IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRET W. GONZALES, Appellant.	)	No. 67333-5-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2013

Leach, C.J. — Bret Gonzales appeals his convictions for the rape and molestation of his niece. He argues that his counsel was ineffective for failing to oppose the admission of misconduct evidence and that the court should have given an instruction limiting the jury's use of that evidence. Before trial, the State sought to admit evidence of Gonzales's sexual misconduct with another niece. Rather than oppose the admission of this evidence, Gonzales's counsel deferred to the court's exercise of its discretion. The court admitted the evidence under ER 404(b) and RCW 10.58.090, and the jury convicted Gonzales as charged. Because Gonzales has not carried his burden of establishing that his counsel's performance was deficient and prejudicial and because the absence of a limiting instruction was harmless, we affirm.

FACTS

Based on allegations that Gonzales sexually assaulted his niece I.C. over a five-year period, the State charged him with three counts of first degree rape of a child and one count of first degree child molestation.

Before trial, the State moved to admit evidence that Gonzales engaged in sexually inappropriate behavior with a different niece, B.C. Defense counsel did not oppose the motion, stating he had assessed the evidence, discussed it with his client, and would defer to the court. Following argument from the prosecutor, the court admitted the evidence under both RCW 10.58.090 and ER 404(b):

> But generally, in describing what I reviewed, I will just generalize it by saying, what I saw was evidence of a plan to sexually exploit children and a plan that basically had elements that collectively could be called grooming them in order to achieve that sexual exploitation.
>
> The elements of that grooming plan were to sort of key in on the child's curiosity about the body and about sexual topics in order to sort of provide a fulcrum for further expansion of sexual activity. And by sexual activity, we are talking about sexual acts that were—began as conversation and then expanded into sexual activity. The conversation began as education talk, but I think at some point it crossed the line from education into a sex act itself intended for gratification and/or intended to facilitate gratification.
>
> With both children, they were blindfolded at points. If this was a motus [sic] operandi analysis, that might actually be sufficient to show identification of the defendant. That's just a side comment, but I think that sort of stood out for me and it was sort of shocking in a way. It suggests a lot of different things, but we are only talking about these two girls, but that kind of technique shows to me from my experience shows further expertise on the part of the defendant that hasn't been revealed.
>
> The location was the same with both children. There was a—there was, I think, a common technique employed in terms of using of bathing or swimming or hot tubbing to get them to disrobe, to sort of make it a normal sort of sequence of events and then once the child was vulnerable then to exploit that. That's sort of a general plan.
>
> I think that plan, the elements of that plan, both of the molestation of BC and the molestation of IC are both examples of that plan being executed with regard to the children.

At trial, Gonzales's sister Beth testified that she has five children,

including daughters I.C., age 14, and B.C., age 13. Gonzales lived with Beth and her children in their Lake Stevens residence between 2003 and early 2005. Gonzales remained close to the family after that, visiting often.

Of all the children, I.C. had the closest relationship with Gonzales. They went on outings together, and Gonzales would often buy her gifts. When the family moved into Beth's boyfriend's home, I.C. started spending the night with Gonzales at his Everett residence or a house in Kirkland that he watched for his friends.

According to I.C. and witnesses to whom she disclosed the abuse, Gonzales began talking to her about sex and sexually abusing her when she was six years old. At various times, he provided explanations about the anatomy of male and female genitalia, sperm, and reproduction. I.C. recalled asking Gonzales why he could see her naked and stare at her but she could not see him naked. He said, "[W]ell I'm an adult and no you can't," but then allowed I.C. to pull his pants down and look at his penis. Gonzales did not say or do anything in response to I.C.'s act. I.C. said Gonzales started abusing her after this incident.

The incidents of abuse included Gonzales rubbing his penis on I.C.'s bottom and vagina, having her perform oral sex, licking her vagina, and engaging in vaginal and anal intercourse. On one occasion, Gonzales used a sock to blindfold I.C. during oral sex. The incidents lasted until she was 10

years old and occurred in Everett, Lake Stevens, and Gonzales's friends' home in Kirkland. Gonzales typically bought I.C. gifts after the incidents and told her not to tell anyone because he could go to prison.

I.C. testified that in the summer of 2008, she lied to her mother and the police when they asked if anything inappropriate had happened with Gonzales. She did not disclose the abuse because she "was too scared." She said her mother told her they were asking about possible abuse because "something inappropriate" had happened to B.C. She denied knowing any details concerning B.C.'s allegations and said she and B.C. never spoke about their respective incidents with Gonzales.

I.C.'s mother, Beth, testified that I.C. eventually disclosed the abuse in early 2009 after B.C. made her own allegations. I.C. was "hysterically crying" and said she had lied about Gonzales's behavior during their previous conversation. When Beth asked if Gonzales "had sex" with her, I.C. said, "[Y]es." Beth again contacted police.

After I.C. disclosed, a child interview specialist interviewed her in January 2009 and again in December 2009. I.C. gave some details about the sexual abuse in the first interview but gave more details in the second.[1] I.C. testified that her story expanded in the second interview because she became more

[1] Transcripts of these interviews were admitted as exhibits and given to the jury.

comfortable with the interviewer.

Bellevue Police Detective Sarah Finkel testified that she talked to Gonzales after I.C.'s disclosure. She asked if he had ever had sexual encounters or demonstrations with I.C. Gonzales responded, "Not that I remember. Let me think about that, no, I didn't." Detective Finkel said that Gonzales's "voice was really shaking" and "his whole body was shaking and shivering."

Dr. Naomi Sugar testified that she examined I.C.'s vagina and anus in March of 2009. The exam was completely normal.

B.C. testified that she stayed overnight with Gonzales at the Kirkland house in 2008. The house had a hot tub and she asked if she could go "skinny dipping." Gonzales said, "I can't, but you can." B.C. then took off her bikini bottoms and got back in the tub. After a while, Gonzales told her to get out of the tub so he could show her something. She got out and put on her nightshirt and underwear. When Gonzales came into the room, he told her to take off her underwear and get on the bed. She complied and laid flat on the bed. He then put his hands on her thighs and put her in "the birthing position" with her legs open and bent at the knees.

B.C. told Gonzales she did not want to look, and he put a towel over her eyes. Gonzales stood in front of her with his hands on her thighs for a short time. He eventually took the towel off her eyes and made a gesture that

involved putting his finger through his other circled fingers. He then asked her to "pinky promise" not to tell anyone because he could go to jail.

B.C. then asked Gonzales what a penis looked like. Gonzales said she could look at him in the shower and he would pretend not to notice. B.C. entered the bathroom while he was showering and pulled back the shower curtain. Gonzales "wasn't pretending not to notice" B.C. Instead, he looked right at her and started explaining the parts of his genitals. B.C. "felt really uncomfortable" and left the bathroom. The next day, Gonzales bought her ice cream and took her home.

Detective Finkel testified that she interviewed Gonzales about B.C.'s allegations. The tape-recorded interview was played for the jury. The record indicates Gonzales told Finkel that B.C. asked if he would skinny dip with her in the hot tub and he declined. B.C. then started talking about sex and claimed to have had a sexual experience with her boyfriend, Conner. Gonzales said it sounded like B.C. was the aggressor. B.C. asked Gonzales what "it" was like and said she wanted to know before she got married. Gonzales thought B.C. was asking him to give her this experience, but he told her he could not legally do that.

After they got out of the hot tub, B.C. said she wanted to see what a penis looked like. Gonzales again explained the legalities. B.C. kept mentioning a book and talking about sex. Gonzales thought it was an anatomy or sex book.

He corrected her erroneous impressions about sex.

Gonzales went into the shower. B.C. came into the shower and opened the shower curtain. Gonzales did not know what to do, so he explained his anatomy to B.C. He denied touching B.C. or doing anything wrong.

Beth testified that she asked Gonzales about B.C.'s overnight visit. Gonzales told her that B.C. asked repeatedly about sex. He said he worried that something might have happened sexually between B.C. and a friend she mentioned named Connor. Beth indicated that according to B.C., there was more to the story. Gonzales asked what B.C. had said, but Beth said she could not tell him. Toward the end of the conversation, Gonzales said, "I knew this time would come."

Beth also testified that as a young girl, B.C. dreamed of becoming a surgeon and liked to watch the "Surgery channel" and "the birthing channels."

The defense called no witnesses. In closing argument, defense counsel pointed out numerous inconsistencies in I.C.'s testimony and statements. He also noted that she was unable to recall the month, season, or year in which the incidents occurred. He noted that in her first interview with police, she said "I don't recall" 45 times, but a year later, in her second interview, she was unable to recall only twice. After pointing out that I.C. and B.C. shared a room and that I.C.'s allegations came to light only after B.C. made her disclosures, counsel suggested that I.C.'s accusations were made solely to protect and support B.C.

The jury convicted Gonzales as charged. He appeals.

DECISION

For the first time on appeal, Gonzales contends the trial court abused its discretion by admitting the evidence relating to B.C. under RCW 10.58.090 and ER 404(b). This court generally will not review a claim raised for the first time on appeal unless it involves manifest error affecting a constitutional right.[2] Because evidentiary errors under ER 404(b) and RCW 10.58.090 are not constitutional error, review of those alleged errors is precluded.[3]

Gonzales argues in the alternative that his trial counsel was ineffective for failing to raise this issue below. Because a claim of ineffective assistance of counsel presents an issue of constitutional magnitude, a defendant may raise it for the first time on appeal.[4] To prevail on an ineffective assistance claim, Gonzales must demonstrate both deficient performance and resulting prejudice.[5] To establish prejudice, he must demonstrate a reasonable probability that but for counsel's alleged deficient performance, the result of the proceeding would have been different.[6] We strongly presume that counsel was effective, and Gonzales bears the burden of overcoming that presumption and demonstrating the absence in the record of a strategic basis for the challenged conduct.[7] Failure to

[2] RAP 2.5(a).
[3] State v. Gresham, 173 Wn.2d 405, 432-33, 269 P.3d 207 (2012).
[4] State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).
[5] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[6] McFarland, 127 Wn.2d at 335.

establish either deficient performance or prejudice is fatal.[8] Gonzales has established neither.

The record affirmatively shows that defense counsel made a strategic decision to defer to the court on the admissibility of the evidence involving B.C. During the pretrial hearing on the evidence, counsel stated,

> As I had indicated in e-mail to the Court on Friday afternoon, I would defer to the Court's assessment of the evidence and the Prosecutor's motion.
>
> I represented Mr. Gonzales in the [B.C.] case, which forms the basis of the prior bad act evidence allegations here. I'm familiar with the evidence in that case. The—and the Prosecutor made a decision in that case before trial to dismiss that case without prejudice, and it was my understanding at that time that that information would be utilized in this case with this basis.
>
> My client has been aware for some months [of] my assessment of the evidence. We discussed it candidly regarding my opinion about that. And I reviewed with him as well that I am deferring to the Court's assessment of the evidentiary admissibility of the evidence under 404(b) and the balancing under 403.

This statement leaves no doubt that counsel made a strategic decision regarding the misconduct evidence. Gonzales does not address this statement in his briefing. Nor does he respond to the State's argument on appeal that defense counsel used the evidence relating to B.C. to bolster a defense based on the timing and substance of I.C.'s disclosures. He has thus failed to carry his burden to demonstrate the absence of a strategic basis for counsel's conduct and to overcome the strong presumption that his counsel was effective.

---

[7] McFarland, 127 Wn.2d at 335-36.

[8] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Gonzales also fails to demonstrate prejudice—i.e., a reasonable probability that but for counsel's omission, the outcome of the proceedings would have been different. In this context, Gonzales must show both a reasonable probability that the court would have excluded the misconduct evidence had defense counsel objected and a reasonable probability that the jury's verdict would have been different as a result.[9] He has not done so.

Evidence of other acts may be admitted to show a common scheme or plan under ER 404(b)[10] if it is "'(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.'"[11] Gonzales challenges the trial court's application of the second and fourth elements of this test.

As to the second element, he correctly points out that a common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances."[12]

---

[9] State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987); State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

[10] ER 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[11] State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

[12] Lough, 125 Wn.2d at 852.

Evidence of such a plan "'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.'"[13]

Contrary to Gonzales's assertions, the incidents with I.C. and B.C. shared sufficient common features to support a conclusion that they were manifestations of a general scheme or plan. The girls were similar in age. Both were Gonzales's nieces. The acts with each girl occurred at a time and place where no one would discover what was happening. The acts were facilitated by Gonzales's position of trust and occurred at a common location. He also used the girls' natural curiosity about anatomy and sex as a gateway to sexual behavior. On at least one occasion, he used the equivalent of a blindfold to lessen each girl's anxiety about his sexual conduct. He also gave the girls gifts or ice cream after the incidents. These common features are supported by the record and were sufficient under ER 404(b).[14]

---

[13] DeVincentis, 150 Wn.2d at 19 (quoting Lough, 125 Wn.2d at 860).

[14] See, e.g., State v. Kipp, 171 Wn. App. 14, 286 P.3d 68, 72 (2012) (facts showed common scheme or plan to get victims alone and sexually abuse them where victims were of similar ages, were defendant's nieces, and were molested in his house and their grandparents' house); Gresham, 173 Wn.2d at 422-23 (evidence showed common scheme or plan where defendant took trips with young girls and fondled their genitals at night when other adults were asleep); State v. Kennealy, 151 Wn. App. 861, 889, 214 P.3d 200 (2009) (facts showed "design or pattern to gain the trust of children. . . in order to sexually molest them" where charged victims were between ages of 5 and 7 and lived in same complex, uncharged victims were nieces and daughter between ages of 7 and 13, acts with all victims occurred out of view of others, children trusted defendant

The trial court was also well within its discretion in concluding that the probative value of the evidence outweighed its prejudicial effect. "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."[15] In State v. Krause,[16] we reasoned that in a child molestation case,

> similar acts of sex abuse can be very probative of a common scheme or plan. The need for such proof is unusually great in child sex abuse cases, given "the secrecy in which such acts take place, the vulnerability of the victims, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation, the unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses."

Here, it is undisputed that the State's case rested almost entirely on I.C.'s testimony and statements and that the outcome largely turned on her credibility. In concluding that the evidence relating to B.C. was highly probative, the trial court recognized the centrality of I.C.'s credibility, stating, "[I]t's going to come down to a credibility issue and the evidence of other acts by BC is critical in that regard, if not absolutely essential." The court also noted that in addition to having a high probative value, the evidence was not unfairly prejudicial:

---

because of family relation or gifts and conversation, victims were touched under and outside of their clothing on their vaginas, and sexual acts occurred more than once with most of the victims).

[15] State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

[16] 82 Wn. App. 688, 696, 919 P.2d 123 (1996) (quoting State v. Wermerskirchen, 497 N.W.2d 235, 240-41 (Minn. 1993)).

> . . . I also think that the evidence that I read is not what we would call particularly inflammatory in terms of emotional information. I think that in reviewing it and listening to it, it's disturbing, it's deeply disturbing. But I would not say that it is a flash point or anything of that nature. So from that standpoint, I don't think it's unfair.

The trial court's assessment of prejudice is supported by the fact that the misconduct evidence did not show any sexual contact, the court did not instruct the jury that it could use the evidence for any relevant purpose, and the prosecutor repeatedly told the jury that the evidence was admitted solely for the purpose of establishing a common scheme or plan.

In these circumstances, the court was within its discretion in admitting the evidence, and there is no reasonable probability that an objection from defense counsel would have altered that decision.

Gonzales next contends the trial court erred in failing to give an instruction limiting the jury's use of the misconduct evidence to prove a common scheme or plan. The State responds that Gonzales cannot raise this contention for the first time on appeal. But an ER 404(b) limiting instruction could not have been given at trial because the evidence was also admitted under RCW 10.58.090. That statute allowed juries to use misconduct evidence for the very purposes disallowed by ER 404(b).[17] Because the statute was declared unconstitutional after his trial, thus leaving ER 404(b) as the only basis for admitting the misconduct evidence, Gonzales is entitled to argue for the first

[17] See Gresham, 173 Wn.2d at 429-30.

time in this court that the jury should have received a proper limiting instruction.

Gonzales correctly points out that when a court admits evidence under ER 404(b), the defendant is entitled to an instruction informing the jury of the specific purpose for which the evidence is admitted and prohibiting it from using the evidence to conclude that the defendant has a particular character and acted in conformity with that character.[18] No such instruction was given in this case. That omission was error.[19]

The State argues, however, that the error was harmless. Error of this nature is harmless unless "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[20] We conclude, for several reasons, that there is no reasonable probability the outcome would have been different had a limiting instruction been given.

First, the court's instruction regarding the misconduct evidence emphasized that it was contextual in nature and not to be given conclusive weight. 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.

[18] Gresham, 173 Wn.2d at 423-24.
[19] Gresham, 173 Wn.2d at 424-25.
[20] Gresham, 173 Wn.2d at 433 (internal quotation marks omitted) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Defense counsel emphasized the importance of this instruction in addressing the misconduct evidence in closing argument.

Second, the court's instruction did not include a sentence that post-Gresham courts have found critical in evaluating harmless error claims.[21] The omitted sentence states in part that "'evidence of the defendant's commission of another sex offense may be considered for its bearing on any matter to which it is relevant.'"[22] This language affirmatively grants juries permission to use prior misconduct evidence for propensity purposes.

Third, and most importantly, the prosecutor not only did not encourage the jury to use the misconduct evidence for propensity,[23] he repeatedly told them it was admitted solely for the limited purpose of deciding whether the incidents demonstrated a common scheme or plan.[24] In his initial closing, he stated,

> 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

[21] State v. Gregg, noted at 170 Wn. App. 1007, 2012 WL 3292904, at *5; State v. Williams, noted at __ Wn. App. __ , 2012 WL 6554786, at *5.

[22] Williams, 2012 WL 6554786, at *3 (emphasis added).

[23] City of Seattle v. Patu, 108 Wn. App. 364, 377, 30 P.3d 522 (2001) (noting that City "did not argue that the conviction made it more likely that Patu was a bad person or that he had a propensity to obstruct the police").

[24] State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) ("the prosecutor effectively gave the jury a limiting instruction during closing argument" by telling them they could not consider prior convictions for propensity and could only consider it for "a common scheme or plan").

> sex, told me what happens when a man and 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.

(Emphasis added.) The prosecutor reiterated this point in rebuttal:

> You were allowed to hear the evidence of [B.C.] . . . for one reason and one reason alone . . . . It was to show you a common scheme or plan by the defendant.

(Emphasis added.)

In light of the instructions and arguments in this case, we conclude there is no reasonable probability that the outcome would have been different had the court given an ER 404(b) limiting instruction.

Affirmed.

Leach, C.J.

WE CONCUR:

Verellen, J.

Cox, J.