

67333-5

67333-5

NO. 67333-5-I

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

STATE OF WASHINGTON

Respondent

v.

BRET W. GONZALES,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 30 AM 11:01

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT7

 A. THE DEFENDANT WAIVED REVIEW OF THE TRIAL COURT’S
 DECISION TO ADMIT EVIDENCE OF OTHER SEXUAL
 MISCONDUCT.....7

 B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF
 COUNSEL.....9

 C. EVIDENCE OF UNCHARGED CONDUCT WAS PROPERLY
 ADMISSIBLE UNDER ER 404(B) FOR THE PURPOSE OF
 SHOWING COMMON SCHEME OR PLAN..... 13

 1. There Were Sufficient Similarities Between The Acts Involving
 B.C. And Those Involving I.C. To Establish A Common Plan To
 Have Sexual Contact With Young Girls..... 15

 2. The Probative Value Of The Challenged Evidence Outweighed
 The Danger Of Unfair Prejudice.....21

 D. THE DEFENDANT WAIVED REVIEW OF THE INSTRUCTION
 REGARDING PRIOR BAD ACTS EVIDENCE WHEN HE DID NOT
 OBJECT TO THE STATE’S PROPOSED INSTRUCTION AND HE
 DID NOT PROPOSE HIS OWN INSTRUCTION.....25

IV. CONCLUSION29

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Davis</u> , 152 Wn.2d 647, 673, 101 P.3d 1 (2004)	10
<u>State ex. rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971)	14
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003)	14, 15
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994)	10
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	27
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	9
<u>State v. Gresham</u> , 173 Wn.2d 405, ____ P.3d ____ (2012)...	8, 9, 15, 16, 20, 26, 27, 28
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	10
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	8
<u>State v. Kennealy</u> , 151 Wn. App. 861, 214 P.3d 200 (2009), <u>review</u> <u>denied</u> , 168 Wn.2d 1012, 227 P.3d 852 (2010). 15, 16, 17, 20, 21, 22	
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	9
<u>State v. Krause</u> , 82 Wn App. 688, 919 P.2d 123 (1996), <u>review</u> <u>denied</u> , 131 Wn.2d 1007, 932 P.2d 644 (1997).....	21, 23, 24
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	10
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	13, 14, 15
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13
<u>State v. Morgan</u> , 163 Wn. App. 341, 261 P.3d 167 (2011).....	25
<u>State v. O'Connell</u> , 137 Wn. App. 81, 152 P.3d 349, <u>review denied</u> , 162 Wn.2d 1007, 175 P.3d 1094 (2007).....	10
<u>State v. Russell</u> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	27
<u>State v. Scherner</u> , 153 Wn. App. 621, 225 P.3d 248 (2009)....	25, 26
<u>State v. Sexsmith</u> , 138 Wn. App. 497, 157 P.3d 901 (2007), <u>review</u> <u>denied</u> , 163 Wn.2d 1014 (2008).....	16, 21, 22, 23
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1999).....	8

FEDERAL CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 8 L.Ed.2d 674 (1984).....	10
--	----

WASHINGTON STATUTES

RCW 10.58.090	7, 8
---------------------	------

COURT RULES

ER 403	21
ER 404(b).....	1, 7, 8, 9, 13, 27
RAP 2.5(1)(3)	8

I. ISSUES

1. When the defense did not object to admission of evidence involving an uncharged victim that was offered to show common scheme or plan under ER 404(b) has the defendant waived the issue for review?

2. Did the defendant receive ineffective assistance of counsel when his attorney did not object to evidence offered to show common scheme or plan?

3. Did the trial court abuse its discretion when it admitted evidence of an uncharged incident involving the victim's sister under the common scheme or plan purpose pursuant to ER 404(b)?

4. Did the defendant waive review of whether the limiting instruction given by the court was a correct statement of the law when he did not object to the instruction at trial?

5. Was the limiting instruction given by the court erroneous?

II. STATEMENT OF THE CASE

The defendant, Bret Gonzales, was very close to his sister Beth Gonzales. Between 2003 and 2005 the defendant lived with Ms. Gonzales and her three children R.C., I.C. born December 13, 1996, and B.C., born May 4, 1998. In August 2003 Ms. Gonzales

bought a home in Lake Stevens. The defendant had his own room in that house; B.C. and I.C. shared another bedroom and Ms. Gonzales shared a third bedroom with R.C. By January 2005 Ms. Gonzales' boyfriend, Scott Camp, moved in the Lake Stevens home and the defendant moved into Mr. Camp's home in Stanwood. When Ms. Gonzales sold her Lake Stevens home the family moved into Mr. Camp's Stanwood home, and the defendant moved into a room in a shop run by Mr. Camp in Everett where he lived until May 2006. 4 RP 15, 54-59; 5 RP 79-85, 107-111.

Ms. Gonzales' children all loved the defendant, but it was I.C. who had the closest relationship with him. The defendant frequently spent more time with I.C. than the other children. He often took her on outings and bought her gifts. When the family moved into Mr. Camp's Stanwood home and the defendant moved out, I.C. started spending the night with the defendant at the shop in Everett, and sometimes at a house in Kirkland where the defendant sometimes house-sat for some friends. 4 RP 60-62, 71, 189-194; 5 RP 89 – 91, 112-16, 139.

The defendant began to sexually assault I.C. when she was six years old. It began when I.C. asked the defendant about looking at his private parts. He allowed her to pull his pants down

and look at his penis. The defendant talked to I.C. about sex. The defendant explained the anatomy of male and female genitalia, what sperm was, and how reproduction happened. Ex. 32, page 23-24, 32; Ex. 33, page 15-16, 19; 4 RP 64, 76, 96.

The defendant's assaults included rubbing his penis on I.C.'s butt and vagina. He made her suck on his penis, and he licked her vagina. The defendant had penile vaginal intercourse with I.C., as well as anal intercourse. When I.C. complained that it hurt when he put his penis in her vagina, the defendant told her to stop being a baby. She was six at the time. On one occasion when the defendant was having oral sex with I.C. he used a sock to blindfold her. The defendant told I.C. not to tell anyone, because if she did he would go to jail or prison. One time I.C. told the defendant to stop having sex with her. The defendant became so angry with her that she did not protest again. The defendant took I.C. out after each sexual encounter and bought her gifts. The sexual assaults lasted until I.C. was ten years old. They happened in the Lake Stevens home, the Everett shop, and the Kirkland house-sitting home. Ex. 32, page 10-11, 16-19, 23, 26-29, 32-43, 45, 47; Ex. 33, page 11-31; 4 RP 64-71, 79-84, 90-100.

Ms. Gonzales and Mr. Camp did not suspect the defendant was sexually assaulting I.C. when it was happening. They were aware that the defendant gave far more attention to I.C. than the other children, and that caused hurt feelings and jealousy among the other children. Ms. Gonzales and Mr. Camp talked to the defendant about giving the other children more attention, and taking turns with the children to have overnights and outings with him. 5 RP 89-98, 101-102, 135-138; Ex 32 page 20, 31-32.

On one occasion the defendant took B.C. for an overnight visit at the house he was house-sitting in Kirkland. B.C. and the defendant were alone that night. While there the defendant suggested that they use the hot tub. They were both wearing swimming suits, but at one point B.C. asked if she could go skinning dipping. The defendant said he could not but that she could. B.C. took off the bottom part of her swimming suit. The defendant told B.C. to get out of the hot tub because he wanted to show her something about sex. B.C. went into the bedroom where she dried off and put on a large shirt and underpants. The defendant came in and told her to take her underpants off and get on the bed. B.C. said she did not want to look, so the defendant put a towel over her face. He then put his hands on her thighs and

raised B.C.'s legs into the "birthing position." After awhile the defendant took the towel off her eyes. He formed a circle with the fingers of his right hand and put his left forefinger through the circle. The defendant told B.C. that she could not tell anyone, or he would go to jail. 4 RP 24- 40.

B.C. became curious, and asked to see what an adult penis looked like. The defendant then proposed to take a shower and pretend not to see when B.C. opened the shower curtain. When B.C. opened the shower curtain the defendant did not pretend not to see. Instead he held his penis and scrotum and began explaining to her those body parts and their functions. 4 RP 41-46.

B.C. did not tell anyone what had happened until about one month later in June 2008. At that time she told her mother what the defendant had done. A report was made to the police who arranged an interview for B.C. Detective Finkle then contacted the defendant who agreed to an interview. The defendant admitted that he had been in the hot tub and the shower. He also stated that he had a conversation with B.C. on the bed about sex wherein the defendant claimed B.C. asked him for a sexual experience. 4 RP 48-50; 5 RP 21-22, 26-27, 36, 139-141.

After the interview with the defendant Detective Finkle contacted I.C. I.C. was afraid to tell the detective anything, and she did not know anything had happened to B.C. I.C. denied anything inappropriate had happened with the defendant at that time. 4 RP 104, 5 RP 39-43.

After the detective left, I.C. asked her mother why the officer had been there. Ms. Gonzales explained that the defendant had done something inappropriate with B.C., but did not give any details. In January 2009 I.C. came to her mother crying, and admitted that she had lied to the detective. As a result Ms. Gonzales made a second report to police. 4 RP 104-105; 5 RP 48, 152.

I.C. was interviewed by police in January 2009 and again in December 2009. She gave some details about the sexual abuse in January, but gave more details in the subsequent interview in December. Ex. 32, 33. I.C. also was examined by Dr. Sugar. I.C. gave Dr. Sugar some details about the sexual assaults with the defendant. Dr. Sugar then conducted a physical exam, which revealed no injuries to I.C.'s genitals. 4 RP 133-136, 141.

Detective Finkle contacted the defendant a second time after the first interview with I.C. The detective asked the defendant if he

had any sexual encounters or demonstrations with I.C. The defendant responded, "Not that I remember. Let me think about that, no, I didn't." 5 RP 54.

III. ARGUMENT

A. THE DEFENDANT WAIVED REVIEW OF THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF OTHER SEXUAL MISCONDUCT.

The defendant was charged with three counts of Rape of a Child First Degree and one count of Child Molestation First Degree. All counts alleged I.C. as the victim of those crimes. 1 CP 49-50.

Pretrial the State sought to admit evidence of the contact between B.C. and the defendant on the night she stayed with him at the house in Kirkland. The evidence was offered under ER 404(b) as a common scheme or plan, and under RCW 10.58.090. 2 CP 61-96. Defense counsel stated that he would defer to the court's judgment on that issue. 1 RP 3.

The trial judge considered the State's arguments, as well as the forensic interviews with B.C. and I.C. and the police reports containing the defendant's admissions. 1 RP 20; 3 CP 97-296; 4 CP 297-343¹. The Court concluded that there were sufficient similarities between the acts involving B.C. and I.C. to constitute a

common scheme or plan. The Court also found that the probative value outweighed the prejudice to the defendant. 1 RP 20-23. The court also reviewed the eight factors for admissibility under RCW 10.58.090 and concluded the evidence was admissible pursuant to that statute as well. 1 RP 24-26.

The defendant now challenges the court's decision to introduce that evidence. The defendant's failure to object waived the issue for review on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

A party may raise an issue involving manifest error affecting a constitutional right. RAP 2.5(1)(3). The defendant may not raise the issue of admissibility under ER 404(b) because it does not raise an issue of constitutional magnitude. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

To the extent the defendant's challenge relates to the admission of evidence pursuant to RCW 10.58.090 the defendant does raise an issue of constitutional magnitude. State v. Gresham, 173 Wn.2d 405, 269 (2012). However, it is not sufficient that the

¹ 3 CP 299-296 and 4 CP 297-343 are transcripts of interviews with I.C. that were later admitted as Ex. 32 and 33 at trial. 4 RP 198-204.

issue raised involve a constitutional question. The claimed error must also be truly manifest. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). To be manifest the defendant must show how the alleged error actually affected his rights at trial. Id. at 926-27.

As discussed below, the evidence was properly admitted under ER 404(b). For that reason the defendant does not show that he was actually prejudiced when the court admitted the evidence on the alternative statutory basis. Gresham, 173 Wn.2d at 419 (holding admission under the rule was dispositive, even though the defendant also challenged the evidence under the statute.) The Court should decline to review the claim that the court erroneously admitted the evidence pursuant to the statute.

B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The defendant argues he is entitled to a new trial on the basis that his trial counsel rendered ineffective assistance of counsel when he did not object to evidence of his misconduct with B.C. Ineffective assistance of counsel is an issue of constitutional magnitude which may be raised for the first time on appeal. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

A claim of ineffective assistance of counsel requires the defendant to show both that counsel performed deficiently, and that as a result he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 8 L.Ed.2d 674 (1984). The claim cannot be sustained if either prong is not established. State v. O'Connell, 137 Wn. App. 81, 92, 152 P.3d 349, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Judicial scrutiny of counsel's performance is highly deferential. Strickland, 466 U.S. at 689. Counsel performs deficiently if his conduct falls below an objective standard of reasonableness. Id. at 688, State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Whether counsel acted reasonably is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). The Court strongly presumes counsel's performance was reasonable. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). If counsel's actions were strategic or go to his theory of the case and were reasonable under the circumstances, then the defendant has not shown deficient performance. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994), Grier, 171 Wn.2d at 33-34.

Here the decision to not object to evidence involving B.C. was a reasonable trial strategy. Defense counsel sought to attack I.C.'s credibility by examining the timing and substance of her disclosures.

The evidence showed that I.C. affirmatively told the detective nothing had happened to her when B.C. first disclosed. 5 RP 42. I.C. made no disclosures until five or six months later. 4 RP 109-10, Ex. 32. She made more complete disclosures about one year after the first forensic interview. Ex. 33.

Counsel questioned I.C. about whether she told the forensic interview anything different between the first and second interview. 4 RP 112, 196-97. Counsel discussed specific differences between the two interviews with I.C., and then offered transcripts of the two interviews into evidence. 4 RP 198-204, Ex. 32, 33. Counsel questioned I.C. about her relationship with B.C. and whether she discussed the allegations with her. 4 RP 204-08. The remainder of counsel's questions revolved around determining what details I.C. could remember regarding specific instances. 4 RP 208-215.

In closing counsel argued that I.C. was not credible based on the timing and content of her disclosures. Counsel suggested that I.C.'s later disclosures were the result of a desire to protect and

support her sister B.C. 6 RP 53-54. He then focused on the inconsistencies between her first statement to the detective, her two forensic interviews, and her trial testimony. 6 RP 52, 58-68.

Under all of the circumstances the defense attorney's decision to leave the question to the court's discretion without lodging an objection was a reasonable trial strategy. If the court admitted evidence B.C. had been victimized by the defendant it would bolster the defense theory that I.C.'s disclosures were the result of her feelings toward B.C., and not because she had been victimized by the defendant. Since I.C. had previously been close to the defendant a jury could likely believe that she was telling the truth when she testified about the sexual abuse unless there was some evidence of another motive for her claims. Alternatively, if the court suppressed the evidence the defense could still argue I.C. had made inconsistent statements and therefore was not credible. The defendant fails to show that his trial counsel performed deficiently when he did not object to the evidence in question because that was a reasonable strategic decision under the circumstance of the case.

Nor does the defendant establish that he was actually prejudiced by counsel's decision. Where there is no affirmative

evidence that the trial court would have granted a motion to suppress evidence if one had been made, the defendant fails to establish actual prejudice. State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995). As shown below, the trial court had a tenable basis on which to permit the evidence related to B.C. under ER 404(b). Because the defendant fails to establish either prong of the ineffective assistance of counsel analysis he is not entitled to a new trial on that basis.

C. EVIDENCE OF UNCHARGED CONDUCT WAS PROPERLY ADMISSIBLE UNDER ER 404(B) FOR THE PURPOSE OF SHOWING COMMON SCHEME OR PLAN.

ER 404(b) prohibits admission of evidence designed simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). However, "it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case." Id. Evidence of a prior crime, wrong, or act may be admitted for some other purpose, such as showing a person's common scheme or plan to commit a particular crime. Id. at 853.

In order to admit evidence under this exception the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a

defense, and (4) more probative than prejudicial.” State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) quoting Lough, 125 Wn.2d at 852.

The trial court found the prior acts against B.C. were proved by a preponderance of the evidence, relying on her forensic interview. 1 RP 22; 3 CP 178-228. The defendant does not challenge this finding. BOA at 15. He does challenge the court’s findings that there was sufficient evidence to establish a common scheme or plan, and that the evidence was more probative than prejudicial.

The trial court applied the framework for consideration of this issue articulated in Lough and DeVincintis. The decision to admit evidence of acts against B.C. should therefore be reviewed for an abuse of discretion. DeVincintis, 150 Wn.2d at 17. An abuse of discretion occurs when the court’s decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. There Were Sufficient Similarities Between The Acts Involving B.C. And Those Involving I.C. To Establish A Common Plan To Have Sexual Contact With Young Girls.

When considering whether evidence is admissible as a common design or plan the court focuses on whether there are similar features to those acts that can naturally be explained as a general plan which is manifested in both the charged conduct and other bad acts. Lough, 125 Wn.2d at 860. The acts at issue need not be identical; it is sufficient if they demonstrate a design to commit an offense. State v. Kennealy, 151 Wn. App. 861, 888, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012, 227 P.3d 852 (2010). See also, Gresham, 173 Wn.2d at 422-23.

The Court found sufficient similarity between the defendant's charged conduct and his prior bad acts to justify admitting evidence of other acts in DeVincentis. There the defendant got to know each victim through a safe channel. In the prior case it was through his daughter. In the charged case it was through a neighbor. In each case the defendant frequently wore a g-string or bikini underpants in the victim's presence before he began sexually abusing her. The trial court found that conduct was designed to reduce the child's natural discomfort to his sexual behavior. DeVincentis, 150 Wn.2d at 22.

The Court also found evidence of uncharged acts were admissible to establish a common scheme or plan in State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007), review denied, 163 Wn.2d 1014 (2008). There the defendant was in a position of authority over both victims, as either the father or father figure for each girl. The defendant isolated each girl while abusing her. Each girl was forced to perform similar acts, such as posing for nude photographs, and watching pornography. Id. at 505.

In Gresham the Court found sufficient similarity to admit evidence of uncharged acts when the abuse of the charged victim and two of the uncharged victims occurred in the context of an out of town trip. The defendant molested each girl at night when other adults were asleep. Gresham, 173 Wn.2d at 422-23. The Court found no abuse of discretion in admitting evidence of two of the defendant's other uncharged victims even though the abuse did not occur in the context of a trip, but where the defendant isolated each victim in bedroom in order to perpetrate the molestation or rape. Id. at 415, 423.

Like the defendant here, the defendant in Kennealy pointed to factual differences between the cases at issue to argue that the uncharged cases should not have been admitted as evidence of a

common scheme or plan. The Court rejected the argument, focusing on the similarities between the cases. Those similarities included evidence that the defendant told both the victim and some of the other uncharged victims not to tell anyone what had happened. The acts were committed in a place, or in a way, that went unnoticed by other persons. The acts were all committed on children that he had been in proximity with, either because he was related to them or because they lived near him. The acts were committed only after the children all knew him and trusted him, either because of his family relationship or because he gave them gifts. All victims were within an age range of 5 to 12 years. And the acts were all committed in a similar way. Kennealy, 151 Wn. App. at 889-890.

The facts which the Court found justified the trial court's decision to admit evidence on the basis of common scheme or plan in Kennealy are very similar to the facts in this case. Here the record shows that the acts were committed on two young girls in the same approximate age range; I.C. had been between 6 and 10 years old and B.C. was 9 or 10 years old at the time. 3 CP 117, 180, 239; 4 CP 317, 338; 4 RP 48, 192; 5 RP 11, 14, 139, 141. In each case the acts occurred at a time and place where no one

would be aware that it was happening. 3 CP 195, 246-247, 253, 256,261, 265, 273, 277-278; 4 CP 313, 315-317. The defendant was a trusted family member, who enjoyed a close relationship with the girl's and their mother and other siblings. All of the children including I.C. and B.C. wanted to spend time with the defendant. 5 RP 106, 136. The defendant had given each girl gifts. 3 CP 161. The defendant used each girl's curiosity as a springboard to expose himself and talk to the girls about sex. 3 CP 195-205, 209-210;4 CP 317-318, 321. On at least one occasion for each girl he used a blindfold to lessen the child's anxiety resulting from his acts. 3 CP 204, 266-267. The defendant told each girl that she should not tell anyone what had transpired between him and the girl or he would go to jail. 3 CP 200, 276; 4 CP 313. Given these similarities the trial court properly considered the defendant's conduct with both girls as part of a plan to groom children so that they would become compliant and agree to sexual contact with him.

The defendant points out several differences between what the defendant did with each girl. He first points out that only one incident occurred with B.C. while there were numerous incidents involving I.C. While the defendant did not touch B.C.'s genitals, I.C. was repeatedly raped and molested. BOA at 16. That should have

no bearing on the analysis. The defendant was careful to tell both children not to tell or he would go to jail or prison. Both children heeded his warning for a time. Arguably the defendant did not did not commit other offenses against B.C. because he lost the opportunity to do so when B.C. did not keep her promise not to tell.

The defendant also asserts the record does not support the trial court's finding that the defendant used sex education and the hot tub to groom the girls for sexual exploitation. BOA at 18. I.C. did state that the defendant started talking to her about the process of sex on several occasions starting when she was six years old. Some of those discussions occurred after I.C. got out of the shower and she questioned why the defendant stared at her while she dressed. 3 CP 252-253, 255-256, 258, 261; 4 CP 317. At the Kirkland house the defendant permitted B.C. to "skinny dip" while they were alone in the hot tub. He then gave her a detailed demonstration about sexual organs and how the birthing process worked. 4 RP 25, 29; 3 CP 197-205, 208-213, 219-221. The defendant confirmed B.C.'s account of their discussion and his demonstrations regarding sex. 3 CP 102, 113, 121. This record supports the trial court's conclusion that defendant's plan to exploit children in both cases involved using circumstances where a child

would normally disrobe and using the child's curiosity about the body to start talking about sex as a segue to further sexual activity. 1 RP 21-22.

The defendant also points out that I.C. had a closer relationship to the defendant than B.C., and received many gifts from him that B.C. did not receive. BOA at 16-17. However the defendant did give B.C. gifts as well. 3 CP 161. The defendant spent time with all of the children when he lived with the girls' family. He had a relationship with all of the children, although he was closer to I.C. than the other children. When the defendant spent more time with the I.C. the other children felt bad because they loved their uncle also. 5 RP 112-113, 136, 3 CP 249, 260-261.

The defendant's challenge rests on the premise that in order to meet the criteria for admission as common scheme or plan the similarities between the two acts must be identical or nearly identical. The Court has rejected that premise in Kennealy and Gresham. Kennealy 151 Wn. App. 888, Gresham, 173 Wn.2d at 422-23. As discussed above, there was similar grooming behavior with both girls. The trial court therefore had a tenable basis on

which to find the defendant's conduct in regards to both B.C. and I.C. constituted a common plan to sexually exploit young girls.

2. The Probative Value Of The Challenged Evidence Outweighed The Danger Of Unfair Prejudice.

Evidence that is relevant to show a common design or plan to commit a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403, Kennealy, 151 Wn. App. at 890. The court's decision that evidence is more probative than prejudicial is reviewed for an abuse of discretion. Sexsmith, 138 Wn. App. at 506.

Courts have found evidence of prior sexual conduct is probative in cases where the only proof of sexual assault comes from the testimony of the child victim. Id. This is due to the secrecy surrounding the crime, the victim's vulnerability, the frequent absence of any physical evidence, public opprobrium connected to such an accusation, a victim's unwillingness to testify, and a lack of confidence that the jury will be able to determine a child witnesses' credibility. Kennealy, 151 Wn. App. at 890, State v. Krause, 82 Wn App. 688, 696, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007, 932 P.2d 644 (1997). The court found no abuse of discretion when the trial court found the probative value

outweighed the danger of unfair prejudice in both Sexsmith and Kennealy Sexsmith, 138 Wn. App. at 506, Kennealy, 151 Wn. App. at 890.

The court here found evidence involving the defendant's acts with B.C. was prejudicial, but that prejudice was not outweighed by its probative value. The court relied on the relationship of trust between the defendant and his victims which he exploited, the victims' vulnerability, and that the case came down to the credibility of the witnesses. 1 RP 23. These factors are supported by the record. The court did not abuse its discretion when it concluded that the evidence should not be excluded on that basis.

The defendant argues the court erred in concluding the proposed evidence involving B.C. was more probative than prejudicial. He suggests that the sheer volume of evidence involving B.C. was disproportionate to the evidence involving I.C. noting the prosecutor stated in closing that B.C.'s allegations constituted 70% of the State's case. He argues the evidence relating to B.C. had the capacity to make it hard to keep the relevance of evidence relating to I.C. in perspective. BOA at 21.

The prosecutor's statement is taken out of context. It was in response to defense counsel claiming 70% of evidence the jury

heard happened in King County, and was not the subject of what the jury was asked to decide. 6 RP 55-56. The events involving B.C. did occur in King County. However, the record does not support the statement that the majority of the evidence involved events occurring in King rather than Snohomish County. While B.C. testified to one incident, the jury heard about numerous sexual assaults on I.C. that happened in three different places over a period of four years. They involved oral, vaginal, and anal intercourse, as well as molestation. The evidence relating to the defendant's conduct with B.C. would support a charge of communicating with a minor for immoral purposes, but not the more serious charges of child rape or molestation. Contrary to the defendant's claim, the evidence involving I.C. was far more likely to eclipse the evidence involving B.C.

The defendant also states that this was a classic credibility case. But as the Court has recognized that is the very circumstance in which this type of evidence becomes highly probative. Sexsmith, 138 Wn. App. at 506, Krause, 82 Wn. App. at 696.

In Krause this Court found no abuse of discretion when it permitted evidence the defendant admitted to molesting other

children at trial where the defendant was accused of raping and molesting two young children. Krause, 82 Wn. App. at 697. This Court reasoned that the necessity for that kind of evidence in child sex abuse cases rendered the trial court's decision proper, even though the child victims were able to recall and relate the incidents in question fairly well. Id.

Finally, the court did give a limiting instruction. The jury was specifically told that evidence of the uncharged offense was not sufficient to prove the defendant guilty of any crime that he had been charged with. 1 CP 31. In closing argument the prosecutor stated the evidence was introduced to show the defendant's design "to talk to children about sex, to get them to be familiar with this subject of sex, so that he could then go ahead and perpetrate this horrendous crime on them." 6 RP 25-26.

Under all the circumstances of this case the court's decision to admit evidence regarding the defendant's conduct with B.C. was not an abuse of discretion.

D. THE DEFENDANT WAIVED REVIEW OF THE INSTRUCTION REGARDING PRIOR BAD ACTS EVIDENCE WHEN HE DID NOT OBJECT TO THE STATE'S PROPOSED INSTRUCTION AND HE DID NOT PROPOSE HIS OWN INSTRUCTION.

The defendant did not object to the State's proposed instruction at trial and he did not propose another limiting instruction. 6 RP 7-8. That instruction was substantially identical to the one given in Scherner. State v. Scherner, 153 Wn. App. 621, 658-59, 225 P.3d 248 (2009). It stated:

Evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information.

1 CP 31.

The defendant now argues that he is entitled to a new trial on the basis that this instruction is erroneous. The Court should reject that argument.

A defendant who does not object to a jury instruction waives any claim of error resulting from the instruction unless the claimed error constitutes a manifest error affecting a constitutional right. State v. Morgan, 163 Wn. App. 341, 349, 261 P.3d 167 (2011). The defendant does not identify what constitutional right is

implicated by this instruction. In addition, no manifest error is evident. Each sentence in the instruction is a correct statement of the law.

The defendant argues that the Supreme Court found this instruction was inadequate in Gresham. BOA at 25. The Court was not addressing this particular instruction, but an erroneous instruction proposed by the defense. “The proposed instruction would have informed the jury that evidence admitted to demonstrate a common scheme or plan could not be considered “as evidence that the defendant’s conduct in this case conformed with the conduct alleged in the prior allegation.” Gresham, 173 Wn.2d at 424. This instruction was erroneous because conformity between the charged and uncharged acts was what made the evidence relevant. Id. The Court did not discuss the instruction that this Court referenced in Scherner. The Court’s silence in regard to the instruction given in Scherner is not an indictment of that instruction.

The defendant acknowledges that he did not object to the instruction in this case, but argues that he is excused from that requirement because the court had a duty to correctly instruct the jury, notwithstanding the defense attorney’s failure to propose a

correct instruction. BOA at 26. That duty arises when in the context of ER 404(b) evidence a criminal defendant requests a limiting instruction. Gresham, 173 Wn.2d at 424. The instruction should state what the trial court determined the purpose for which the evidence was found admissible and that the evidence should be used for no other purpose. Id. quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950). But the court has no duty to give an ER 404(b) limiting instruction in the absence of a request by the defendant. State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Since the defendant did not request a limiting instruction he should not be able to complain that the one given was wrong.

Further, the jury was informed of the purpose for which the evidence involving B.C. was admitted. The prosecutor argued:

The testimony of [B.C] was given to you for only one reason, because keep in mind that the charges that you are asked to deliberate upon relates to [I.C.], because we are dealing with charges that occurred in Snohomish County.

But we put in the evidence of [B.C] for you, so you could see this common scheme or plan at work. So when [I.C] says to you when I was six years old he talked to me about sex, told me about sex, told me what happens when a man and a woman have sex, taught me about sex, you can also relate that to the testimony you heard from [B.C.] and the defendant's own words.

6 RP 26.

Thus the jury was actually told essentially what the defendant argues the trial court should have told them in an instruction. If error occurred, it was ameliorated by the prosecutor's argument.

What the defendant seeks is a windfall. He asks the Court to excuse him from the obligation to propose his own limiting instruction and his obligation to object to the State's proposed instruction in order to be afforded a new trial on the basis that the limiting instruction proposed by the State was inadequate where he did not object to that instruction at trial. Where the instruction was a correct statement of the law, even though it did not follow the formula noted in Gresham, the defendant should not be granted relief.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on March 29, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 MAR 30 AM 11:00

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

THE STATE OF WASHINGTON,

Respondent,

v.

BRET W. GONZALES,

Appellant.

No. 67333-5-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29th day of March, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 29th day of March, 2012.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit