IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NOEL JAY WALKER, Appellant.	No. 39404-9-II UNPUBLISHED OPINION

Johanson, J. — Noel Jay Walker appeals his jury trial conviction for second degree child molestation.[1] He argues that (1) the trial court erred by admitting evidence of prior, uncharged sexual misconduct under RCW 10.58.090; (2) this same evidence was not admissible under ER 404(b); and (3) admission of this evidence was not harmless. The State concedes that under *State v. Gresham*,[2] RCW 10.58.090 is unconstitutional. But the State contends that the evidence was admissible under ER 404(b) and that the admission of the prior sexual misconduct was not

[1] In its response, the State acknowledged a potential sentencing error. On February 16, 2011, we granted Walker's motion for permission to allow the trial court to resentence him to correct this error and to enter a new judgment and sentence. Accordingly, the sentencing issue is no longer before us.

[2] 173 Wn.2d 405, 269 P.3d 207 (2012).

harmful. We agree that *Gresham* precludes admission of the prior sexual misconduct evidence under RCW 10.58.090.[3] Although we also hold that the trial court properly admitted the prior sexual misconduct evidence under ER 404(b) as evidence of a common scheme or plan and intent, we conclude that admitting this evidence without a limiting instruction was not harmless. Accordingly, we reverse the conviction and remand for further proceedings.

FACTS

I. Background

In late December 2007, 13-year-old HLL[4] spent the night at her friend KW's house. Walker is KW's father. In July 2008, HLL disclosed to her mother that Walker had engaged in inappropriate sexual contact with her during the December 2007 overnight visit. The State charged Walker with second degree child molestation of HLL occurring between December 1, 2007 and January 1, 2008.

II. Procedure

A. Admission of Uncharged Sex Offense under RCW 10.58.090

Before trial, the State moved to introduce an uncharged sex offense under RCW

[3] *Gresham* declared RCW 10.58.090 unconstitutional long after trial in this case.

[4] Throughout this opinion, we use initials to identify the juvenile victim and other juveniles involved in this matter to protect their privacy.

10.58.090.[5] The State planned to present evidence from another girl, LG,[6] who also alleged that Walker had touched her inappropriately when she stayed overnight at his home. Walker moved to exclude this evidence, arguing that RCW 10.58.090 was unconstitutional and that the evidence was unfairly prejudicial.

At a hearing on the State's motion,[7] LG testified that she too had befriended Walker's daughter, KW, and that Walker had engaged in inappropriate physical contact with her (LG) when she spent the night at his home two years earlier. The trial court ruled that LG's testimony was admissible under RCW 10.58.090.

The trial court also concluded that LG's testimony was also admissible under ER 404(b). The trial court commented that if it had admitted this evidence solely under ER 404(b), a limiting instruction would be required but that a limiting instruction was not required because it had also

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[5] RCW 10.58.090, which took effect on June 12, 2008, provides in part:

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
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> (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
>
> . . . .
>
> (5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

[6] LG was 14 years old at the time of the October 2009 trial.

[7] Walker was represented by counsel at this hearing.

admitted the evidence under RCW 10.58.090.

B. Trial

The State presented testimony from HLL, LG, and two detectives who interviewed Walker following his arrest. Walker's only witness was KW. He represented himself during the trial.

1. HLL's testimony

HLL testified she met KW when their brothers had become friends and that the two families sometimes spent time together. In late December 2007, she spent the day with KW and was then invited to stay overnight. The girls went to bed in KW's bedroom at about 10:00 pm.

During the night, HLL woke to find that KW was in the bathroom getting sick. After about 10 or 15 minutes, HLL felt "kind of nauseous" because KW was getting sick and decided to try to call her parents on her cellular telephone and ask to come home. 1 Verbatim Report of Proceedings (RP) at 67. Her phone was in her bag outside the bedroom, and she hesitated to get the phone after seeing Walker because she did not know him very well. Walker then came into KW's bedroom and asked HLL what she was doing.

According to HLL, Walker followed her back into the bedroom and lay down with her on KW's bed; HLL was inside her sleeping bag on top of the covers. She told Walker that she "didn't feel comfortable around people that were sick," and he told her that it was "fine" and then started talking to her about school and other "random questions," including whether she

had a boyfriend, if she had "ever kissed a guy," and whether she had "started [her] period." 1 VRP at 69-70. She answered some of his "random" questions, but she did not respond to these three specific questions. 1 VRP at 70. As he talked to her, Walker touched her on her breast over her clothing and then kissed her on the mouth.

When HLL then told him that she did not "feel good," "wanted to go home," and felt like she was "going to get sick," he told her to "tough it out," and that she was not going to get sick. 1 VRP at 72. She asked him to get her a "bucket" in case she got sick, and he kissed her on the lips again before retrieving a bowl. 1 VRP at 72. When he returned, he got back on the bed, rubbed her chest, and kissed her. He told HLL that he wanted her to stay and to not call her parents because it would make him look like a "bad father," because KW had gotten sick. 1 VRP at 74. He then offered to "comfort" her and rubbed her back, under her clothing. 1 VRP at 74. After rubbing her back for a couple of minutes, he then said, "[']Now for your butt,[']" but HLL told him no and turned over. 1 VRP at 74.

HLL told Walker that she was not going to be able to sleep and that she wanted to go home, but Walker said he would come back in a half hour and if she was still awake she could call her parents. When he returned, she was still awake. He again told her to "tough it out," and then sat next to her bed, placed his head on the bed, and told her that she could not tell anyone about what had happened because "it would ruin [her] and [KW's] and our family's relationship with each other." 1 VRP at 76. When HLL promised not to tell, he left the room again. This time, as he left, he said "that he wasn't a perv." 1 VRP at 76. Although he checked on her again, she pretended to be asleep. He took her home the next day.

At first, HLL did not tell anyone about this incident because she thought it would ruin her friendship with KW. HLL continued to see KW, but she frequently avoided going over to KW's house. HLL did, however, spend the night at KW's house approximately three more times. HLL testified that on her last overnight visit the following July, Walker "tried to see [her] while she was changing" her clothes after swimming. 1 VRP at 79. HLL told KW about the peeking incident and what had happened that past December. KW convinced her not to go home because KW did not want her father to get into trouble.

The next morning, while KW was showering, Walker talked to HLL about the incident in December and "explained that he thought [they] could have had something, that he thought [she] was special and that [they] could have gone on and had wild sex and he said that he had dreams about what could have happened later that night." 1 VRP at 87. He also told her that the reason he had tried to see her the previous day "was because he wanted to finish what he was doing." 1 VRP at 88. In addition, he said that if she told her parents that he had tried to see her "naked," he would say he was just walking by as she was changing. 1 VRP at 88. The following day, HLL told her mother about the two incidents.[8]

2. LG's testimony

LG testified that she had spent the night in the Walker home about two years earlier, when she was 12 years old.[9] When Walker picked her up to go swimming with KW, he commented on

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[8] HLL also testified that although she recognized LG from school, she did not know LG. She denied telling LG about the incidents with Walker.

[9] LG's trial testimony was substantially similar to her testimony at the pretrial hearing at which the trial court determined the admissibility of her testimony.

how she had changed and told her she was beautiful. He also asked her if her sister was a virgin, which "made [her] really uncomfortable." 1 VRP at 148.

That night, LG fell asleep on the couch while they were watching a movie, and KW went to bed in the room she shared with her younger brother.[10] The next thing she recalled was Walker waking her up, commenting on her sunburn, and asking her if he could rub lotion on her legs. He rubbed the lotion on her legs up to her thighs. When he tried to put his hands on her hips, she told him to stop and asked to sleep with KW. He told her that it was okay to stay on the couch, but she got up and went toward KW's room. Walker allowed her to go, and moved KW's brother to the couch so LG could sleep in his bed.[11]

3. The detectives' testimonies

The two detectives who interviewed Walker after his arrest testified that during the interview Walker asserted that HLL was standing in a doorway while he was helping KW and that HLL "jump[ed] on him and put[] him in a bear hug" when he walked by the doorway. 1 VRP at 169. He stated that he "had to peel her off of him" and that he then "led her into the bedroom." 1 VRP at 169. He commented that HLL's behavior made him uncomfortable and that he was concerned her behavior was "some type of sexual advance[]," but he stayed in the bedroom with her to try to calm her down because she was upset. 2 VRP at 199.

[10] This incident took place at a different location than the incident involving HLL.

[11] LG also testified that she had seen HLL before but that she did not know HLL and had never talked to her about Walker. LG was unaware of HLL's allegations before disclosing her (LG's) own contact with Walker. LG did not explain how law enforcement learned of her allegations, but a detective testified that they had learned about LG from a school counselor's Child Protective Services referral.

At first, he told the detectives that he did not touch HLL, but he later stated that he had rubbed her back while keeping his knee on the floor and that when he got up to leave, HLL kissed him on the cheek. He also stated that he thought HLL was "sexually attracted to him." 1 VRP at 173. He admitted that he had never told HLL's parents about this incident, noting that it "probably would have been a good idea for him to do it." 1 VRP at 173. Walker also denied trying to look at HLL as she was dressing during her visit in July. 1 VRP at 173-74.

At the end of the interview he told the detectives that he had had sexual feelings towards HLL and "that he was afraid that his thoughts were going to . . . get him in trouble," but he also stated that he knew there was a line and that he had not crossed it. 1 VRP at 173. Although the detectives drafted a statement for Walker to sign, he did not sign it, stating that he had already told them "a lot more than [he] had planned to" and that an attorney had told him never to "give a signed statement." 2 VRP at 206.

4. KW's testimony

Through KW, Walker presented evidence suggesting that HLL was not telling the truth because there would have been no reason for her to try to retrieve her cell phone from another room as she knew she would not get reception at the Walkers' home and there was a telephone available to her in KW's room. KW also testified that although HLL had later told her that she (HLL) thought Walker had tried to peek at her while she was changing, HLL had stayed at their home several times and had never appeared to be uncomfortable around Walker or expressed any fear.

C. Verdict and Appeal

The jury found Walker guilty of second degree child molestation. Walker appealed his conviction. We stayed this appeal pending our Supreme Court's decision in *Gresham*. *Spindle*. After our Supreme Court filed *Gresham*, we issued an order directing the parties to address *Gresham* in supplemental briefs.

ANALYSIS

Walker's original argument was that RCW 10.58.090 is unconstitutional on several grounds and that the trial court erred in admitting LG's testimony under that statute. As the State concedes, our Supreme Court recently held in *Gresham* that RCW 10.58.090 is unconstitutional. Accordingly, we hold that the trial court erred in admitting LG's testimony under RCW 10.58.090.

Walker now argues that the trial court also erred in finding that LG's testimony was admissible under ER 404(b) and that this error was harmful. Walker did not challenge the trial court's ER 404(b) ruling in his original briefing—he first raised this issue in his supplemental brief responding to our order requesting additional briefing on *Gresham*.[12] Generally, we do not address issues raised for the first time in a responsive brief. *State v. Wilson*, 162 Wn. App. 409,

[12] At most, he acknowledged in a footnote in his reply that "[a]lthough the trial court purported to find the evidence admissible under an exception to ER 404(b), the court did not give an instruction limiting the jury's consideration of the evidence." Reply at 7 n.1. We note that Walker cites *State v. Russell*, 154 Wn. App. 775, 225 P.3d 478 (2010), for the proposition that the trial court must give a limiting instruction when it admits evidence under ER 404(b). But after Walker filed his reply, our Supreme Court specifically overruled the Court of Appeals on that point, holding that the trial court is not required to give a limiting instruction unless a party requests one. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

7 n.5, 253 P.3d 1143, *review denied*, 173 Wn.2d 1006 (2011). But because the State has had an opportunity to respond to this argument and whether LG's testimony is admissible is relevant on remand, we briefly address the trial court's ER 404(b) ruling and whether the absence of a limiting instruction was harmful.

I. Admission of Evidence Under ER 404(b)

The trial court ruled that LG's testimony was admissible under ER 404(b) to show (1) a common scheme or plan, (2) intent, (3) opportunity, and (4) absence of mistake or accident. We review the trial court's admission of evidence of abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

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.

The court may also admit such evidence to prove a common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 853-54, 889 P.2d 487 (1995). "The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case." *Lough*, 125 Wn.2d at 859.

A. Common Scheme or Plan

> When a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be

> explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct 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.

Lough, 125 Wn.2d at 860 (footnotes and internal citations omitted).

Here, the evidence showed that HLL and LG were similar ages when the incidents occurred and that Walker allowed each young girl who had befriended his daughter to spend the night, asked each girl inappropriate questions, approached them when they were alone and in his care, and touched them inappropriately while purporting to comfort them. We conclude these similarities were sufficient to allow the trial court to conclude that LG's testimony demonstrated that Walker acted by design. LG's testimony that Walker had behaved according to a similar plan or design on a similar occasion was important to this case because the only evidence of Walker's inappropriate behavior with HLL was her testimony, which was tempered by the fact she did not report the incident for several months, and Walker's admission that he may have had sexual feelings toward HLL. Given the importance of LG's testimony and the fact Walker's behavior was limited to inappropriate touching, kissing, and inappropriate comments, as opposed to more aggressively sexual behavior, LG's corroborating testimony was not unfairly prejudicial. Accordingly, we hold that the trial court did not abuse its discretion in ruling that LG's testimony was admissible as evidence of a common scheme or plan.

B. Intent

Walker contends that LG's testimony was not admissible to establish "intent" because

"intent" is not an element of child molestation. Appellant's Suppl. Br. at 5. But, as the State recognizes, "[s]econd degree child molestation necessarily involves a purposeful or intentional and unlawful or unprivileged touching." *State v. Stevens*, 127 Wn. App. 269, 277, 110 P.3d 1179 (2005), *aff'd*, 158 Wn.2d 304, 143 P.3d 817 (2006). "Intent is relevant to the crime of second degree child molestation because it is necessary to prove the element of sexual contact." *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Accordingly, Walker does not show that the trial court erred in concluding that LG's testimony was admissible to show intent.

C. Opportunity

Walker next argues that "L.G.'s testimony did nothing to show opportunity under ER 404(b)." Appellant's Suppl. Br. at 5. The State does not respond to this argument. We agree with Walker that it is not clear from the record how LG's testimony was relevant to opportunity to commit the crime. Walker never disputed that he was alone with and touched HLL. Accordingly, Walker is correct that the trial court should not have admitted LG's testimony for this purpose.

D. Absence of Mistake or Accident

Finally, Walker argues that absence of mistake was not relevant because his theory at trial was that he did not touch HLL's chest. The State does not address this argument. Walker did not deny touching HLL, hugging her, or rubbing her back—he never alleged that his contact with HLL was accidental. Instead, it was the exact nature of the touching, his intent, and the purpose of his contact with HLL that was at issue here. Accordingly, Walker is correct that the trial court should not have admitted LG's testimony to establish absence of mistake or accident.

II. Lack of Limiting Instruction: Harmful Error

Even though portions of the trial court's ER 404(b) ruling was correct, we must still determine whether the trial court's admission of the uncharged sexual misconduct evidence without any limiting instruction was prejudicial. *See Gresham*, 173 Wn.2d at 423-24. Generally, a trial court is not required to provide an ER 404(b) limiting instruction unless one of the parties requests a limiting instruction, and we normally refuse to address whether a limiting instruction was required if the defendant failed to request one. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011); RAP 2.5(a); *see also Gresham*, 173 Wn.2d at 423, n.2. But the facts here show that although the trial court acknowledged that a limiting instruction would have been appropriate if LG's testimony was admissible only under ER 404(b), any request for a limiting instruction would have been futile given that the trial court also admitted the evidence under RCW 10.58.090. Accordingly, we cannot fault Walker for not requesting or the trial court for not giving a limiting instruction.

> If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request. An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24 (footnote and citations omitted). In *Gresham*, the court held that the evidence of Gresham's co-appellant's, Scherner, prior molestations of four additional victims was admissible for the purpose of showing a common scheme or plan and that the trial court erred in failing to give a limiting instruction related to that evidence. *Gresham*, 173 Wn.2d at 423-25. Holding that RCW 10.58.090 was unconstitutional, the court then proceeded to determine if the

trial court's failure to give the limiting instruction was harmless given the evidence was admissible under ER 404(b). *Gresham*, 173 Wn.2d at 425. The court evaluated whether, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Gresham*, 173 Wn.2d at 425 (internal quotations marks omitted). The court concluded that the lack of a limiting instruction was harmless because there was "overwhelming evidence of Scherner's guilt" apart from the ER 404(b) evidence. *Gresham*, 173 Wn.2d at 425. This "overwhelming evidence" included "[the victim's] detailed testimony, evidence of Scherner's flight from prosecution, the jury's opportunity to assess Scherner's credibility, and, perhaps most damning, [a] recorded phone conversation in which Scherner all but admits his molestation of [the victim]." *Gresham*, 173 Wn.2d at 425.

Here, however, absent a limiting instruction,[13] the jury could have considered LG's testimony for any purpose, including as improper propensity evidence, and, unlike the evidence in Scherner's case, there was no additional "overwhelming evidence." The only evidence here was HLL's testimony and Walker's statement about his possible sexual feelings towards HLL. And without a limiting instruction, it is unlikely that the jury would have understood that LG's testimony could be considered only for purposes allowed under ER 404(b), such as common scheme or plan or intent. Given that this case hinged on HLL's credibility, the fact there was little evidence other than HLL's statements, and the potentially prejudicial nature of LG's testimony because it involved inappropriate physical contact with a child, we cannot say, within reasonable

[13] Additionally, during their closing arguments, neither the State nor Walker mentioned LG's testimony or discussed how that testimony could or could not be used during deliberation. Thus the jury was without any guidance on how it could use this evidence.

probabilities, that had the error not occurred the outcome of the trial would have been materially different. Thus, we hold that admission of LG's testimony without a limiting instruction was not harmless error.

Accordingly, we reverse Walker's conviction and remand for further proceedings. On remand, if the State again chooses to present LG's testimony, it should ensure that the trial court offers appropriate limiting instructions upon Walker's request.

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.

Johanson, J.

We concur:

Hunt, J.

Worswick, C.J.