignored him and he left. RP 73. He returned about half an hour later and told her that he had tried to hang himself. RP 73. LN was extremely scared. RP 74. She did not call the cops, however. RP 74. She was afraid that she would not be able to get by without her father. RP 74. She loved him, even at the time of trial, and missed him very much. RP 75, 78. LN did not report Newmiller to the police, but did tell her best friend, MM. RP 75.

After what was going on was reported, LN talked to an interviewer at the courthouse. RP 75. She did not tell them everything that had happened. RP 76. She told the child interviewer that the February 2010 incident was the only one. RP 77. She was afraid to say there were more. RP 77. She was afraid she would never see her father again. RP 76.

She did not really understand at the time that what he was doing was wrong. RP 76. Then she saw a show where the guy got arrested, and she thought, "oh my gosh, that's my life." RP 76. It was a little bit of a rude awakening for her. RP 77. She was feeling very depressed about keeping it inside, and hoped she would feel better if she told someone. RP 78. A few months after she began living with her aunt, she finally told her aunt what had happened. RP 77. She decided that if she could tell her aunt she could tell the prosecutor. RP 77.

On March 4, 2010, Sheriff's Detective Doug Dillard contacted. RP 50. Dillard told Newmiller that LN had made some allegations about him, and that Dillard wanted to talk to him about them. RP 51. Dillard did not say what the allegations were. RP 52. Newmiller paced around and then threw his arms in the air and said, "Well, whatever my daughter said happened. Whatever she said happened." RP 52.

Exhibit 2, Newmiller's stipulation, was admitted into evidence, and

read to the jury:

On April 21, 2010, I pleaded guilty to the crimes of child molestation in the second degree, domestic violence, date of incident, February 26, 2010, and tampering with a witness, domestic violence, dates of incident, February 26, 2010, through March 4, 2010, under Cause No. 10-1-00238-1.

The victim in Cause No. 10-1-00238-1 was LN, date of birth 8/19/96."

RP 81.

Newmiller testified and denied that allegations were true. RP 94.

### III. ARGUMENT

**A. THE TRIAL COURT PROPERLY WEIGHED THE PROBATIVE VALUE VERSUS THE PREJUDICIAL EFFECT OF EVIDENCE THAT NEWMILLER HAD PREVIOUSLY BEEN CONVICTED OF MOLESTING THE SAME VICTIM AND DID NOT ABUSE ITS DISCRETION IN FINDING IT ADMISSIBLE TO SHOW HIS LUSTFUL DISPOSITION AND A COMMON PLAN OR SCHEME.**

Newmiller argues that the trial court erred in admitted evidence of his molestation of LN that occurred outside the charging period of this prosecution, and to which he had previously pled guilty. Newmiller does not appear to argue that the evidence was irrelevant, only that the trial court erred in concluding that the probative value of the evidence was not outweighed by its potential for unfair prejudice. The trial court did not abuse its discretion.

***1. The trial court properly admitted evidence of Newmiller's***

***molestation of LN to show his lustful disposition toward her and to show a common scheme or plan.***

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996).

ER 404(b) states:

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.

Before a court admits evidence under this rule, it must (1) identify the purpose for introducing the evidence, (2) determine relevancy to an element of the crime charged, (3) weigh the probative value against its prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The evidence here was admitted for a proper and relevant purpose. The trial court specifically found that the evidence was admissible it for the purpose of showing Newmiller's lustful disposition toward LN, and that it was part of a common scheme or plan. CP 8. Newmiller does not appear to challenge this conclusion.

**a. Lustful disposition**

The Supreme Court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it

shows the defendant's lustful disposition directed toward the victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). The critical factor is that the other misconduct is directly connected to the victim, and thus does not just reveal the defendant's general sexual proclivities:

Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.

... The important thing is whether it can be said that it evidences a sexual desire for the particular female.

The kind of conduct receivable to prove this desire at such ... subsequent time is whatever would naturally be interpretable as the expression of sexual desire.

*Ray*, 116 Wn.2d at 547 (*quoting State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983) (alterations the Court's)). The limits of time over which such evidence may range lies within the discretion of the trial court. *Ray*, 116 Wn.2d at 547-48 (holding incidents of incest occurring ten years before charged offense properly admitted). The testimony is admissible even if it is not corroborated by other evidence. *Id.* These standards were satisfied here.

**b. Common scheme or plan**

One of the well-defined exceptions to ER 404(b) is evidence of a common scheme or plan. The common scheme or plan exception applies when the defendant has devised a plan and used it repeatedly to perpetuate separate but similar crimes. *State v. Burkins*, 94 Wn. App. 677, 689, 937

P.2d 15 (1999); *see also State v. Krause*, 82 Wn. App. 688, 693-94, 919 P.2d 123 (1996).

*Lough* is the leading case applying the common scheme or plan in the context of sexual misconduct. The Supreme Court noted in *Lough* that “[t]here are two different situations wherein the ‘plan’ exception to the general ban on prior bad acts evidence may arise. One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. ... The other situation arises when an individual devises a plan and uses it repeatedly to perpetuate separate but very similar crimes.” *Lough*, 125 Wn.2d at 854-55. The latter situation is discussed in detail in *Lough*.

In *Lough*, the defendant was charged with indecent liberties and attempted rape. *Lough*, 125 Wn.2d at 849. The victim reported that while watching a video with the defendant, he mixed her a drink and shortly thereafter, she felt dizzy and disoriented. She recalled her pants being pulled down and the defendant’s genitals in her hands and by her face. She later awoke and found that she was nude from the waist down. *Id.* At trial, evidence was admitted concerning the defendant’s drugging and rape of four other women over the ten years prior to the charged crime. *Id.*, at 850. The trial court held that the purpose for which this evidence was admitted was to show a common scheme or plan. *Id.*, at 853-54

The Washington Supreme Court affirmed the trial court's decision noting that:

The existence of a design or plan may not be proved just by similarity of result, but may be proved circumstantially by evidence that the defendant had performed acts having "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."

*Id.*, at 856 (quoting *People v. Ewoldt*, 7 Cal. 4th 380, 402, 867 P.2d 757 (1994)). The *Lough* also cited to *People v. Carradus*, 29 Cal. App. 4th 1 (1994), which held that evidence of a common design or plan does not require a single all-embracing plan nor require unusual common features, but does require sufficient common features to support the inference the defendant employed the plan in committing the charged offense; courts look to the nature and degree of similarity of the charged offense and the uncharged conduct.

*Lough* was reaffirmed by the Supreme Court in *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). The Supreme Court held that evidence of a common scheme or plan is relevant when the existence of the crime is at issue. *DeVincentis*, 150 Wn.2d at 21. Here, Newmiller denied that the charged acts occurred. Moreover, there was no other evidence that corroborated LN's allegations. The evidence was thus highly probative.

Newmiller, however, appears to concede relevance and proper

purpose, and instead argues that the trial court applied the incorrect standard in weighing the probative value of the evidence versus its potential for unfair prejudice.

**2. *The trial court properly weighed the probative value of the evidence.***

A trial court has wide discretion in balancing probative value versus prejudicial effect under ER 403. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). This court reviews the trial court's balancing of probative value against prejudicial effect for abuse of discretion. *Id.*

Newmiller argues that the following weighing analysis was flawed as a matter of law:

THE COURT: ... And four, under 403, whether the probative value is outweighed by unfair prejudice, the court would find this is very probative, and the probative value does outweigh unfair prejudice. Any of this type of evidence is prejudicial, but in this case it's not unfairly prejudicial given the strong probative value of the evidence, so the court will allow the 404(b) evidence to be admitted at trial.

RP (6/14) 10-12. Newmiller fails to offer any authority for the claim that this analysis is flawed. The cases are to the contrary.

In *State v. Kennealy*, 151 Wn. App. 861, ¶¶ 73-74, 214 P.3d 200

(2009), this Court engaged in an analysis virtually identical the trial court's here:

Prior similar acts of sexual abuse are generally “very probative of a common scheme or plan,” and the “need for such proof is unusually great in child sex abuse cases.” *Krause*, 82 Wn. App. at 696. The evidence is strongly probative because of the secrecy surrounding child sex abuse, victim vulnerability, the frequent absence of physical evidence of sexual abuse, the public opprobrium connected to such an accusation, a victim's unwillingness to testify, and a lack of confidence in a jury's ability to determine a child witness's credibility. *See Krause*, 82 Wn. App. at 696, 919 P.2d 123 (citations omitted); *see also Sexsmith*, 138 Wn. App. at 506 (courts generally find substantial probative value in prior sexual abuse evidence when the only other evidence in the charged case is the child's testimony).

Here, there was no violence involved, there was no resulting physical evidence of abuse, the children were young when they testified, and there were no witnesses to the acts. As in *Krause* and *Sexsmith*, we hold that the trial court did not abuse its discretion in admitting the evidence to prove a common scheme or plan because the danger of unfair prejudice does not substantially outweigh the probative value of the four witnesses' testimony of prior acts of child sexual abuse.

*See also, State v. Womac*, 130 Wn. App. 450, 457, 123 P.3d 528, 531 (2005) (“Applying ER 403, the trial court held that considerable probative value would result from using the evidence to show lack of accident, and that such value was not substantially outweighed by the unfair prejudice that might result if the evidence were used to show Womac's propensity to hit young children.”), *reversed on other grounds*, 160 Wn.2d 643 (2007); *State v. Bennett*, 36 Wn. App. 176, 672 P.2d 772 (1983) (upholding trial court's

weighing due to high probative value and importance of evidence to State's case). The comment to ER 403 also suggests the availability of other means of proof is a factor to weigh in deciding ER 403 issues. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998) ("The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence.") (citing ER 403 cmt.).

While the court below may have spoken somewhat in shorthand, it acknowledged the prejudicial nature of the evidence, but nevertheless concluded that due to its highly probative nature, the prejudicial effect was outweighed. That conclusion was not an abuse of discretion. There was no other corroborative evidence of LN's allegations. The fact that Newmiller had previously admitted to sexual impropriety with her was thus highly probative as corroboration of her story. On the other hand, the jury had already heard from LN that she essentially acted as her father's mistress for many years. It is difficult to imagine that evidence of one more act of sexual abuse would have tipped the scales to cause the jury to react in emotional and unreasoning manner. This claim should be rejected.

**B. NEWMILLER MAY NOT CLAIM THAT THE PROPERLY ADMITTED ER 404(B) EVIDENCE RENDERED HIS TRIAL UNFAIR DUE TO A LIMITING INSTRUCTION THAT HE REQUESTED.**

Newmiller, claiming manifest constitutional error, next claims that the trial court gave an inadequate ER 404(b) limiting instruction. This claim is without merit because issues relating to the admission of evidence, including limiting instructions relating thereto, are not of constitutional magnitude. More importantly, however, Newmiller proposed the instruction he now attacks. Any purported error is thus invited and may not be the basis for appeal.

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (citing *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, moreover, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “‘manifest,’ i.e., whether the error had ‘practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

Questions of the admissibility of evidence , and instructions relating thereto, are not of constitutional magnitude and do not fall within RAP 2.5’s exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); see also *State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999); *State v. Russell*, 171 Wn.2d 118, ¶ 9 & n.2, 249 P.3d 604 (2011) (noting, in case regarding trial court’s duty to give a ER 404(b) limiting instruction, that the exceptions to RAP 2.5(a), including manifest constitutional error, were “not applicable here”).

Even were the issue of constitutional magnitude, however, Newmiller proposed the instruction. *Cf.* CP 52 & 84. He may not now attack it on appeal:

Unhappily for [the defendant] ... we have also held that “[a] party may not request an instruction and later complain on appeal that the requested instruction was given.” *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting *State v. Boyer*, 91 Wn.2d

342, 345, 588 P.2d 1151 (1979)). *Henderson* also involved erroneous WPIC instructions proposed by a defendant and later complained of, and we held there that “even if error was committed, of whatever kind, it was at the defendant’s invitation and he is therefore precluded from claiming on appeal that it is reversible error.” *Henderson*, 114 Wn.2d at 870, 792 P.2d 514 (emphasis added). *Henderson* is directly on point. There can be no doubt that this is a strict rule, but we have rejected the opportunity to adopt a more flexible approach. *See Henderson*, 114 Wn.2d at 872, 792 P.2d 514 (dissent argues that “the doctrine should be applied prudently, with respect to the facts of each case,” but acknowledges that “[t]his court’s history of applying the doctrine of invited error with little analysis or discussion implies that the doctrine is strictly applied regardless of circumstances.”) (Utter, J., dissenting) (citations omitted).

*State v. Studd*, 137 Wn.2d 533, 546-547, 973 P.2d 1049 (1999) (alterations after ellipsis the Court’s).

Even beyond the fact that this issue should not be considered for the first time on appeal, and that it is based upon invited error, Newmiller’s argument is based on the notion that improper propensity evidence was admitted in his trial. As discussed previously, the ER 404(b) evidence was properly admitted.

For nearly 50 years, it has been the rule in Washington that the trial court does not err in admitted ER 404(b) evidence without a limiting instruction, if the defendant does not request one. *Russell*, 171 Wn.2d at ¶ 10. This history strongly suggests that introduction of proper ER 404(b) evidence without a limiting instruction does not create a due process

violation.

Newmiller cites three cases in support of his claim. None seems to require reversal here. *Old Chief v. United States*, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), has no application in the present context. The Supreme Court explicitly stated its “holding is limited to cases involving proof of felon status.” *Old Chief*, 519 U.S. at 183 n.7.

Nor does *McKinney v. Rees*, 993 F.2d 1378 (9<sup>th</sup> Cir. 1993), have any discernible bearing on the issue presented. There, the court determined that the evidence in question was not relevant, except for proving propensity. *Id.*, at 1385 (“McKinney’s trial was impermissibly tainted by irrelevant evidence”).

Reliance on *Garceau v. Woodford*, 275 F.3d 769 (2001), also seems to be misplaced. Most notably, its holding does not seem to have been adopted or endorsed by any court in the eleven years since it was decided. As that opinion itself notes, it is not an interpretation of the due-process clause that has been accepted by the United States Supreme Court.

Even following *Garceau*, however, and even assuming that the evidence in this case was improperly admitted, no due process violation is shown.<sup>3</sup> In *Garceau*, the court adopted the following test to determine if the

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<sup>3</sup> The defendant in *Garceau* objected to the instruction that was given his jury. *Id.*, at 773.

admission of other crimes evidence violated due process:

(1) the balance of the prosecution's case against the defendant was "solely circumstantial;" (2) the other crimes evidence, ... was similar to the [crime] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was "emotionally charged."

*Garceau*, at 775. Here, the case was not circumstantial at all, but relied almost entirely on the victim's direct testimony of Newmiller's acts. The other crimes evidence here was similar. Unlike in *Garceau*, where the "prosecutor referred to [the prior crime] on dozens of pages of the transcript of his closing argument, the State did not dwell on the 2010 molestation. Indeed in its closing, the State specifically argued what the proper and improper purposes of the evidence were, and briefly mentioned why it was relevant:

You also have Jury Instruction No. 12 that talks about the fact that the defendant has been, in fact, convicted of a prior sex offense against his daughter. It's not really a prior sex offense; it's actually the subsequent sex offense. That's what we knew about it at that time. It's only prior in terms of conviction as opposed to what happened. Evidence of that sex offense -- and we'll call it the February 2010 incident -- on its own is not sufficient to prove the defendant guilty of the two counts of rape that he's charged with. Why am I telling you that? Because *you can't say, well, he did it on that day so he must have done it on this day and forget everything else. Don't do that. We're not asking you to do that.* What we are asking you to do is to consider the lustful disposition he had. The time when she says no was the last time it happened. It wasn't the first and only; it was the last. It was the time she said, "No, no more, you're not doing it to me." Why did she say it that one time? Who knows? Maybe she was just done.

But do you believe in your heart of hearts based on this girl's credibility that that was the only time that it happened? There was such a pattern of grooming, preparation, planning, for this man to be able to get this young girl to want to seek comfort from her dad when she has nightmares by getting sexual contact. That takes a lot of planning and time and grooming. That's what this guy did. And you can consider that conviction, and you should consider that conviction as proof of a lustful disposition that he had for his daughter. He wanted her.

RP 107-08. Finally, while the evidence might be characterized as "emotionally charged" it was essentially part of a continuing course of conduct with the charged offenses, and differed from the charged offenses only in that the victim was much younger in the *charged* offenses.

In short, Newmiller fails to demonstrate that a purported error that he invited warrants the granting of a new trial. This claim should be rejected.

**C. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING A LIMITING INSTRUCTION THAT WOULD HAVE HIGHLIGHTED HIS LUSTFUL DISPOSITION AND LIMITED THE USE TO WHICH NEWMILLER COULD USE THE ER 404(B) EVIDENCE.**

Newmiller next claims that counsel was ineffective for not proposing WPIC 5.30. This claim is without merit because Newmiller fails to establish that the decision was not tactical, or that he was prejudiced.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of

demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Judicial scrutiny of a defense attorney's performance must be "highly deferential" in order to "eliminate the distorting effects of hindsight."

*Strickland*, 466 U.S. at 689. The reviewing court will defer to counsel's strategic decision to present or forego a particular defense theory when the decision falls within the wide range of professionally competent assistance. *United States v. Layton*, 855 F.2d 1388, 1420 (9th Cir. 1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883.

The decision not to obtain a limiting instruction can be a legitimate trial tactic because such an instruction may simply underscore the damaging evidence. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (“We can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.”); *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011) (“We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence.”).

Notably, Newmiller fails to now suggest what the instruction might have looked like in the context of this case. He quotes WPIC 5.30, which sets forth the instruction to be used when ER 404(b) evidence is admitted:

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of . You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with

this limitation.

Perhaps intentionally, Newmiller has declined to insert the relevant language into the template.

Tailoring the operative second sentence to the facts of this case would produce an instruction to the jury that would have read:

This evidence consists of the 2010 sexual conduct between the defendant and LN and may be considered by you only for the purpose of showing the defendant's lustful disposition toward LN, and whether he had a common scheme or plan.

First, it is hard to see how telling the jury that the 2010 molestation could only be used to show Russell's lustful disposition toward LN or that he had a common scheme or plan could not have highlighted the evidence, and for that matter, put the idea that he had a lustful disposition toward LN into the jurors' minds.

Perhaps more importantly, such an instruction would not have well served the overall defense strategy. Newmiller's defense was that this was a "he said/she said" case, that LN's testimony was not in any way corroborated, and that when he actually molested LN, he owned up to it and pled guilty. This argument would have been disallowed by the instruction Newmiller argues counsel should have requested.

For the same reasons, and in light of the State's closing argument on the subject of the 2010 molestation, Newmiller fails to establish prejudice

flowing from the alleged deficiency. This claims should be rejected.

**D. THE RECORD DOES NOT SHOW THAT THE COURT EXCLUDED THE PUBLIC FROM DISCUSSIONS ON FURTHER INSTRUCTION TO THE JURY; MOREOVER, EVEN IF IT DID, THIS COURT HAS CONCLUDED THAT SUCH DISCUSSIONS ARE PART OF JURY DELIBERATIONS AND AS SUCH ARE NOT PART OF THE RIGHT TO AN OPEN TRIAL.**

Newmiller finally claims that the trial court violated constitutional provisions relating to open trials. This claim is without record support.

The only thing apparent from the record is that the court reporter was not present at the time the conference on the additional jury instructions was held. There is no evidence whatsoever that the conference was not held in open court or that the public was excluded from the court room at the time it was held.

To the contrary, the clerk's minutes for October 12, 2011, reflect the following:

2:59 Court – Excuses alternate jurors.

2:59 Jurors out of courtroom to begin deliberations.

3:00 Court is at recess.

4:35 Court is in session.

4:36 Jurors in the courtroom.

Court – Inquires of jurors as to whether they want to return tomorrow or Monday. Jurors will return tomorrow morning at 9:00 a.m.

4:37 Court is at recess.

State's supp. CP (Clerk's Minutes of Jury Trial, at 8). Likewise, the trial prosecutor has no recollection of there ever having been any in-chambers conference in this case. State's supp. CP (Declaration of Kelly Montgomery). Since Newmiller has failed to produce a record that supports his claim, it should be rejected. *State v. Koss*, 158 Wn. App. 8, ¶ 24, 241 P.3d 415 (2010).

Even assuming that the record supported this claim, however, it is one this Court has rejected:

¶ 39 The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Wise*, 148 Wn. App. 425, 433, 200 P.3d 266 (2009). We review de novo whether a trial court has violated a defendant's public trial right. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

¶ 40 Whether a defendant's public trial right applies in the context of an in-chambers conference to answer a question the jury submitted during its deliberations appears to be an issue of first impression in Washington. In *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008), this court recognized that the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings, during voir dire, and during the jury selection process. But this court also determined that "[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wn. App. at 114, 193 P.3d 1108.

¶ 41 Here, the trial court's in-chambers conference addressed a jury question regarding one of the trial court's instructions, a purely legal issue that arose during deliberations and that did not require the resolution of

disputed facts. Thus, under this court's decision in *Sadler*, the defendants' right to a public trial did not apply in this context. Further, CrR 6.15(f) provides in part that "[the trial] court shall respond to all questions from a deliberating jury in open court *or in writing*." (Emphasis added [by Court].) More important, questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial. *See, e.g., Clark v. United States*, 289 U.S. 1, 12-13, 53 S. Ct. 465, 77 L. Ed. 993 (1933) (citing *Woodward v. Leavitt*, 107 Mass. 453, 460, 9 Am. Rep. 49 (1871); *In re Matter of Cochran*, 237 N.Y. 336, 340, 143 N.E. 212 (1924); *In re Matter of Nunns*, 188 A.D. 424, 430, 176 N.Y.S. 858 (1919)); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989); *Crowe v. County of San Diego*, 210 F. Supp. 2d 1189, 1196 (S.D. Cal. 2002). Because the public trial right does not apply to a trial court's conference with counsel on how to resolve a purely legal question which the jury submitted during its deliberations, we hold that the trial court did not violate the appellants' public trial right by responding to the jury's question in writing as CrR 6.15(f) provided.

*State v. Sublett*, 156 Wn. App. 160, ¶¶ 39-41, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010); *accord, Koss*, 158 Wn. App. at ¶ 20. This claim is factually and legally without merit and should be rejected.

#### IV. CONCLUSION

For the foregoing reasons, Newmiller's conviction and sentence should be affirmed.

DATED July 9, 2012.

Respectfully submitted,

RUSSELL D. HAUGE

Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal stroke extending to the right.

RANDALL AVERY SUTTON

WSBA No. 27858

Deputy Prosecuting Attorney

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# KITSAP COUNTY PROSECUTOR

## July 09, 2012 - 4:00 PM

### Transmittal Letter

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