IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. JASON PHILLIP ROMERO, Appellant/Cross-Respondent.	No. 39660-2-II (Consolidated with No. 40769-8-II) UNPUBLISHED OPINION
In re Personal Restraint Petition of JASON PHILLIP ROMERO, Petitioner.	

Quinn-Brintnall, J. — A jury found Jason Romero guilty of first degree child molestation. Romero appeals, arguing that the trial court erred by admitting evidence of a prior indecent liberties conviction under ER 404(b) and that the trial court erred by not declaring a mistrial after two violations of a ruling in limine. In his statement of additional grounds (SAG),[1] Romero asserts that the limiting instruction as to the prior conviction evidence was inadequate to

[1] RAP 10.10.

cure potential prejudice and polygraph test results should have been admitted as evidence at trial. In his personal restraint petition (PRP),[2] Romero asserts that the prosecutor prosecuted Romero in retaliation for Romero's former employer's allegedly faulty countertop installation. We affirm.

FACTS

On November 14, 2008, the State charged Romero with one count of first degree child molestation. RCW 9A.44.083. On February 6, 2009, the State filed a notice of intent to offer evidence of prior sex offenses under either RCW 10.58.090[3] or ER 404(b). Specifically, the State sought to admit evidence that on August 7, 2006, Romero was sentenced to 17 months confinement for indecent liberties against two female relatives.[4] Romero objected, arguing that RCW 10.58.090 was unconstitutional. Romero then moved to exclude evidence of his prior conviction.

[2] RAP 16.4.

[3] RCW 10.58.090(1), *abrogated by State v. Gresham*, 173 Wn.2d 405, 413, 269 P.3d 207 (2012), provides,

> 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.

[4] On April 24, 2006, Romero pleaded guilty to the indecent liberties charge. The two victims, S.M.P. and C.M.P., were 20 and 13 years old, respectively, when Romero committed the offenses.

On April 6, the trial court held an ER 404(b) hearing on the admissibility of evidence of Romero's prior indecent liberties conviction under both ER 404(b) and RCW 10.58.090.[5] On May 4, the trial court orally ruled that it would admit the evidence as to C.M.P. because of commonalities between C.M.P. and C.R.D., the current alleged victim. The trial court noted "similar age, similar manner of offending, opportunistic crime, and the age and the vulnerability of the victim[s]." Report of Proceedings (RP) (May 4, 2009) at 7. The trial court excluded evidence as to S.M.P. because it found dissimilarities.

The trial court then conducted a written RCW 10.58.090(6) (ER 403) balancing test and ruled that evidence of Romero's prior conviction as to C.M.P. was admissible. The trial court noted that it "reache[d] the same conclusion as it would in conducting a traditional ER 404(b) analysis with the caveat that the evidence could have been admitted for any purpose and not limited to demonstrating that a crime had been committed under the common scheme or plan exception to ER 404(b)." CP at 141-42.

A jury trial began on June 11. During trial, the State called C.M.P., the victim of Romero's previous indecent liberties conviction. Romero was C.M.P.'s older sister's boyfriend.

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[5] On May 18, the trial court entered a written finding that "RCW 10.58.090 is a substantive rule [that] does not violate the Constitution's Art. IV §1," but noted that if the statute was a procedural rule, then it would be void as a violation of the separation of powers doctrine. Clerk's Papers (CP) at 136. On appeal, Romero also argues that RCW 10.58.090 is unconstitutional. On January 14, 2011, we stayed this case pending the outcome of *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009), *aff'd*, 173 Wn.2d 405, 269 P.3d 207 (2012), and *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009), *rev'd*, 173 Wn.2d 405. On January 5, 2012, our Supreme Court issued *Gresham*, 173 Wn.2d 405, holding that RCW 10.58.090 is unconstitutional. The State concedes that RCW 10.58.090 is an unconstitutional procedural rule and withdraws its cross appeal of the trial court's finding that RCW 10.58.090(6)(e) was unconstitutional. We accept the State's concession and address the remaining ER 404(b), SAG, and PRP issues.

C.M.P. testified that when she was 13, she was staying overnight at her sister's house when Romero entered the room. C.M.P. woke when Romero reached between her legs and touched her genitals for one or two minutes. Romero left without speaking to her.

C.R.D. testified that she was eight years old when she stayed at her older half sister's house. Romero was her half sister's husband. At some point during the night, Romero entered the bedroom, rubbed C.R.D.'s crotch area and buttocks on the outside of her pajamas, put his thumb in her mouth, licked her lips with his tongue, and left the room.

On June 17, a jury found Romero guilty of first degree child molestation. The sentencing court sentenced Romero to 70 months confinement and community custody for the remainder of his life. Romero timely appeals. Romero also filed a PRP on May 25, 2010. We consolidated Romero's PRP and appeal on August 27.[6]

DISCUSSION

ER 404(b) Analysis

Romero asserts that the trial court erred by admitting C.M.P.'s testimony. Romero argues that C.M.P.'s irrelevant testimony generated unfair prejudice that outweighed probative value contrary to ER 404(b) and ER 403. Because the evidence was admissible under the ER 404(b) common scheme or plan exception, we disagree.

We review evidentiary rulings for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion if it bases a ruling on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775

[6] Because Romero's PRP was consolidated with his direct appeal, we stayed consideration of the PRP pursuant to our order staying Romero's direct appeal pending the outcome of *Gresham*, 173 Wn.2d at 413.

(1971). We will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. *State v. St. Pierre*, 111 Wn.2d 105, 119, 759 P.2d 383 (1988).

Under ER 404(b), "[e]vidence 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." Before admitting ER 404(b) evidence, a trial court "'must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Foxhoven*, 161 Wn.2d at 175.

To admit evidence of a common scheme or plan, i.e., a plan to commit similar crimes repeatedly, the trial court must find substantial similarity between the prior bad acts and the charged crime. *DeVincentis*, 150 Wn.2d at 21. "[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial," but not "unique." *DeVincentis*, 150 Wn.2d at 20-21.[7] The purpose of admitting evidence of a common scheme or plan is "to show

[7] We note that evidence of a common scheme or plan is distinguished from modus operandi because prior misconduct proffered to demonstrate a modus operandi is admissible as evidence of identity of the perpetrator if it "bears such a high degree of similarity as to mark it as the handiwork of the accused." *Foxhoven*, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)). Modus operandi evidence is relevant only if the method used to commit both crimes is so unique that proof the defendant committed one crime makes it highly probable he committed the other crime. *Thang*, 145 Wn.2d at 643. However, because we hold that the evidence of Romero's prior assault against C.M.P. is admissible under ER 404(b)'s common scheme or plan exception, we do not need to determine whether the evidence would be admissible under the modus operandi exception.

that the defendant has developed a plan and has again put that particular plan into action." *State v. Scherner*, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). This standard is not new, as our Supreme Court explained in *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995),

> 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.

(Citing *People v. Ewolt*, 7 Cal. 4th 380, 402, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994).)

Here, there is no dispute that the State showed the prior acts by a preponderance of the evidence. Thus, we address whether the acts constituted a common scheme or plan, whether the evidence was relevant, and whether the evidence was more probative than prejudicial. *DeVincentis*, 150 Wn.2d at 17 (quoting *Lough*, 125 Wn.2d at 852).

Romero relies on *Gresham*, 173 Wn.2d 405, to argue that there must be a long-standing pattern demonstrating similarities between C.R.D. and C.M.P. Specifically, Romero argues that in *Scherner*, unlike in his case, ER 404(b) permitted evidence of years of prior incidents of child molestation against victims between 7 and 13 years old where the instant victim was 7 or 8 years old. *Scherner*, 173 Wn.2d at 414-17. But Romero ignores well-established Washington case law. In *DeVincentis*, our Supreme Court affirmed the trial court's ruling admitting evidence of a prior child molestation conviction where the only previous victim was 10 years old and the instant victim was 12 years old. 150 Wn.2d at 13-15. Division One of this court has also affirmed the trial court's ruling admitting evidence of a prior victim molested between the ages of 7 and 11 in a trial where the alleged victim was 8 years old. *State v. Baker*, 89 Wn. App. 726, 733, 950 P.2d 486 (1997), *review denied*, 135 Wn.2d 1011 (1998). Romero does not cite to any legal authority

for the proposition that a "long-standing pattern" of conduct is required for the State to meet its burden to show a common scheme or plan. RAP 10.3(a)(6). We assume he has none. Therefore, Romero's assertion that a single prior act against a 13-year-old victim is inadmissible in a trial where the alleged victim was 8 years old fails.

Furthermore, there are sufficient similarities between C.R.D. and C.M.P. to support the trial court's finding that the incidents demonstrated a common scheme or plan. The trial court found commonality in that neither victim was related biologically to Romero, but had a familial relationship with his then girlfriend. The trial court also found commonality in that the two offenses were opportunistic, occurring only when the victims slept at Romero's house. The trial court reasoned that even if 13-year-old C.M.P. was post-pubescent, she would still be an adolescent and similar to 8-year-old C.R.D. The trial court concluded that given "the fact that we actually had more common features between these two crimes than what were alleged in the *DeVincentis* case, I had to come down on admissibility." RP (May 4, 2009) at 7.

We hold that the trial court did not abuse its discretion in finding a common scheme or plan because of "similar age, similar manner of offending, opportunistic crime, and the age and the vulnerability of the victim[s]." RP (May 4, 2009) at 7; *DeVincentis*, 150 Wn.2d at 17. C.M.P. and C.R.D. were 13 and 8 years old, respectively, at the time of the first incidents involving Romero touching each girl's crotch area on the outside of their pajamas, and the incidents only occurred when the girls spent the night at their older sister's house. Because these facts show substantial similarities between Romero's molestation of C.R.D. and C.M.P., the evidence was admissible under the ER 404(b) common scheme or plan exception. *DeVincentis*, 150 Wn.2d at 13-15.

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401. Evidence of a common scheme or plan "is relevant when the existence of the crime is at issue." *DeVincentis*, 150 Wn.2d at 21. Here, Romero pleaded not guilty to the first degree child molestation charge as to C.R.D. Thus, the existence of a design to commit abuse, evidenced by a similar pattern of past behavior, was relevant to prove the crime of child molestation occurred. *DeVincentis*, 150 Wn.2d at 17-18; *see Lough*, 125 Wn.2d at 862 (past act evidence was relevant to show whether the charged conduct occurred or if it was a fabrication by the victim).

Under ER 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has wide discretion in balancing probative value versus prejudice under ER 403. *State v. Stein*, 140 Wn. App. 43, 67, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045 (2008). Here, the trial court initially stated that "[i]t is obvious to the court that admissibility of any prior acts from that one plea of guilty is going to be prejudicial." RP (May 4, 2009) at 3. The trial court then concluded that C.M.P.'s testimony was more probative than prejudicial because of the substantial similarities between the crimes. The trial court noted that the State had agreed to a limiting instruction. In light of the similarities between C.M.P. and C.R.D., the trial court did not abuse its discretion in finding the evidence more probative than prejudicial in this case. *Stein*, 140 Wn. App. at 67.

Accordingly, because C.M.P.'s testimony demonstrated a common plan or scheme, was relevant, and was more probative than unfairly prejudicial, we hold that the trial court did not err

in admitting C.M.P.'s testimony under ER 404(b) and ER 403.

Motion for Mistrial[8]

Romero asserts that the trial court erred by failing to grant a mistrial after two violations of a ruling in limine. We disagree. Testimony violating a ruling in limine may be grounds for a mistrial if it prejudices the jury. *State v. Escalona*, 49 Wn. App. 251, 254-56, 742 P.2d 190 (1987). A mistrial is not warranted when a prosecutor does not intentionally solicit or expand upon a witness's testimony that violates an order in limine. *State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989), *review denied*, 114 Wn.2d 1005 (1990). A trial court properly declares a mistrial only when the defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be fairly tried. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). The trial court is best suited to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court has broad discretion in determining whether an instruction can cure an error. *State v. Ecklund*, 30 Wn. App. 313, 316, 633 P.2d 933 (1981). We presume juries follow the trial court's instructions. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994).

Here, the trial court excluded evidence as to S.M.P., the older victim of Romero's indecent liberties conviction. The record shows that, at trial, the State did not ask C.R.D. directly about S.M.P. Rather, the State asked C.R.D., who was then 11, whether she remembered a time when Romero "was gone for kind of a long time." RP (June 11, 2009) at 44. C.R.D. responded that her mother had initially told her that he was in Alaska "[b]ut then after, after she told

[8] In his SAG, Romero also alleges that the court erred by denying the motion for a mistrial; however, Romero does not present any additional arguments that warrant treating Romero's SAG separately.

everybody else she told me that he was really in jail for doing the same thing to [S.M.P.] and [C.M.P.]." RP (June 11, 2009) at 45. The trial court sustained Romero's objection and instructed the jury to disregard the remark.

Outside the presence of the jury, the State suggested the trial court "caution" C.R.D. not to refer to S.M.P. while testifying. The trial court agreed and defense counsel said she appreciated the State's "desire for caution." RP (June 11, 2009) at 52. The trial court then reminded C.R.D. not to mention S.M.P. again. Afterwards, C.R.D. referred to S.M.P. once by saying, "I'm not allowed to say her name." RP (June 11, 2009) at 54.

A mistrial is not warranted here because C.R.D.'s comments were spontaneous and unsolicited. *Clemons*, 56 Wn. App. at 62. The trial court properly instructed the jury to disregard C.R.D.'s statement mentioning S.M.P. by name and we presume juries follow the trial court's instructions. *Hanna*, 123 Wn.2d at 711. Accordingly, the two violations of rulings in limine were not grounds for a mistrial.

SAG Issues

In his SAG, Romero asserts that the limiting instruction as to C.M.P.'s testimony was inadequate to cure prejudice, and that the results of his polygraph tests should have been admitted as evidence at trial. We disagree.

First, generally, when a trial court admits evidence of other wrongs under ER 404(b), it must give the jury a limiting instruction. *Foxhoven*, 161 Wn.2d at 175. We presume a jury follows the trial court's instructions. *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (citing *State v. Suleski*, 67 Wn.2d 45, 406 P.2d 613 (1965)). But "an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence

admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Miles*, 73 Wn.2d at 71 (citing *Suleski*, 67 Wn.2d 45). We review a trial court's decision to give a particular limiting instruction for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, before C.M.P. testified at trial, the trial court instructed the jury as follows:

> Members of the jury, I want to give you a cautionary instruction now because we are about to hear some evidence from this witness, evidence of the defendant's commission of the crime of indecent liberties. Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a prior conviction for indecent liberties. Evidence of this conviction cannot be used to prove the character of the defendant nor to show he acted in conformity therewith. It may be considered by you only for the purpose of evaluating whether the defendant had a common scheme or plan to commit the crime of child molestation. You may not consider it for any other purpose.
>
> Any discussion of the evidence during your deliberations must be consistent with this limitation. Evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in this information.
>
> Bear in mind, as you consider this evidence, at all times the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. The defendant is not on trial for any act, conduct, or offense not charged in this information.

RP (June 11, 2009) at 91-92. The trial court repeated the instruction in written form before deliberation.

As discussed above, although the admitted ER 404(b) evidence was prejudicial, it was not unfairly so. ER 403; *Stein*, 140 Wn. App. at 67. The trial court conducted an exhaustive ER 404(b) hearing, inquiring as to the evidence's admissibility under both ER 404(b) and RCW 10.58.090. The trial court also conducted the ER 403 balancing test on the record, explaining the commonalities between C.R.D. and C.M.P. and dissimilarities between C.R.D. and S.M.P. Furthermore, because Romero actively agreed to the limiting instruction, the instruction became

the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (if parties do not object to jury instructions, they become the law of the case). Romero did not object to the instruction, and we presume that juries follow the trial court's instructions to consider evidence only for a certain purpose. *Miles*, 73 Wn.2d at 71 (citing *Suleski*, 67 Wn.2d 45). Accordingly, we hold that the instruction was adequate to cure prejudice in this case.

Second, Romero asserts he has "passed" several polygraph tests as to his conduct toward C.M.P. Presumably, Romero asserts that the trial court erred by granting the State's motion in limine to exclude any polygraph results. Romero's last assertion is meritless. Polygraph test results are inadmissible as evidence in a criminal proceeding absent stipulation from both parties. *State v. Thomas*, 150 Wn.2d 821, 860-61, 83 P.3d 970 (2004). The trial court granted the State's motion in limine to exclude polygraph results; Romero did not object to the ruling. The record contains no showing that the State would stipulate to the admissibility of test results it moved in limine to exclude and, absent such stipulation, the trial court did not err in refusing to admit polygraph results.

PRP Issue

In his PRP, Romero asserts that the prosecutor had a conflict of interest because Romero's former employer had installed allegedly faulty countertops in the prosecutor's home. Thus, Romero asserts that the prosecutor had "a personal agenda to 'get back' at a person who he was threatening to sue." PRP at 3. Specifically, Romero alleges that the prosecutor threatened to sue his former employer during the pendency of his trial and "may have seen my boss or co-workers at court or even heard I worked there in a court session." PRP at 3. Romero concedes that he is "not positive" whether he himself worked on the prosecutor's house. PRP at

3. Last, Romero alleges that the prosecutor suspiciously "turned up a lot" during his trial proceedings even though another prosecutor was assigned; the prosecutor also responded to his appeal. PRP at 3.

> Relief through a PRP is available to petitioners where they are under a "restraint" that is "unlawful." RAP 16.4(a)-(c). Collateral relief through a PRP is limited "'because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). Thus, challenges based on constitutional error require the petitioner to demonstrate that he "was actually and substantially prejudiced by the error." *Davis*, 152 Wn.2d at 671-72. Nonconstitutional challenges require the petitioner to show that "'the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis*, 152 Wn.2d at 672 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner carries the burden to prove error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).
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> The petitioner must state the facts on which he bases his claim of unlawful restraint and state the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086[, *cert. denied*, 506 U.S. 958] (1992). Where the "petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence." *Rice*, 118 Wn.2d at 886. "The affidavits . . . must contain matters to which the affiants may competently testify." *Rice*, 118 Wn.2d at 886. The evidence must show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Rice*, 118 Wn.2d at 886.

In re Pers. Restraint of Crace, 157 Wn. App. 81, 93-95, 236 P.3d 914 (2010) (footnote omitted), *rev'd*, ___ Wn.2d ___, 280 P.3d 1102 (2012).

A prosecutor's decisions whether to file charges or plea bargain are executive, rather than adjudicatory, decisions so that appearance of fairness doctrine is inapplicable with respect to such

decisions. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Thus, Romero presents a nonconstitutional challenge in which he must show that "'the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis*, 152 Wn.2d at 672 (quoting *Cook*, 114 Wn.2d at 813). But Romero's conclusory allegations are insufficient to meet his burden of proof. RAP 16.7(a)(2)(i); *Williams*, 111 Wn.2d at 365. Romero has failed to present affidavits establishing facts which might entitle him to relief. *Rice*, 118 Wn.2d at 886. Neither does Romero present any corroborating evidence to support his conflict of interest allegation beyond mere speculation or conjecture. *Rice*, 118 Wn.2d at 886. Accordingly, Romero has failed to meet his burden to prove error by a preponderance of the evidence, and we dismiss his petition. *Lord*, 152 Wn.2d at 188.

C.M.P.'s testimony was properly admitted under ER 404(b) and ER 403, and Romero's SAG and PRP claims are meritless. Romero's PRP is dismissed, and Romero's conviction for first degree child molestation is 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:

VAN DEREN, J.

WORSWICK, C.J.