IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK LEROY CHRISTENSEN, Appellant.	No. 40116-9-II UNPUBLISHED OPINION

Penoyar, C.J. — A jury convicted Mark Christensen of five counts of raping and molesting MS, his girl friend's daughter, when MS was between the ages of 10 and 16. At a pretrial hearing, and subsequently at trial, MS's older sister, DS, testified that Christensen inappropriately touched her (DS's) genital area on one occasion when she was 13 years old. The trial court admitted DS's testimony under ER 404(b) and RCW 10.58.090. Christensen appeals his convictions, arguing that (1) the trial court abused its discretion by admitting DS's testimony under ER 404(b); and (2) RCW 10.58.090 is unconstitutional, both facially and as applied. Christensen also challenges the trial court's entry of findings of fact 3, 4, and 5 after the pretrial hearing, arguing that (3) these findings improperly invaded the jury's province and violated the appearance of fairness doctrine, (4) substantial evidence does not support these findings, and (5) the prosecutor committed misconduct by drafting and submitting these findings to the court. Finally, he raises numerous issues in his statement of additional grounds (SAG),[1] none of which has merit. Because the trial court properly admitted DS's testimony under ER 404(b) and properly entered the three challenged findings, we affirm.[2]

[1] RAP 10.10.

FACTS

DS and MS are GC's daughters.[3] DS was born in October 1983, and MS was born in October 1987. In September 1995, when GC and her daughters lived in South Dakota, GC met Christensen and the couple began dating. Three to four weeks later, Christensen moved into the family home. Almost immediately after moving in, Christensen began to enforce the household rules and to discipline the children. In March 1998, GC, her children, and Christensen moved to Lakewood, Washington. GC and Christensen married in 2009.

In December 2006, when MS was an adult, she revealed to DS that Christensen had sexually abused her (MS) while the family lived in Lakewood. MS later reported the abuse to police.

At trial, MS testified that the first incident of sexual abuse occurred when she was about 10 years old. She was lying on the living room couch watching television. Christensen was lying behind her. The rest of the family had gone to bed. Christensen reached over MS's body and touched her genital area. He turned her around to face him and, while still clothed, rubbed his body against hers for 30 to 45 minutes. A few days later, Christensen engaged in similar conduct, rubbing MS's genital area through her clothing while the two were on the couch watching television after the rest of the family had gone to bed. A few months later, Christensen began entering her bedroom at night several times a week to perform sexual acts, which eventually included vaginal and oral intercourse.

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[2] Because we affirm on ER 404(b) grounds, we do not need to address Christensen's argument that RCW 10.58.090 is unconstitutional.

[3] We use DS's, MS's, and GC's initials in order to protect the victims' privacy.

In August 2007, the State charged Christensen with one count of first degree child molestation,[4] two counts of second degree child rape,[5] and two counts of third degree child rape.[6]

Before trial, the State notified Christensen that it intended to elicit DS's testimony at trial that Christensen had attempted to sexually assault her on one occasion shortly before he began to abuse MS. *See* RCW 10.58.090(2). Christensen moved in limine to exclude DS's testimony about this event. In response, the State argued that DS's testimony was admissible as a common scheme or plan under ER 404(b).

At a pretrial hearing to determine the admissibility of DS's testimony, DS testified about the 1997 incident, which occurred in the South Dakota residence when she was 13 years old. DS was the only witness at the pretrial hearing, and her testimony was limited to a description of the 1997 incident. She testified that, on the evening in question, GC, Christensen, and DS were on the living room couch watching the movie "Tin Cup." Report of Proceedings (RP) (Apr. 13, 2009) at 98. GC went to bed. Christensen, who was lying behind DS on the couch, put his arm over her waist and starting massaging her genital area through her jeans. He pressed his body against hers. He unbuttoned and unzipped her jeans, at which point DS moved his hand away. Christensen got up from the couch, said "Sorry, [DS]," and went to bed. RP (Apr. 13, 2009) at 103.

The next day, DS told GC what had happened. When GC and DS confronted Christensen, he explained that he had fallen asleep on the couch and thought that GC, not DS, had

[4] RCW 9A.44.083.

[5] RCW 9A.44.076.

[6] RCW 9A.44.079.

been lying next to him on the couch. DS testified that when Christensen touched her, he was not snoring, did not call her "GC," and did not otherwise indicate that he believed her to be GC. She did not believe that he touched her accidentally.

Before ruling, the trial court heard argument from both parties on the admissibility of DS's testimony at trial. The State described MS's expected trial testimony. Christensen argued, in relevant part, that DS's testimony was not admissible to show a common scheme or plan under ER 404(b) because it was not similar to the charged crimes against MS. His counsel argued to the trial court:

> You can read the Declaration for Determination of Probable Cause if you doubt my word about what some of the allegations are as far as what my client allegedly did to the younger sister [MS] once they got to Lakewood, Washington, because the similarities are not there. The only similarities they have, again, is [sic] this lustful predisposition.

RP (Apr. 13, 2009) at 119.

Several months after the pretrial hearing, the trial court entered written findings of fact and conclusions of law. Three findings pertained to Christensen's abuse of MS:

> 3. The defendant began abusing [MS] when she was 10 years old.
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> 4. The abuse of [MS] started as the defendant would [lie] with her on the couch and would grind his body against [MS's]. The defendant would [lie] behind [MS] and fondle her crotch area while pressing his body against hers. As the defendant would press his body against [MS], she could feel that he had an erection.
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> 5. This behavior continued in the same manner on a daily basis until [MS] reached 13 years of age. At age 13 the defendant began having vaginal and oral intercourse with [MS].

Clerk's Papers (CP) at 168.

In its oral ruling, the trial court stated that it reviewed the declaration for determination of

probable cause, as Christensen had suggested, for details about his alleged abuse of MS. Additionally, the trial court entered a written finding that DS was a credible witness.

In its written conclusions, the trial court concluded that DS's testimony was admissible to show a common scheme or plan under ER 404(b). The trial court also concluded that DS's testimony established that "the prior sex offense occurred by a preponderance of the evidence" and that the prejudicial effect of the testimony did not outweigh its probative value. CP at 170.

Christensen's first trial ended in a mistrial because the jury could not reach a unanimous verdict. A different trial judge presided over the second trial. Before his second trial, Christensen renewed his objection to the admission of DS's testimony. After argument, the trial court issued an oral ruling adopting the earlier findings and conclusions.

At the second trial, MS and DS were the State's only witnesses. They testified consistent with the above facts. Christensen called GC as his only witness.

The jury convicted Christensen on all five counts. He appeals his convictions.

ANALYSIS

I. ER 404(b)

Christensen argues that the trial court abused its discretion when it allowed DS to testify that Christensen touched her genital area once when she was 13 years old. He argues that DS's testimony was not evidence of a common scheme or plan under ER 404(b) because "the State established only that Mr. Christensen's hand touched [DS's] crotch area" but did not establish that the "incident was one of sexual misconduct." Appellant's Br. at 23, 28. Alternatively, he argues that even if the testimony was admissible to show a common scheme or plan, the trial court should have excluded the testimony under ER 403. We conclude that the trial court properly

admitted DS's testimony under ER 404(b) as evidence of a common scheme or plan.[7]

A. Standard of Review

We review a trial court's ruling to admit evidence under ER 404(b) for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). We review a finding that a defendant committed a past "crime, wrong, or act" for substantial evidence. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Substantial evidence is that which persuades a fair-minded, rational person of the finding's truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

B. Common Scheme or Plan

Evidence of a defendant's other "crimes, wrongs, or acts" is generally inadmissible to demonstrate the defendant's propensity to commit the charged crime. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). But if the State offers such evidence for a legitimate purpose, it is not inadmissible under ER 404(b). *Lough*, 125 Wn.2d at 853.

Evidence of other "crimes, wrongs, or acts" is admissible under ER 404(b) for the legitimate purpose of proving a common scheme or plan if the evidence is (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more

[7] We note that the trial court gave the following limiting instruction in this case: "Evidence regarding an incident between [DS] and the defendant has been admitted in this case for a limited purpose—to assist you in determining the credibility of witnesses. Any discussion of the evidence during your deliberations must be consistent with this limitation." CP at 216. Because Christensen's trial counsel approved this instruction and because Christensen did not assign error to this instruction on appeal, we decline to address its impact on his trial. For future guidance, however, we note that this instruction did not limit consideration of DS's testimony to the purpose for which the trial court admitted it: to prove common scheme or plan. This instruction may be read to invite jurors to draw a propensity inference from DS's testimony.

probative than prejudicial. *Lough*, 125 Wn.2d at 852. The trial court may admit evidence of other "crimes, wrongs, or acts" to prove a common scheme or plan where the defendant "devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Lough*, 125 Wn.2d at 855. For such evidence to be admissible, the other "crimes, wrongs, or acts" must be substantially similar to the charged crime. *State v. DeVincentis*, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). The other "crimes, wrongs, or acts" and the charged crime must be "naturally explained as individual manifestations of a general plan." *DeVincentis*, 150 Wn.2d at 21; *accord Lough*, 125 Wn.2d at 853 (common scheme or plan evidence is admissible to "prov[e] . . . a scheme or plan of which the offense charged is a manifestation.").

DeVincentis is instructive. There, the defendant hired KS, a 12-year-old friend of his next-door neighbor's daughter, to clean his house. *DeVincentis*, 150 Wn.2d at 13. As KS cleaned, the defendant walked around the house in revealing underwear. *DeVincentis*, 150 Wn.2d at 13. On two different occasions when KS entered his bedroom, the defendant asked her to remove her clothing, to massage him, and to perform sexual acts on him. *DeVincentis*, 150 Wn.2d at 14. He also massaged her and performed sexual acts on her. *DeVincentis*, 150 Wn.2d at 14. At the defendant's trial, the State sought to admit evidence that the defendant had been convicted fifteen years earlier of sexually abusing VC, his daughter's 10-year-old friend. *DeVincentis*, 150 Wn.2d at 14-15. At a pre-trial hearing,VC testified that the defendant walked around his home in revealing underwear, asked for massages, and performed sexual acts on her. *DeVincentis*, 150 Wn.2d at 15. The *DeVincentis* court held that the trial court had tenable grounds for admitting VC's testimony. 150 Wn.2d at 23-24. With regard to the purpose and relevancy components of the 4-part *Lough* test, the court approved of the trial court's reasoning:

> The [trial] court ruled that [VC's] testimony was "relevant to show that the act was committed, a corpus delicti purpose . . . where the defendant denied the event." The trial court explained that "the evidence involving [VC] is relevant to show that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door neighbor girl. . . ." This led to "greater familiarity occurring in his own home . . . ." This plan allowed DeVincentis to bring the children into "an apparently safe but actually unsafe and isolated environment so that he could pursue his compulsion to have sexual contact with these . . . prepubescent or pubescent girls." The girls were both between 10 and 13 years old.
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> Other similarities that the trial court noted included walking around his house in an unusual piece of clothing—bikini or g-string underwear. On both occasions, the trial court found that DeVincentis "indicated he . . . intended by the casual wearing of almost no clothes to reduce the children's natural discomfort or negative reaction to such behavior. . . ." With both girls, DeVincentis "asked for a massage or gave [a] massage, asked or directed the child to a secluded spot such as a bedroom, directed or asked that clothes be taken off . . . ." Finally, in both instances, he had the girls masturbate him until climax. The trial court concluded that this was relevant to support [KS's] testimony.

DeVincentis, 150 Wn.2d at 22 (alterations in original) (citations omitted). Our Supreme Court also noted that the trial court had properly rejected the State's attempt to admit testimony that DeVincentis had sexually abused several other girls on prior occasions where this abuse "lack[ed] . . . similarity with the charged crimes." *DeVincentis*, 150 Wn.2d at 23.

Applying *Lough*'s 4-part test to the present case, we conclude that the trial court had tenable reasons for admitting DS's testimony. First, the State proved the occurrence of the act by a preponderance of the evidence. On appeal, Christensen does not challenge the trial court's finding that he "fondle[d] [DS's] vaginal area" and "press[ed] his body against hers," or its conclusion that the State proved, by a preponderance of the evidence, that Christensen committed a "sex offense"[8] when he touched DS. CP at 168, 170; *see also Hill*, 123 Wn.2d at 644

[8] In its oral ruling, the trial court stated that Christensen committed the crime of indecent liberties against DS. *See* RCW 9A.44.100.

(unchallenged findings of fact are verities on appeal). He continues to argue, however, as he did below, that his touching of DS was "an accidental unconscious act performed . . . while he was asleep." Appellant's Br. at 20. But the resolution of this issue turns on whether DS's account of events was credible, including her testimony that the touching was nonaccidental. We defer to the trial court's unchallenged written finding that DS was credible. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (appellate courts defer to the factfinder on issues of witness credibility); *Hill*, 123 Wn.2d at 644.

Second, there was a substantial similarity between Christensen's sex offense against DS and his sex offenses against MS. In both cases, Christensen obtained and exercised parental control over the girls before he abused them. Like the defendant in *DeVincentis*, he got to know the girls "through a safe channel"—here, his relationship with their mother—which led to their greater familiarity with him and to opportunities for him to "pursue his compulsion to have sexual contact with . . . prepubescent or pubescent girls." *DeVincentis*, 150 Wn.2d at 22. He initiated sexual contact with both girls in an identical fashion, by touching the girls on their genital areas on the living room couch while watching television or a movie after GC had gone to sleep. Like the victims in *DeVincentis*, DS and MS were of pubescent or prepubescent age when he abused them. In sum, the facts here suggest that Christensen's sex offenses against DS and MS were "individual manifestations of a general plan" to gain access to and parental control over his girl friend's young daughters by moving into the family home, thereby enabling him to fulfill his compulsion to have sexual contact with the daughters. *DeVincentis*, 150 Wn.2d at 21. Accordingly, the trial court had tenable grounds to admit DS's testimony for the purpose of proving this common scheme or plan.

Third, as our Supreme Court has recognized, when the issue before the jury is whether the charged crime occurred, "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." *DeVincentis*, 150 Wn.2d at 17-18; *see* ER 401. Thus, "evidence of substantially similar features between a prior act and the disputed act is relevant." *DeVincentis*, 150 Wn.2d at 20. Because, as we explain in the preceding paragraph, Christensen's abuse of DS and MS shared substantially similar features, DS's testimony was relevant to the issues before the jury, in particular, to bolster MS's credibility.

Finally, the trial court properly exercised its discretion when it concluded that DS's testimony was more probative than prejudicial. The principal factor affecting the probative value of this type of evidence "is the tendency of [this] evidence to demonstrate the existence of a common design or plan." *Lough*, 125 Wn.2d at 863. Here, as the trial court recognized, DS's testimony was highly probative because it tended to demonstrate the existence of Christensen's plan to sexually abuse his girl friend's daughters. The trial court had tenable reasons for determining that this probative value exceeded the "substantial prejudicial effect . . . inherent in ER 404(b) evidence." *Lough*, 125 Wn.2d at 863.

II. Arguments Related to Findings of Fact 3, 4, and 5

Christensen also challenges findings of fact 3, 4, and 5, which the trial court entered after the pretrial hearing, arguing that these findings improperly invaded the jury's province and violated the appearance of fairness doctrine. He further contends that substantial evidence did not support these three findings because there was no testimony at the pretrial hearing about his abuse of MS. Finally, he asserts that the prosecutor committed misconduct by drafting and submitting these three findings to the court. Appellant's Br. at 34-40. These arguments fail.

In a criminal case, "[i]t is the province of the jury . . . to pass on the weight and sufficiency of the evidence." *State v. Frye*, 53 Wn.2d 632, 633, 335 P.2d 594 (1959) (quoting *State v. Rubenstein*, 69 Wash. 38, 40, 124 P. 135 (1912)). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). Before an appearance of fairness claim will succeed, a defendant must demonstrate evidence of a judge's actual or potential bias. *Gamble*, 168 Wn.2d at 187-88.

Here, the trial court's entry of findings 3, 4, and 5—all of which pertained to Christensen's alleged abuse of MS—was appropriate. First, the findings did not invade the jury's province because the jury reached its verdict independently after considering the evidence at trial. Second, these findings do not demonstrate the trial court's actual or potential bias. *See Gamble*, 168 Wn.2d at 187-88. Because the issue before the trial court at the pretrial hearing was whether DS's testimony was evidence of a common scheme or plan under ER 404(b), the trial court necessarily had to compare Christensen's alleged abuse of DS to his alleged abuse of MS. The State described MS's expected trial testimony, and Christensen himself invited the trial court to review the determination of probable cause for details about his alleged abuse of MS. In effect, therefore, he stipulated to the facts in the declaration for determination of probable cause for the limited purpose of permitting the trial court to determine whether DS's testimony revealed evidence of a common scheme or plan. As such, he has waived his right to challenge these stipulated facts on appeal. *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). Accordingly, we need not review whether substantial evidence supports the challenged findings. Finally, because the trial court's consideration of these facts was necessary and appropriate, the

prosecutor did not commit misconduct by drafting and submitting these findings to the court.

IV. SAG Issues

A. Claims Related to First Trial

In his pro se SAG, Christensen argues that his constitutional rights were violated at his first trial—which ended in a mistrial—because (1) six of the twelve jurors were "rape victims," (2) the prosecutor made improper comments in closing argument, and (3) MS's trial testimony was inconsistent with an earlier statement to police. SAG at 7. Because the jury did not convict Christensen at the first trial, we decline to review these arguments.

B. Ineffective Assistance of Counsel

Christensen next argues that his counsel provided ineffective assistance when she declined to use materials that he provided to her as exculpatory or impeachment evidence for his second trial. Specifically, he contends that his attorney should have sought to admit the following evidence, which he provided to her, for his second trial: (1) information from the website Internet Movie Database (IMDb)[9] that the movie "Tin Cup" was released in VHS format in May 1997, which he alleges is one month after DS left the South Dakota home; (2) photographs showing that MS's and DS's friends visited the family home; (3) photographs showing the family "having fun and being spontaneous"; (4) therapy records from a counselor that MS visited after an unrelated sexual assault when she was in ninth grade; (5) MS's journal entries; (6) DS's journal entries; (7) Christensen's medical records; (8) the police's videotaped interview of MS after she first reported his abuse; and (9) MS's report cards showing that she was an "A" student, which, in his view, would have contradicted the State's theory that MS would not have invented the story of Christensen's abuse. SAG at 6. He also suggests that his counsel provided ineffective assistance

[9] www.imdb.com.

because she violated several rules of professional conduct, including RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.4 (communication) during her representation.[10]

Christensen's ineffective assistance claims rely entirely on matters outside of the record. Therefore, we cannot review them. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). The appropriate means of raising these claims is through a personal restraint petition. *McFarland*, 127 Wn.2d at 338.

C. Prosecutorial Misconduct

Christensen further argues that the prosecutor committed misconduct in the second trial because (1) the testimony of one of the State's witnesses, DS, differed slightly between the first and second trials; and (2) the prosecutor violated RPC 3.4(e) in closing argument when he characterized the family as "dysfunctional." SAG at 11; RP (Nov. 19, 2009) at 538. These arguments fail.

A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial. *Fisher*, 165 Wn.2d at 747. Failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

[10] Specifically, he states that his counsel violated the RPCs because she (1) did not meet with him enough due to an "overwhelming case load," (2) did not return phone calls or e-mails in a timely manner, (3) refused to subpoena helpful witnesses, (4) left the courtroom to retrieve evidence from his wife, (5) did not bring her file to the courtroom one day, (6) did not interview a potential trial witness in a timely manner and (7) did not consult him about trial tactics and strategy. SAG at 4.

Christensen's first argument fails. By simply observing that DS's testimony at the two trials differed as to a relatively minor detail,[11] Christensen has not met his burden to show that the prosecutor acted improperly. He points to no evidence that the prosecutor encouraged, knew about, or even noticed this minor discrepancy.

Christensen's second argument is also meritless. Immediately after the prosecutor explained to the jury which sexual acts supported the individual counts, the prosecutor stated:

> Sure, there's a lot of other stuff all over the board. *Clearly, this family is about as dysfunctional as you can come up with.* But if you believe what [MS] told you happened, if you believed that he fondled her, had her perform oral sex, and had sex with his penis in her vagina, he's guilty of all five counts.

RP (Nov. 19, 2009) at 538 (emphasis added). Christensen construes the prosecutor's "dysfunctional" comment as an improper personal opinion under RPC 3.4(e), which states that a lawyer shall not, "in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused." As the context of the closing argument makes clear, the prosecutor here was not stating his personal opinion as to any witness's credibility or as to Christensen's guilt. Rather, he was encouraging the jury to convict Christensen only if it concluded that the State had proved the facts necessary to prove the charged crimes beyond a reasonable doubt.

[11] At the pretrial hearing and at the first trial, DS testified that the day after Christensen touched her inappropriately, she told a close friend, KP, what Christensen had done to her. KP advised DS to come to her house and speak with her (KP's) mother. DS told KP's mother what had happened. Then DS called GC and told her to come over to KP's house. When GC arrived at KP's house, DS told her about Christensen's inappropriate touching the night before. At the second trial, DS testified that she did not tell KP's mother about Christensen's abuse before GC arrived at KP's house.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.