No._____

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ABLE MERINO TAPIA,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 87081-5-I (58425-5-II)
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 21-1-03171-2
The Honorable Stanley Rumbaugh, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Able Merino Tapia, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 1, case number 87081-5, which was filed on January 27, 2025. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Able Merino Tapia's "intent" where his intent was not materially relevant in the case?
2. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing Able Merino Tapia's "motive" where the only relevance of the

evidence to the issue of motive was under a forbidden theory of propensity?

3. Did the trial court err in admitting ER 404(b) evidence for the purpose of showing the alleged victim's "state of mind for [her] delayed disclosures" where there was no established connection between the other misconduct and her state of mind or delayed disclosure?

4. Where prior misconduct evidence was not admitted for a proper purpose under ER 404(b), was the admission error because it was merely propensity evidence?

5. Does the improper admission of prior misconduct evidence require reversal because the erroneously admitted testimony was highly inflammatory and unduly prejudicial?

IV. STATEMENT OF THE CASE

A.R. lives with her mother and three sisters at the

Sunrise Apartment Complex in Tacoma. (RP5 305, 306; RP6 406)[1] Able Merino Tapia lived in the same complex with his wife and two young sons for part of 2017 and 2018. (RP6 409, 433; RP8 580-81) The two families met at their church, and A.R.'s family occasionally went to Merino Tapia's apartment to socialize. (RP5 309, 310, 393. 394; RP6 409-10; RP8 585592-93) Merino Tapia's wife, Ruth Ortega Mejia, and A.R.'s mother, Antonieta Bernal-Tapia, generally talked together in the kitchen while the children played together in the living room. (RP5 311, 395; RP6 411) Merino Tapia was usually at the apartment during these visits. (RP6 411; RP8 586)

Ortega Mejia and Merino Tapia went to Bernal-Tapia's apartment one day, and Ortega Mejia asked if she could pay A.R. to tutor one of their sons and help him with

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[1] The transcript volumes labeled with Roman numerals I thru XVII will be referred to by their corresponding Arabic numeral (1 thru 17). The remaining volumes will be referred to by the date of the proceeding.

his homework. (RP5 311, RP6 412; RP8 595) So A.R. went to Merino Tapia's apartment without her family a few times for the purpose of tutoring. (RP5 312, 395-96) But rather than helping with schoolwork, A.R. mostly just played with the boys. (RP5 312)

One afternoon, A.R. was playing outside with a friend near Merino Tapia's apartment. (RP5 325, 326) Merino Tapia called out to A.R. and asked her to come inside. (RP5 325) A.R. followed Merino Tapia into his living room. (RP5 326, 327) According to A.R., Merino Tapia crouched down, pulled down A.R.'s pants and underwear, and put his fingers into her vagina. (RP5 328-29, 330) She testified that this lasted "a while" and that it was painful. (RP5 331)

A.R. was about 10 years old at the time. (RP5 326) Even though her mother had previously spoken to A.R. about "good" and "bad" touch and had encouraged A.R. to share if anyone ever touched her in a "bad" way, A.R.

did not tell her mother or anyone else about this incident. (RP5 359-60; RP6 419) A.R. testified she did not tell because she was scared of how people would view her, and because Merino Tapia told her no one would believe her. (RP5 350, 351) But A.R. did tell her mother that she did not want to go to Merino Tapia's apartment anymore. (RP6 413) Merino Tapia and his family moved away later that year, and the two families did not keep in contact. (RP6 409, 413-14, 422, 433)

In August of 2021, as A.R.'s older sister Mitzy Vera-Bernal was preparing to return to college, A.R. told her the story about what had happened with Merino Tapia. (RP5 352, 397) Vera-Bernal told their mother, and together they called the police to make a report. (RP5 354-55, 371; RP6 398, 399, 414, 415) A.R. testified that she did not plan to tell her mother and did not expect that her disclosure to her sister would lead to a criminal case. (RP5 354-55, 371)

The State charged Merino Tapia with rape of a child in the first degree and child molestation in the first degree, both based on this single incident.[2] (CP 3-4, 140, 146, 182-83; RP8 606, 627, 631)

During pretrial motions, the prosecution asked the court to admit evidence of other misconduct by Merino Tapia towards A.R.: "two incidents where the defendant allegedly pulled A.R.'s pants and underwear down and masturbated while looking at the partially nude child without touching her." (CP 64-65) The State acknowledged that ER 404(b) prohibits admission of propensity evidence, but argued the court should admit evidence of these other acts to show motive and intent, to

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[2] The State also charged Merino Tapia with one additional count of child molestation against a separate alleged victim, B.C.G. (CP 3-4, 182-83) The trial court granted the defense's pretrial motion to sever this count from the trial on the two counts related to A.R. (03/15/23 RP 15-26; CP 67-68) A jury later acquitted Merino Tapia of this charge. (RP16 1234; CP 205-06, 207)

explain the delayed disclosure, and to rebut a claim of mistake or accident. (CP 12-30; 03/15/23 RP 5-8)

Defense counsel opposed admission of these incidents on the basis that they did not satisfy the rules associated with these proffered purposes, that they were relevant only for the improper purpose of demonstrating a propensity to commit sexual assault, and that their admission would be substantially more prejudicial than probative. (CP 39-44; 03/15/23 RP 16-24)

The trial court nevertheless admitted evidence of these prior acts to show Merino Tapia's motive, to explain A.R.'s "state[] of mind for [her] delayed disclosure[]," and to prove "intent by showing that [Merino Tapia's] purpose for the alleged touching of A.R.['s] intimate parts was done to gratify sexual desire." (CP 66; 03/15/23 RP26) The court concluded that the prejudice caused by the admission of this evidence would not be unfairly prejudicial. (CP 66-67; 03/15/23 RP 26)

A.R. testified about these two other incidents at trial. According to A.R., during one visit to Merino Tapia's apartment he told A.R. to go upstairs with him. (RP5 317) They stopped in the second floor hallway, where Merino Tapia pulled down her pants and underwear then masturbated himself while she stood against the wall. (RP5 317-21) A.R. also testified that one other time when her family visited his apartment, Merino Tapia took her to his bedroom and told her to get on her hands and knees. (RP5 344-45, 346) Then Merino Tapia stood behind her and masturbated himself. (RP5 347-49)

Child forensic interviewer Jennifer Schooler interviewed A.R. (RP7 539) A.R. disclosed incidents of sexual abuse to Schooler. (RP7 540-41) Schooler also testified that delayed disclosure by children of sexual abuse is very common and can happen for a variety of reasons. (RP7 533, 534)

Merino Tapia's wife testified that A.R. was only at

her apartment a few times. (RP8 587, 593, 595-96) She never noticed any inappropriate behavior by Merino Tapia towards A.R. (RP8 587-88) But she did see A.R. go up to Merino Tapia and hug him. (RP8 600)

The jury found Merino Tapia guilty on both counts. (RP8 672; CP 151-52) The trial court dismissed the lesser charge of child molestation so as not to violate Merino Tapia's double jeopardy protections. (RP8 674-75; CP 232, 234) The trial court imposed a low-end standard range sentence of 93 months to life, and waived all legal financial obligations. (RP17 1253, 1255; CP 233, 234-35, 237)

Merino Tapia timely appealed. (CP 252) The Court of Appeals affirmed Merino Tapia's conviction and sentence.

V. ARGUMENT AND AUTHORITIES

The issues raised by Merino Tapia's petition should be addressed by this Court because the Court of Appeals'

decision conflicts with settled case law of the Court of Appeals and this Court. RAP 13.4(b)(1) and (2).

Merino Tapia is entitled to a new trial because the court violated ER 404(b) and ER 403 by admitting highly prejudicial evidence of other misconduct demonstrating a propensity to commit sexual crimes against children. The Court of Appeals incorrectly concluded that this evidence was "relevant and admissible to establish motive and intent" (Opinion at 4)

A. ABSENT A SPECIFIC EXCEPTION, PROPENSITY EVIDENCE IS INADMISSIBLE.

ER 404(b) prohibits admission of "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." The same evidence, however, may be admitted for proper purposes that include but are not limited to "'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *State v. Gresham*,

173 Wn.2d 405, 420, 269 P.3d 207 (2012) (quoting ER 404(b)). For evidence of other misconduct to be admissible under ER 404(b),

> "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

Gresham, 173 Wn.2d at 421 (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The fourth step of the ER 404(b) analysis is consistent with ER 403, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" *See State v. Gunderson*, 181 Wn.2d 916, 923, 333 P.3d 1090 (2014). There is a heightened probability of prejudice in cases involving sex offenses. *Gresham*, 173 Wn.2d at 433. Thus, "an intelligent weighing of potential prejudice

against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Other misconduct evidence is presumed inadmissible and the court must resolve any doubt as to whether to admit the evidence in the defendant's favor. *State v. Fuller*, 169 Wn. App. 797, 829, 282 P.3d 126 (2012). A trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P. 3d 937 (2009). If the trial court interprets ER 404(b) correctly, the court reviews the decision to admit misconduct evidence for an abuse of discretion. *Fisher*, 165 Wn.2d at 745. A trial court abuses its discretion by failing to abide by the requirements of the evidentiary rule. *Fisher*, 165 Wn.2d at 745.

In admitting testimony of two other incidents of

sexual misconduct with A.R., the trial court erred in several respects. None of the three purposes the trial court relied on was a proper basis for admission, and the evidence was substantially more prejudicial than probative.

B. THE TESTIMONY WAS NOT ADMISSIBLE TO ESTABLISH MERINO TAPIA'S INTENT.

The Court of Appeals incorrectly found that, "while intent in general is not an element of the crimes charged, the specific intent toward A.R. was relevant to show planning and intent" (Opinion at 6) because intent was not a material issue in the case.

A trial court may not admit prior acts evidence to prove the defendant's intent or state of mind unless his mental state at the time of the alleged offense is relevant, and unless the prior acts shed light on his state of mind at the time of the charged offense. *State v. Acosta*, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). To admit

evidence of prior acts to prove intent, some logical theory–other than propensity–must connect the prior acts to intent, and intent must be an element of the charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). "The evidence should not be admitted to show intent ... if intent is of no consequence to the outcome of the action." *Saltarelli*, 98 Wn.2d at 363.

The State charged Merino Tapia with first degree rape of a child. (CP 3, 182) The elements of the crime are "sexual intercourse with another who is less than twelve years old and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). Intent is not an element of rape of a child in the first degree. *See Saltarelli*, 98 Wn.2d at 364-65. Therefore, Merino Tapia's intent was not at issue for this charge, and the evidence of uncharged misconduct was not admissible to prove his intent. *State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995) ("prior misconduct evidence was

improperly admitted for intent in this case because intent was not a disputed issue").

The State alternatively charged Merino Tapia with first degree child molestation. (CP 3-4, 182-83) The elements of the crime are "sexual contact with another who is less than twelve years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083. The term "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13).

Sexual gratification is not an element of child molestation in the first degree; rather, it is a definition that clarifies the meaning of the element "sexual contact." *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). However, although the crime of child molestation requires proof that the touching was done for the purpose of gratifying sexual desire, that does not mean intent is

always a material issue justifying the admission of prior bad act evidence.

Generally, intent is at issue only if the proof of intent is ambiguous, such as if the defendant admits touching the sexual or intimate parts of a child but claims the touching was because of mistake or accident. *See State v. Bowen*, 48 Wn. App. 187, 193-95, 738 P.2d 316 (1987)[3]; *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986). But here, the evidence was not admissible to demonstrate that the touching was not an accident or mistake because the defense was general denial (03/15/23 RP 19-20). *See Bowen*, 48 Wn. App. at 193-94 (in the absence of an assertion of a defense of accident or mistake, the State may not introduce such evidence to show the touching was not done by accident or mistake).

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[3] *Overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Furthermore, proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991); see also *Ramirez*, 46 Wn. App. at 226 ("[w]here an adult, unrelated male, with no caretaking function, is proven to have touched the 'sexual or intimate parts' of a little girl … the jury may infer from that proof that the touching was for the purpose of sexual gratification").

Therefore, intent was not a material issue in this case because proof of intent followed from the testimony regarding the alleged acts, and Merino Tapia did not assert a defense of accident or mistake. The charges were based on A.R.'s testimony that Merino Tapia touched her "private part" and inserted his fingers into her vagina for "a while." (RP5 329, 330, 331) There should be no question that such alleged acts, if performed, were

for the purpose of gratifying sexual desire. In fact, the prosecutor made this same argument in his closing statement: "What other purpose would he have to touch her in this way but for it being sexual, to gratify his sexual desire?" (RP8 639)

Intent was not a material issue justifying the admission of prior bad act evidence. It was error to admit A.R.'s testimony describing the two other incidents for the purpose of showing Merino Tapia's intent in touching A.R. was to gratify his sexual desire.

C. THE TESTIMONY WAS NOT ADMISSIBLE TO ESTABLISH MERINO TAPIA'S MOTIVE.

The other misconduct evidence was not admissible to prove motive because the only relevance of the evidence to the issue of motive was under a theory of propensity.

Motive is "[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." *Saltarelli*, 98

Wn.2d at 365 (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); and BLACK'S LAW DICTIONARY, p. 1164 (4th rev. ed. 1968)). Evidence of motive "can demonstrate an impulse, desire, or any other moving power which causes an individual to act." *Powell*, 126 Wn.2d at 259.

For example, in *State v. Hieb*, 39 Wn. App. 273, 693 P.2d 145 (1984),[4] Division 1 held that in a prosecution for the murder of a child, evidence that the defendant had injured the child on other occasions was inadmissible to show motive. The court explained:

> It is difficult to ascertain how the prior assaults on [the child] could be a motive or inducement for Hieb's later assault on [the child]. There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to Hieb's motive for the last assault. The

[4] *Reversed on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986).

evidence was not admissible on this basis.

Hieb, 39 Wn. App. at 282-83.

Similarly, in *Saltarelli*, the Court found that evidence of a prior attempted rape of another woman several years prior was improperly admitted to show the defendant's motive for the current charge of second degree rape. 98 Wn.2d at 365. The Court first noted that "[i]t is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later." 98 Wn.2d at 365. But even if there was some marginal relevance, the Court found that its probative value would be slight because "[t]he only issue was whether the victim consented to intercourse with defendant; in the present case, defendant's motive was irrelevant to this issue." 98 Wn.2d at 365.

Likewise, the reason or motivation for why Merino Tapia committed the charged act is irrelevant. But even if his motive is marginally relevant, it is unclear how the

alleged prior acts induced or tempted Merino Tapia to commit the acts giving rise to the charges here. Instead, the only relevance of the prior acts is to suggest that because he acted in this manner before he must have done so again, i.e., that he has a propensity to rape or molest A.R. But that is not a proper use of prior acts evidence. ER 404(b). Thus, the evidence was not relevant to show Merino Tapia's motive and was improperly admitted for this purpose. *See Saltarelli*, 98 Wn.2d at 365.

In the absence of an explanation of how the prior misconduct served as a motive or inducement for the current crime, the prior act evidence is inadmissible to prove motive. *Saltarelli*, 98 Wn.2d at 365. It was error to admit A.R.'s testimony describing the two other incidents for the purpose of showing Merino Tapia's motive.

D. THE TESTIMONY WAS NOT RELEVANT OR PROBATIVE OF A.R.'S STATE OF MIND.

The other misconduct evidence was not admissible to prove A.R.'s state of mind for her delayed disclosure because there was no connection demonstrated between the other acts of sexual misconduct and A.R.'s delayed disclosure.

In child molestation and sexual abuse cases, courts have allowed evidence of prior bad acts by the defendant against the victim to explain the victim's delay in reporting sexual abuse. *See State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (1991); *Fisher*, 165 Wn.2d at 745; *State v. Baker*, 162 Wn. App. 468, 474-75, 259 P.3d 270 (2011). "In analyzing the admissibility of [other misconduct] to explain a victim's state of mind, delay in reporting, or credibility under ER 404(b), courts have focused on the relevance factor of the ER 404(b) test for admissibility." *Fisher*, 165 Wn.2d at 760 (Madsen, J.,

concurring) (citing *Wilson*, 60 Wn. App. at 890). When admitted to explain delay, "the relevance standard under ER 404(b) requires that the evidence … demonstrate the [other misconduct] caused the sexual assault victim hesitation to report the sexual abuse." *Fisher*, 165 Wn.2d at 760 (Madsen, J., concurring)

The State made no such demonstration here. A.R. did not explain how the two other incidents impacted her state of mind or caused her to delay disclosure of the charged incident. No connection was made by the prosecutor for why these two other incidents caused A.R. to delay her disclosure. And the defense did not make the delayed disclosure an issue at trial or use the delay to attack A.R.'s credibility. A.R.'s testimony regarding the other two incidents of misconduct therefore lacked any relevance or probative value.

E. THE ERRONEOUSLY ADMITTED TESTIMONY WAS HIGHLY INFLAMMATORY AND UNDULY PREJUDICIAL.

The improperly admitted evidence of Merino Tapia's other misconduct with A.R. was highly inflammatory and likely left a strong negative impression on the jury. The evidence characterized Merino Tapia as "a person of abnormal bent, driven by biological inclination," and thus the jury likely concluded based on that evidence alone, "that he must be guilty, he could not help but be otherwise." *Saltarelli*, 98 Wn.2d at 363-64.

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Gresham*, 173 Wn.2d at 433. Evidence of other sexual misconduct is particularly inflammatory and prejudicial in a prosecution for a sex offense. The Washington Supreme Court has not hesitated to reverse a sex offense

conviction where evidence of other sexual misconduct was erroneously admitted at trial. *See, e. g., Gresham*, 173 Wn. 2d at 433-34; *Sutherby*, 165 Wn.2d 870, 887, 204 P.3d 916 (2009); *Saltarelli*, 98 Wn.2d at 367.

For example, in *Gresham*, a prosecution for child molestation, the trial court erroneously admitted evidence that the defendant had previously molested another child. 173 Wn.2d 405. The untainted evidence consisted of the alleged victim's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. 173 Wn.2d at 433-34. The Supreme Court held that, although this evidence was sufficient for the jury to convict, there was nonetheless a reasonable probability that absent the highly prejudicial other misconduct evidence, the jury's verdict would have been materially affected. 173 Wn.2d at 433-34.

In *Sutherby*, the defendant was convicted of child

rape and child molestation for abusing his granddaughter. 165 Wn.2d at 874-85. He was also convicted of possession of child pornography for possessing images of children unrelated to his granddaughter. The Supreme Court held that defense counsel was ineffective for failing to move to sever the rape and molestation counts from the child pornography counts. 165 Wn.2d at 884-87. Counsel's ineffective assistance required reversal because, had the charges been severed and the evidence of child pornography not been admitted at a separate trial on the rape and molestation counts, there was a reasonable probability that the outcome of that separate trial would have been different. 165 Wn.2d at 887; *see also Saltarelli*, 98 Wn.2d at 367 (conviction for first degree rape reversed where trial court erroneously admitted evidence of defendant's prior sexual assault against a different woman).

Just as in *Gresham*, *Sutherby*, and *Saltarelli*, the

erroneous admission of evidence of other sexual misconduct was not harmless in this case. A.R.'s detailed description of the other incidents was highly inflammatory. The incidents portrayed Merino Tapia as a deviant predator. They likely offended every member of the jury and predisposed them to judge him harshly. It is unlikely that the jury was able to put the statements out of their minds or enter a verdict that was unaffected by the erroneously admitted evidence. Thus, there is a reasonable probability that, absent the improper evidence, the outcome of the trial would have been materially affected.

The remaining, untainted evidence consisted principally of A.R.'s testimony. If the jury had any doubts about A.R.'s credibility, the propensity evidence suggesting Merino Tapia had a predisposition to molest children likely influenced the jury to resolve those doubts against him. The erroneous admission of the evidence in

violation of ER 404(b) was not harmless and his conviction must be reversed.

VI. CONCLUSION

The trial court erroneously admitted propensity evidence in violation of ER 404(b) and ER 403 and this error deprived Merino Tapia of a fair trial. This Court should accept review, and reverse Merino Tapia's conviction.

I hereby certify that this document was produced using 14-point Arial text and contains 4,159 words excluding the parts of the document exempted from the word count according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: February 19, 2025

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APPENDIX

COURT OF APPEALS OPINION IN STATE V. MERINO TAPIA, 87081-5

FILED
1/27/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ABLE MERINO TAPIA, AKA ABEL MERINO TAPIA, Appellant.	DIVISION ONE No. 87081-5-I UNPUBLISHED OPINION

PER CURIAM — A jury convicted Able Merino Tapia of child molestation in the first degree and rape of a child in the first degree. He challenges the trial court's admission of two uncharged acts of sexual misconduct involving the victim, A.R. We hold both that the evidence of the prior acts was properly admitted to prove motive and intent and that Merino Tapia does not establish that the prejudice to him resulting from the admission of the evidence outweighed the evidence's substantial probative value. Therefore, we affirm.

I. BACKGROUND

A.R., her mother, and her sisters met Merino Tapia and his family through their church. In 2017, when A.R. was approximately 10 years old,[1] Merino Tapia, his wife, and two sons moved into the apartment complex in which A.R. and her family lived. Occasionally, A.R.'s family visited Merino Tapia's apartment, and A.R. and her sisters played with Merino Tapia's sons while their mothers prayed,

[1] A.R. was born December 31, 2006.

studied, or socialized. A.R. also visited the apartment by herself after Merino Tapia and his wife asked for her to help one of their sons with his homework. Merino Tapia was present in the apartment during these visits.

Merino Tapia and his family moved away from the apartment complex in 2018. The two families did not keep in contact.

In August 2021, A.R. disclosed to her older sister that she had been sexually assaulted by Merino Tapia. A.R. and her sister, together, informed their mother. A.R.'s sister then called the police to report the allegations.

The State charged Merino Tapia with one count each of rape of a child in the first degree and child molestation in the first degree.[2] The charges resulted from a single incident that occurred when A.R. was about 10 years old. She was playing outside with a friend when Merino Tapia called her to come inside his apartment. When they were in the living room, Merino Tapia crouched down, pulled down A.R.'s pants and underwear, and put his fingers into her vagina.

Prior to trial, the State filed a motion to admit evidence of two additional acts of sexual misconduct perpetrated on A.R. by Merino Tapia. The State sought to admit the evidence of the two uncharged acts to show motive, res gestae, intent, and, potentially, absence of accident or mistake if the issue arose at trial. The motion included an offer of proof of the following two incidents as disclosed by A.R. during a forensic interview.

[2] Merino Tapia was also charged with one count of child molestation in the first degree for a separate incident involving a different victim. Pursuant to a defense motion, the trial court severed this count from the two counts pertaining to A.R. A jury subsequently acquitted Merino Tapia of this charge.

In the first incident, A.R. described that she was playing with the other children downstairs when Merino Tapia motioned for her and then led her upstairs to a hallway near his room. Merino Tapia pulled her pants and underwear down and crouched down to be at her height. According to A.R., Merino Tapia "started touching 'his part,' and white stuff came out."

The second incident occurred during one of the times that A.R. and her mother visited Merino Tapia's apartment. While A.R.'s mother and Merino Tapia's wife were downstairs, Merino Tapia took A.R. to his room. He told A.R. to get into a position "like a dog," and pulled her pants down. Merino Tapia "got behind her on his knees and began touching himself until white stuff came out." The "white stuff" soiled A.R.'s clothing, and Merino Tapia told her to clean it up.

After hearing argument from the parties, the trial court determined that the evidence of the prior acts was admissible.

> [W]ith regard to the 404(b), it does appear to me by a preponderance of the evidence these prior events occurred. It does appear to me as though there is a reason, other than propensity, motive, res gestae. There is a need to show a purpose here for the acts that is more than innocent. Sexual gratification is an element. Sexual motivation is certainly a purpose that it appears to me as though it makes this evidence relevant, and it appears to me as though the probative value may in terms of explaining how children react to these sorts of events in the way of disclosure or in the way of other behaviors outweighs any prejudice, and there is prejudice no question, but I don't believe it's unfair prejudice.

A.R. testified as to the details of the two uncharged acts during trial. The trial court issued an instruction to the jury that the evidence of the uncharged acts

was to be considered "only for the purpose of the defendant's motive, intent, or A.R.'s state of mind for her delayed disclosure of the alleged abuse."

The jury found Merino Tapia guilty as charged. The trial court imposed a standard range indeterminate sentence of 93 months to life.

Merino Tapia appeals.

II. ANALYSIS

Merino Tapia contends that the trial court erred in admitting testimony describing two uncharged acts involving A.R. According to Merino Tapia, the evidence was not admissible to establish intent, motive, or A.R.'s state of mind. We disagree. The evidence was relevant and admissible to establish motive and intent.

"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." ER 404(b). However, such evidence may be admissible for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Admission of evidence pursuant to ER 404(b) requires the application of a four-factor test. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

> "[T]he trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

Gresham, 173 Wn.2d at 421 (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

We review a trial court's interpretation of ER 404(b) de novo as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court correctly interpreted the rule, we review the decision to admit or exclude the evidence for abuse of discretion. Fisher, 165 Wn.2d at 745. "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Improper admission of evidence may be harmless, requiring reversal only if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Concerning admission of evidence of prior bad acts pursuant to ER 404(b), any error is harmless when the evidence is properly admitted for another reason. State v. Crossguns, 199 Wn.2d 282, 296, 505 P.3d 529 (2022); State v. Foxhoven, 161 Wn.2d 168, 178-79, 163 P.3d 786 (2007).

Here, among the cited purposes, the trial court admitted the evidence of the prior acts to show motive and intent. The trial court specified that the evidence was admissible to show motive "pursuant to State v. Crossguns . . . and its progeny," as well as intent "by showing that the defendant's purpose for the alleged touching . . . was done to gratify sexual desire." Both motive and intent are proper purposes for admission of ER 404(b) evidence.

The Washington Supreme Court has identified that, particularly in cases of child sexual assault, evidence of prior acts "shows the planning and intent involved in building a relationship with the child victim in order to obtain the

access and opportunity to commit the acts of sexual assault." Crossguns, 199 Wn.2d at 295. Such evidence demonstrates the dynamics between the offender and the victim, including the necessary components of "'access and control'" and "developing trust" that are necessary to the "'grooming process.'" Crossguns, 199 Wn.2d at 295 (quoting Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 364, 368 (2012)).

The two uncharged incidents of sexual misconduct involving Merino Tapia and A.R. are the types of acts that, pursuant to Crossguns, are admissible to establish intent. The incidents demonstrate that Merino Tapia repeatedly isolated A.R., establishing the access and control necessary to commit sexual assault. Thus, while intent in general is not an element of the crimes charged, the specific intent toward A.R. was relevant to show planning and intent.

Additionally, evidence of the prior incidents was relevant to proving intent for the crime of child molestation in the first degree. See State v. Stevens, 158 Wn.2d 304, 309, 143 P.3d 817 (2006). A person is guilty of child molestation in the first degree "when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "Sexual contact" consists of "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13). Given this statutory definition, "[t]o prove sexual contact, an element of child molestation, the State

must prove a purpose or intent to gratify sexual desires." State v. Edwards, 171 Wn. App. 379, 389, 294 P.3d 708 (2012). A defendant's purpose or intent, then, is relevant in child molestation cases. Stevens, 158 Wn.2d at 310.

After the trial court properly determines the admissible purpose and relevance of ER 404(b) evidence—here to establish motive and intent—the court must weigh the probative value of the evidence against its prejudicial effect. See Gresham, 173 Wn.2d at 422. Due to the inherent prejudice of ER 404(b) evidence, "[s]ubstantial probative value is needed to outweigh the potential prejudicial effect." State v. Sexsmith, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007). "Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." Sexsmith, 138 Wn. App. at 506.

According to the trial court, "[t]here is prejudice, but the probative value in terms of explaining how children react to these events, the way they disclose, or other behaviors outweighs it." On appeal, Merino Tapia asserts that the evidence of his other misconduct was "highly inflammatory and likely left a strong negative impression on the jury." However, he fails to explain how this prejudice outweighs the probative value which is substantial "where the only direct witness to sexual abuse was the child victim." State v. Gantt, 29 Wn. App. 2d 427, 450, 540 P.3d 845, review denied, 3 Wn.3d 1002 (2024). Therefore, we conclude that the trial court did not abuse its discretion in admitting the evidence of Merino Tapia's prior misconduct.

Affirmed.

For the court:

Díaz, J.

Feldman, J.

Chung, J.

February 19, 2025 - 2:11 PM

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Superior Court Case Number:	21-1-03171-2

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