IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v.	No. 40884-8-II
M.B.J.,[†] Appellant.	UNPUBLISHED OPINION

Quinn-Brintnall, J. — M.B.J. appeals his four adjudications of first degree rape of a child, contending that the trial court denied him a fair trial by admitting evidence of prior sexual abuse involving the same two victims. Finding no reversible error, we affirm.

Facts

In March 2006, Julie Edwards moved from Missouri to Longview with four of her children; her mother, Nancy Smith; her sister, Suzan Jones; and Jones's 13-year-old son, M.B.J. Edwards brought her 13-year-old daughter, C.P., and three sons: 10-year-old Q.A.W., 9-year-old Q.I.W., and 8-year-old W.W. Edwards stayed at the family's new house on Fir Street for about a

[†] Under RAP 3.4, this court changes the title of the case to the juvenile's initials. The opinion also uses initials for the juvenile victims to protect their confidentiality.

month but then returned alone to Missouri.

Six months later, Edwards rejoined the family in Longview. The extended family moved to several other houses before Edwards and her children moved to their own home. In January 2010, she overheard a heated telephone conversation between Q.I.W. and M.B.J.'s girlfriend. This conversation led to Q.I.W. and Q.A.W. alleging that their cousin, M.B.J., had sexually molested them.

The State charged M.B.J. in juvenile court with two counts of first degree rape of a child involving Q.A.W. and two additional counts involving Q.I.W. Before the fact-finding hearing began, defense counsel moved to prohibit the State from asking about prior sexual abuse that M.B.J. allegedly inflicted on the boys in Missouri, arguing that this prior bad act evidence was inadmissible under ER 404(b). The State responded that the Missouri evidence was admissible under the res gestae rule to show how the abuse began and to explain the relationship between the parties. When the court asked about admissibility to show a common scheme or plan, the State asserted that the Missouri evidence would show the beginning of a common scheme or plan of sexual misconduct that continued throughout the cousins' relationship. The defense argued that the prejudicial effect of this evidence outweighed its probative value, but the court ruled that questioning about how the abuse started in Missouri was relevant to "explain the relationship between the parties and explain the event." 1A Report of Proceedings (RP) at 15.

Q.A.W. testified that the molestation began when he was 10 and the cousins lived in Missouri. When Q.A.W. and M.B.J. were on the bed upstairs, M.B.J. raped him anally while W.W. played a video game in the same room. Q.A.W. said this happened six or seven times in Missouri and that M.B.J. called the sex "Yahtze." 1A RP at 26. Q.A.W. added that he saw

M.B.J. do the same thing to Q.I.W. in Missouri and that M.B.J. had the two brothers perform oral sex on him more than once in Missouri.

Q.A.W. further testified that once the family moved to Longview, the "same routine" happened in M.B.J.'s attic bedroom on Fir Street. 1A RP at 36. After he and his brother went to the attic to play video games, M.B.J. anally raped them in front of each other and had the brothers perform oral sex on him. Q.A.W. testified that the anal sex occurred six or seven times and the oral sex once or twice. M.B.J. would initiate the sex by saying, "Let's play Yahtze," or "Let's do stuff." 1A RP at 37. After sex, the boys would smoke cigarettes together. Q.A.W. said that W.W. was sometimes present during the sex. Q.A.W. explained that the molestation stopped when he was 12 because it hurt and he told M.B.J. to stop. After Q.I.W. told Edwards about the abuse, she asked Q.A.W. if it had happened to him, and he told her about it because Q.I.W. wanted him to tell.

Q.I.W. testified that M.B.J. began molesting him when he was six years old and living in Missouri. Q.I.W. said that M.B.J. raped him anally 10 times and forced him to perform oral sex on M.B.J. 8 times while they lived in Missouri. Q.I.W. was nine years old when the family moved to Longview. He said he would go up to the attic to play video games, and M.B.J. would come in and molest him. Q.I.W. estimated that M.B.J. anally raped him five times and made him engage in oral sex twice after moving to Longview. Q.I.W. added that M.B.J. called sex "Yahtze" and that this name began in Missouri. 1A RP at 121. Q.I.W. said that the sex occurred once in front of Q.A.W. in Missouri, adding that he and Q.A.W. talked about having sex with M.B.J. He said that the abuse occurred on Fir Street and an additional Longview address but stopped when M.B.J. got a girlfriend in February 2009. Q.I.W. eventually told Edwards about the molestation

because he was tired of being teased about being bisexual.

W.W. testified that when he was seven and the family lived in Missouri, he saw M.B.J. sucking Q.I.W.'s penis. Once the family moved to Longview, he saw Q.I.W. and M.B.J. naked and moving under the bed covers. W.W. testified that the attic contained a video game player, a bed, and a television.

Edwards testified that in January 2010, Q.I.W. was on the phone with M.B.J.'s girlfriend and overheard her call him a "faggot." 1B RP at 186. Q.I.W. became upset and said that he was a faggot because M.B.J. had been molesting him since he was six years old. When Edwards asked what was going on, Q.I.W. said that when the boys were little and playing video games, M.B.J. had done things he should not have done that he called Yahtze. Q.I.W. told her about the anal sex, and Q.A.W. confirmed his brother's account.

Longview Police Detective Mark Langlois interviewed both Q.I.W. and Q.A.W. Q.A.W. told the detective about the sex acts that M.B.J. performed in Missouri and said they happened in Longview "just like that." 1B RP at 237. When the detective asked M.B.J. about the allegations, he admitted playing video games in the bedroom with his cousins in Missouri and then insisted that he was not gay. He denied his cousins' allegations of sexual molestation.

Edwards's daughter testified for the defense. She could not remember a television in the attic and was not aware of any sexual misconduct on M.B.J.'s part. M.B.J.'s mother testified that there was no television in the attic. His grandmother could not remember a television or game system in the attic and said the younger boys were not allowed up there. M.B.J. again denied having sexual contact with his cousins and said there was no television or game system in the attic. Although he admitted that there was a game system in Missouri, he denied playing video games with Q.A.W. or Q.I.W.

The trial court found M.B.J. guilty as charged and entered written findings of fact and conclusions of law. The trial court specifically found that Q.I.W. and Q.A.W. were credible witnesses and that M.B.J. was not. The court also found that M.B.J. had been having sexual intercourse with both victims for a number of years.

Discussion

Evidence of Prior Sexual Misconduct

On appeal, M.B.J. argues that his right to a fair trial was violated when the trial court admitted evidence of his prior sex acts with Q.A.W. and Q.I.W. in Missouri. More specifically, he contends that the prejudicial effect of this evidence outweighed its probative value, thereby making it inadmissible under ER 403. The State responds that the trial court properly admitted the Missouri evidence under ER 404(b) to show M.B.J.'s lustful disposition toward his cousins as well as a common scheme or plan.

We review the trial court's decision to admit evidence for an abuse of discretion. *State v. Thach*, 126 Wn. App. 297, 310, 106 P.3d 782, *review denied*, 155 Wn.2d 1005 (2005). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or untenable reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). We apply an even more liberal standard when reviewing the admission of evidence in a bench trial, presuming that "the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making [her] findings." *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970).

ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime, but allows its admission for other limited purposes:

> 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.

To admit evidence under ER 404(b), the trial court must identify the purpose for which the evidence is to be admitted, determine that it is relevant, and determine that its probative value outweighs its prejudicial effect. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). The admissibility of the evidence must meet the standard in ER 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Camarillo*, 115 Wn.2d 60, 69-70, 794 P.2d 850 (1990).

In sex offense prosecutions, the defendant's prior sexual offenses against the victim in the present case are routinely held admissible to show the defendant's lustful disposition toward that victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003), *review denied*, 151 Wn.2d 1036 (2004). The Washington Supreme Court found evidence of additional sexual misconduct toward the same victim admissible in *Camarillo*, recognizing that "this court has 'invoked an exception in similar cases to permit evidence of collateral sexual misconduct when it shows a lustful disposition directed toward the offended (victim).'" 115 Wn.2d at 70 (quoting *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1993)). When considering lustful disposition, it is important that the prior conduct reveals a sexual desire for that particular victim. *Guzman*, 119 Wn. App. at 182. Such evidence makes it more probable that the defendant committed the offense charged. *State v. Thorne*, 43 Wn.2d 47, 60, 260 P.2d 331 (1953).

Here, the trial court found the Missouri misconduct admissible to help explain the history and relationship between the cousins. The court did not expressly refer to this as evidence of M.B.J.'s lustful disposition, but it clearly was admissible as such.[1] Although the trial court also did not weigh the probative value of this evidence against its prejudicial effect on the record, the need for such balancing is diminished in a bench trial. We presume that a trial judge considers evidence only for its proper purpose. *See State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177, *cert. denied*, 371 U.S. 818 (1962). Moreover, the danger of prejudice is reduced in a bench trial because a trial judge is in a better position than jurors to identify and focus on the probative quality of evidence and disregard its prejudicial aspects. *State v. Jenkins*, 53 Wn. App. 228, 236-37, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989); *see also State v. Majors*, 82 Wn. App. 843, 848-49, 919 P.2d 1258 (1996) (in bench trial, court is presumed to give evidence its proper weight), *review denied*, 130 Wn.2d 1024 (1997).

The State also argues that the trial court properly admitted the Missouri evidence under ER 404(b) to show a common scheme or plan. Evidence of prior sexual acts against persons other than the victim are admissible under this theory if (1) the State can show the prior acts by a preponderance of the evidence, (2) the evidence is admitted for the purpose of showing a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial. *State v. Kennealy*, 151 Wn. App. 861, 886, 214 P.3d 200 (2009), *review denied*, 168 Wn.2d 1012 (2010). "[W]hen similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

[1] We may affirm the trial court on any basis the record supports. *State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

Prior similar acts of sexual abuse can be very probative of a common scheme or plan, which in turn is relevant to disproving a defendant's denial of the current acts. *State v. Krause*, 82 Wn. App. 688, 695-96, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007 (1997).

Here, both victims testified that M.B.J. committed acts of sexual abuse against them in Missouri that were similar to those that allegedly occurred in Washington, with M.B.J. referring to the acts in both states as playing Yahtze. The victims alleged that the abuse occurred in Missouri and Washington when the cousins were in a bedroom playing video games or watching television. Q.A.W. also described the similar patterns of abuse to Detective Langlois. The similarity between the acts in Missouri and Washington with regard to both victims made the Missouri allegations cross admissible to prove a common scheme or plan on M.B.J.'s part.

Any error that occurred when the trial court failed to expressly address each ER 404(b) factor before allowing testimony about the Missouri acts was harmless because of the considerable additional evidence supporting the trial court's findings. *See Miles*, 77 Wn.2d at 601 (new trial ordinarily will not be granted for error in the admission of evidence during a bench trial if there remains substantial admissible evidence to otherwise support the trial court's findings). The trial court made unchallenged findings that Q.A.W. and Q.I.W. were credible witnesses and that it believed their testimony. Their description of the abuse that occurred in Washington provides substantial evidence to support the trial court's findings and verdict.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.