

69238-1

69238-1

NO. 69238-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN SHELBY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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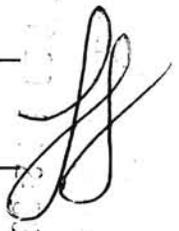


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A. ISSUE PRESENTED

1. Under ER 404(b), evidence of a defendant's prior crimes or other acts may be admissible if the evidence is relevant to a material issue at trial. Shelby was charged with two counts of child molestation for molesting his niece. Evidence of Shelby's prior uncharged sexual abuse of his step-daughter, which occurred in a similar manner, was admitted to show common scheme or plan, motive, and intent. Did the trial court exercise sound discretion in admitting this evidence under ER 404(b)?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant John Shelby was charged by Amended Information with two counts of child molestation in the first degree-domestic violence. CP 128-29. Shelby's niece, J.P., was the named victim on both counts. CP 128-29. Shelby's wife, LaTonya Shelby was originally charged as a co-defendant; she was charged with assault of a child in the third degree-domestic violence, also as to J.P.¹ CP 128-29. J.P. was the named victim on all counts.

¹ LaTonya Shelby will be referred to as "LaTonya." The defendant, John Shelby, will be referred to as "Shelby."

CP 128-29. LaTonya pleaded guilty prior to trial and did not participate at Shelby's trial. 6RP² 21-22.

A jury found Shelby guilty of both counts of child molestation. CP 61-62; 7RP 56. The trial court imposed a standard-range sentence of 89 months of incarceration. CP 64, 67; 8RP 9.

2. SUBSTANTIVE FACTS.

When J.P. was three months old, she went to live with her aunt and uncle, LaTonya and John Shelby. 6RP 45. LaTonya and Shelby raised J.P., and she referred to them as "mom and dad." 6RP 132. Shelby sexually abused J.P. on two occasions when she was between six and eight years old. CP 197.

One evening, J.P. stayed up watching football with family members because she was hoping to watch cartoons after the football game finished. CP 187; 6RP 140. After her sister, cousin, and LaTonya went to bed, Shelby took J.P. into the kitchen where he held her. 6RP 140. Shelby "pulled [J.P.] through his knees, then he started to squeeze [J.P.] with his legs" while J.P. was

² There are 8 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (May 15, 29, 30, and 31, 2012); 2RP (June 4, 2012); 3RP (June 5, 2012); 4RP (June 6, 11, and 12, 2012); 5RP (June 13 and 14, 2012); 6RP (June 18 and 19, 2012); 7RP (June 25, 2012); and 8RP (August 24, 2012).

between his legs. CP 185; 6RP 94. Shelby placed his hands on J.P.'s shoulders while J.P. was bent over with her back to Shelby. CP 185; 6RP 95. Shelby told J.P. "don't tell anyone." 6RP 94. Shelby told J.P. to lie down on the kitchen floor and positioned her face-down. CP 187; 6RP 140. Shelby got on top of J.P. and he "started doing things" to J.P. 6RP 140. Shelby thrust up and down on top of J.P. 6RP 142. J.P. felt Shelby on her back and on her "butt" while he was "jumping up and down really softly." CP 187; 6RP 141. J.P. "didn't really know what part of his body [Shelby] put on [her];" she described it feeling like "pushness." 6RP 142. As this was happening, Shelby's face was on the side of J.P.'s; J.P. could smell beer on his breath. 6RP 142. After it was over, Shelby told J.P. to go to bed. CP 187; 6RP 143. While in the kitchen, Shelby did not remove his own or J.P.'s clothing. CP 184.

J.P. told LaTonya what Shelby had done while Shelby was present. 6RP 145. Shelby apologized and told J.P. he would not do it again. 6RP 145-46. The family then prayed together. 6RP 146.

On another occasion, while LaTonya was visiting family in Kansas City, Shelby "did the same thing." 6RP 147-48. Shelby again took J.P. into the kitchen, laid her on the kitchen floor, and

got on top of her. 6RP 148-49. J.P. felt "lumps and bumps" as Shelby moved on top of her. 6RP 148-49. She also felt "some part of his body" on her "butt." 6RP 148-49.

While J.P. lived with LaTonya and Shelby, LaTonya physically abused J.P. 6RP 137-38. LaTonya hit J.P. with a green plastic baseball bat and repeatedly whipped the child with an extension cord. 5RP 154; 6RP 79, 89.

In February of 2010, a school official called Child Protective Services (CPS) after noticing marks on J.P.'s body. 5RP 146; 6RP 84. Johanna Lehr, a CPS social worker, spoke with J.P. at the elementary school where J.P. was attending third grade. 5RP 139, 150-51. Lehr observed a scabbed-over C-shaped wound on J.P.'s forehead and scabbed-over marks on J.P.'s back. 5RP 154-55. Due to the physical abuse, J.P. was removed from her home. 5RP 156. While J.P. was gathering her possessions into a garbage bag, LaTonya checked her back to see if J.P. had any scars. 6RP 161. At the time of her removal, J.P. had disclosed Shelby's sexual abuse only to LaTonya. 5RP 157.

After J.P. was removed from her home, J.P.'s foster mother took her to Dr. Naomi Sugar at Harborview Medical Center to be evaluated in connection with the physical abuse. 6RP 66, 77-78.

After answering questions about the physical abuse she had suffered, J.P. was asked by Dr. Sugar if anyone had hurt her in her “privates” in a way she did not like. 6RP 93. J.P. responded that Shelby did so “when he was drinking too much.” 6RP 94. J.P. described the sexual abuse to Dr. Sugar. 6RP 94-96. Dr. Sugar noted that J.P.’s scars were consistent with the physical abuse she described at the hands of her mother and that her descriptions of sexual abuse were specific and detailed. 6RP 113. Dr. Sugar examined J.P.’s genital region and did not notice any injuries. 6RP 107.

In July of 2010, Patricia Maley, the King County Sheriff’s detective investigating Shelby’s sexual abuse, received a phone call “out of the blue” from Shelby’s adult step-daughter, A.P. 6RP 25, 165. When A.P. was approximately seven years old, her mother, LaTonya, married Shelby. 6RP 165-68. Shelby then moved in with A.P. and her mother. 6RP 168. Over the course of several years, Shelby sexually abused A.P. on multiple occasions. The first instance occurred shortly after Shelby moved in. 6RP 169. When LaTonya was at school, Shelby pulled A.P. down on top of him and rubbed A.P.’s bottom against his erect penis. 6RP 169. At the time, Shelby was wearing a bathrobe and A.P. was fully

clothed. 6RP 169. On several other occasions, Shelby took A.P. into a back room where he would make her “dance” with him.

6RP 172. Shelby would position A.P. so she was “straddl[ing] him” in the front while Shelby danced and rubbed his erect penis against her while they were both fully clothed. CP 134-35; 6RP 172-73.

In front of Shelby and LaTonya, A.P. told her grandmother that Shelby had pulled her down into his lap and rubbed her up and down. CP 147-49; 6RP 175. As A.P. told her grandmother, Shelby was sweating profusely. 6RP 176. Shelby denied any wrongdoing. 6RP 176. LaTonya “got really upset” and acted “like it was not true.” 6RP 37. After A.P. returned home from her grandmother’s home, Shelby called A.P. a liar. 6RP 177. LaTonya told A.P. that she did not believe her. CP 149. That night A.P., LaTonya, and Shelby had a bible study regarding A.P.’s allegations. CP 149. A.P.’s grandmother reported the abuse to church elders, but did not report it to the police. 6RP 40-41.

A few years later, A.P. awoke while Shelby was touching her in the lower part of her back under her shirt. CP 137; 6RP 179. A.P. turned around and saw Shelby sitting cross-legged in his underwear. 6RP 178. Shelby told A.P. not to tell her mom and walked away. 6RP 178. A.P. told her mother, LaTonya. CP 138.

LaTonya told her she would talk to Shelby and “take care of the situation.” CP 138. Although A.P. told her mother and grandmother, she never told J.P. what Shelby had done to her. 6RP 193.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE ADMISSION OF ER 404(b) EVIDENCE.

Shelby claims that evidence of his prior sexual abuse of A.P. was improperly admitted to prove his propensity to molest children. This argument fails. The trial court did not abuse its discretion where it properly weighed the factors for admissibility under ER 404(b) and ruled that Shelby’s prior acts against A.P. were admissible to show common scheme or plan, motive, and intent.

Shelby’s trial court held a pre-trial hearing to determine admissibility of ER 404(b) evidence. CP 74; 2RP 4-14. The court ruled that evidence of Shelby’s prior sexual abuse of A.P. was admissible to show common scheme or plan, motive, and intent. 2RP 13; 6RP 206-07; CP 74-79. Shelby offered a limiting instruction which was given by the court. CP 50; 6RP 163, 203-04; 7RP 2, 4. Shelby did not testify at trial.

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, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). A trial court must initially presume that any evidence of bad acts is inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

To admit evidence of other crimes, wrongs, or acts, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for introducing the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of admitting the evidence against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Courts review the trial court’s interpretation of ER 404(b) *de novo* as a matter of law. DeVincentis, 150 Wn.2d at 17. If the trial court interprets ER 404(b) correctly, the court’s ruling to admit or exclude evidence of prior acts is reviewed for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court

abuses its discretion where it fails to abide by the rule's requirement. Id.

First, the court found by a preponderance of the evidence that the prior acts occurred. CP 74-75; 6RP 206. A court may determine that a prior act occurred by a preponderance of the evidence based upon an offer of proof. State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002). It is within the "sound discretion" of the court to decide whether the court has sufficient information to make such a determination based upon an offer of proof or whether an evidentiary hearing is necessary. Id. Holding an evidentiary hearing every time a defendant contests a prior act would serve no purpose, cause delay, result in court-supervised discovery, and force witnesses to be cross-examined twice. Id. at 294-95.

As an offer of proof, the court reviewed the following: a transcript of A.P.'s witness statement, a transcript of an interview of A.P. conducted by the defense attorney and investigator, and a transcript of an interview of A.P.'s grandmother conducted by Shelby's defense counsel and defense investigator. CP 131-42, 144-65, 221-55; 1RP 59; 2RP 4. In addition, before making its ruling, the court viewed a DVD and reviewed a transcript of J.P.'s interview with a child interview specialist. CP 167-200; 1RP 39-40.

Finally, both the prosecutor and Shelby's trial counsel presented written and oral argument that included factual information. CP 29-40, 93-96, 109-17; 2RP 4-14. Based on the offer of proof, the court found by a preponderance of the evidence that the prior acts of abuse against A.P. had occurred. CP 74-75.

Second, the court identified three reasons for which the evidence would be introduced. The court found that the evidence was being offered to show common scheme or plan, motive, and intent. CP 74-79; 2RP 13; 6RP 206-07.

Third, the court found that the evidence was relevant for all three purposes. CP 74-79; 6RP 206-07. Evidence of past acts may be admissible to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. DeVincentis, 150 Wn.2d at 19. Where a defendant is charged with child molestation, the existence of a "design to fulfill sexual compulsions evidenced by a pattern of past behavior" is probative of the defendant's guilt. Id. at 17-18.

To be relevant, the past act and the charged act must be substantially similar. Id. at 20. The similarity must indicate conduct created by design; the similarity must not be merely coincidental. Lough, 125 Wn.2d at 860. However, the level of similarity does not

require that the evidence of common features show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21.

Contrary to Shelby's claim, the trial court did not abuse its discretion when it found that there was a substantial similarity between Shelby's abuse of A.P. and his abuse of J.P. Shelby was a relative of both girls and was in a position of caretaking authority over both girls. He was A.P.'s stepfather beginning when she was seven years old, and he was the primary father-figure for J.P. since shortly after she was born. 6RP 45, 132, 165-68. Both girls were approximately the same age when Shelby molested them. A.P. described the abuse taking place when she was between the ages of eight and ten. 6RP 169, 179-80. J.P. described the first instance of abuse occurring when she was six years old; she was removed from the home at the age of eight. 6RP 78, 96. In both cases, Shelby would abuse the girls when they were isolated from others. 6RP 140, 147-48, 169, 172.

Significantly, the manner in which Shelby abused the girls was similar. Shelby rubbed his penis against both girls while both he and the girls were clothed. CP 134-35, 185, 187; 6RP 94, 141, 148-49, 172-73. Shelby told both girls not to tell after instances of abuse. 6RP 94, 178. Shelby committed the abuse more than once

with each girl. 6RP 140, 146, 169, 173. Both girls disclosed to family members in front of Shelby after being abused by him. CP 138; 6RP 145, 175. In both cases, the abuse was not reported to the authorities and the family then prayed or took part in a “bible study” together. CP 149; 6RP 40-41, 146.

There was a significant lapse of time between the abuse of A.P. and the abuse of J.P. CP 128-29, 131-32; 6RP 180. However, the passage of time may be without real significance if the older offense is part of a “pattern” of similar misconduct occurring over a number of years. Lough, 125 Wn.2d at 850 (citing State v. Wermerskirchen, 497 N.W.2d 235, 243 n.3 (Minn. 1993)).

The trial court’s finding that Shelby’s prior acts are sufficiently similar to the charged crime as to be admissible to show a common scheme or plan is supported by several Washington cases. In DeVincentis, the court found evidence admissible as a common scheme or plan where the defendant planned to get to know girls of a similar age, created a trusting relationship with them, isolated them from others, and desensitized them to nudity by wearing almost no clothing around them. 150 Wn.2d at 13. In State v. Sexsmith, the court found prior acts admissible to show a plan to molest where the defendant was in a position of authority

over the victims as a father or a caretaker, he isolated the girls when he abused them, both girls were approximately the same age when molested, and he molested them in a similar manner. 138 Wn. App. 497, 505, 157 P.3d 901 (2007).

Similarly, in State v. Krause, the court allowed prior acts as evidence of a design to molest boys where the defendant interjected himself into situations with adults with small children, gained the children's affections, and isolated them before molesting them. 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996). Finally, in State v. Kennealy, the court found a plan or design to gain access to children for the purpose of sexual abuse where the defendant had previously committed acts of abuse in a similar manner against children only after they knew and trusted him. 151 Wn. App. 861, 889, 214 P.3d 200 (2009).

Here, while the individual features of the abuse of A.P. and J.P. are not unique in themselves, the cumulative similarity between them suggests a common plan or design rather than mere coincidence. Thus, the trial court did not abuse its discretion in finding the evidence of Shelby's prior molestation of A.P. to be relevant.

The court also did not err when it found Shelby's prior acts admissible as evidence of motive. Motive "can demonstrate an impulse, desire, or any other moving power which causes an individual to act." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Shelby's prior acts against A.P. were relevant to demonstrate Shelby's impulse or desire which led him to abuse J.P.

Additionally, the court properly exercised its discretion where it found Shelby's prior acts relevant to show Shelby's intent. Intent is the state of mind in which a person seeks to accomplish a certain result through a course of action, and the design, resolve, or determination with which a person acts. Powell, 126 Wn.2d at 261 (quoting Black's Law Dictionary, 810 (6th rev. ed. 1990)).

To distinguish motive and intent, "motive is what prompts a person to act," where "intent refers only to the state of mind with which the act is done." Id. Intent was relevant here to prove that the sexual contact Shelby had with J.P. was "for the purpose of sexual gratification." RCW 9A.44.083; CP 128-29. Evidence of Shelby's prior acts against A.P. were relevant to show that when he rubbed himself on J.P., it was done for the purpose of his sexual gratification and was not an act that was misinterpreted by J.P.

Fourth, the trial court properly balanced the prejudicial and probative value of Shelby's prior acts. Evidence of prior acts is subject to a balancing required under ER 403. Sexsmith, 138 Wn. App. at 505. Pursuant to ER 403, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. A court's balancing of probative value against prejudice is reviewed for abuse of discretion. Sexsmith, 138 Wn. App. at 506.

Courts generally find substantial probative value in prior sexual abuse evidence where the only evidence of abuse in the charged case is the child's testimony. Id. Such 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." Kennealy, 151 Wn. App. at 890.

Here, there was no physical evidence of sexual abuse, there were no witnesses to the abuse, J.P. was young when she testified, and Shelby raised a defense of general denial. 2RP 6; 6RP 107, 126. This meant that every element of the charged offenses was at issue and that credibility was central to the outcome of the case. The trial court did not err when it found Shelby's prior acts admissible as "powerful, convincing, reliable, and relevant evidence." CP 78.

Shelby also claims that the limiting instruction was "inadequate and came far too late in the proceedings." Brief of Appellant at 13. Shelby's claim is misguided. The trial court instructed the jury that it could consider testimony regarding prior acts of sexual abuse from A.P. and her grandmother only for the limited purposes of common scheme or plan, motive, or intent. CP 50. Shelby's claim that the limiting instruction is inadequate is unpersuasive where he proposed the limiting instruction given by the court. 6RP 163, 203-04. Further, Shelby does not explain in his argument how the instruction is lacking nor does he argue that it was a manifest error affecting a constitutional right under RAP 2.5. Additionally, his assertion that the instruction was given too late in the proceedings is vitiated by the fact that it was given to the jury

before closing arguments and before their deliberations commenced. CP 41-62; 6RP 203-04.

Finally, Shelby claims that the prosecutor's closing argument shows that the purpose of the ER 404(b) evidence was to show Shelby's propensity to molest. Brief of Appellant at 11. This argument also fails. In her closing argument, the prosecutor explained that A.P.'s testimony "is to help you see if there is a motive, an intent, or common scheme and plan between what happened to [A.P. and J.P.]." 7RP 20. Again in rebuttal, regarding A.P.'s testimony, the prosecutor stated: "And you are to consider it for common scheme, plan or motive." 7RP 51.

In sum, the court properly weighed the factors for admissibility under ER 404(b). Nothing in the record demonstrates that the court abused its discretion or based its decision on untenable grounds or reasons. Thus, the court did not err in admitting evidence of Shelby's abuse of A.P. This Court should affirm Shelby's convictions.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Shelby's convictions and sentence.

DATED this 20 day of September, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

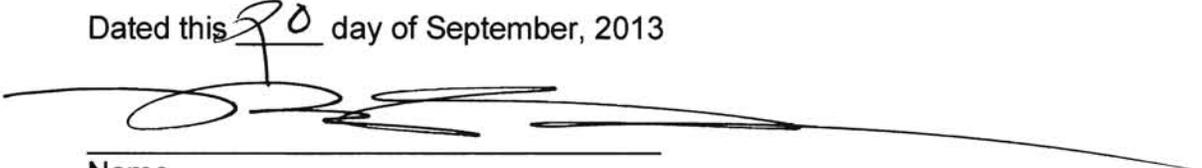
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JOHN SHELBY, Cause No. 69238-1 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of September, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington