IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRETT ANTHONY SCHMUS, Appellant.	No. 41578-0-II UNPUBLISHED OPINION

Worswick, C.J. — A jury convicted Brett Schmus of three counts of third degree child rape for sexual intercourse with 15-year-old CM. The trial court admitted testimony of VC, a prior victim of Schmus's, ruling the testimony admissible under RCW 10.58.090[1] and ER 404(b). Schmus appeals, arguing that (1) RCW 10.58.090 is unconstitutional, (2) Schmus's prior crime against VC was inadmissible under ER 404(b), and (3) the trial court's findings of fact and conclusions of law finding VC's testimony admissible invaded the province of the jury. We affirm.

FACTS

Fifteen-year-old CM met Schmus and his fiancée at a square dancing club. CM, Schmus, and his fiancée talked and danced at club events.

One day, CM stayed home from school and called Schmus around midmorning, asking

[1] RCW 10.58.090, found unconstitutional in *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207 (2012), provided for the admissibility of a defendant's prior sex offenses when charged with a current sex offense notwithstanding ER 404(b).

him to "[c]ome over and hang out." Report of Proceedings (RP) (Oct. 26, 2010) at 105-06. Schmus came to CM's home and sat on the couch with her to watch television. Schmus began touching her on the legs and then the crotch, first over her clothes and then under them. Schmus then digitally penetrated CM.

At one point, Schmus stopped touching CM, who went upstairs. Schmus then went up the stairs and asked for a "tour" of the house. RP (Oct. 26, 2010) at 115-16. After CM showed him the upstairs rooms, Schmus pushed CM into her bedroom, where he again began touching her crotch and he digitally penetrated her for a second time.

Schmus undressed CM and digitally penetrated her once more. Schmus then went to his car, returning shortly thereafter. Schmus undressed himself, put on a condom, and pushed CM back on her bed and had vaginal intercourse with her. The State charged Schmus with three counts of third degree child rape.[2]

The State sought to admit evidence of Schmus's past sexual intercourse with VC when she was 14 to 15 years old. The State argued that VC's testimony was admissible under RCW 10.58.090 and ER 404(b). At a pretrial hearing, the State proffered that VC would testify as follows: VC knew Schmus because they went to the same school, though they were not friends. Schmus entered her room through her window and told her to take her clothes off, and then Schmus actually took her clothes off. However, Schmus left when VC's mother arrived home. Schmus returned "a couple" weeks later, undressed VC and himself, and had vaginal intercourse with her without a condom. RP (Oct. 20, 2010) at 24. Schmus returned once or twice a week

[2] RCW 9A.44.079.

and had vaginal intercourse with VC for six months until they were caught. Schmus also digitally penetrated VC and had VC perform oral sex on him and he performed oral sex on her. VC complied only because Schmus threatened to hurt her father.

The State further proffered that CM would testify to the facts noted above regarding Schmus's sexual intercourse with her. Schmus objected to admitting VC's testimony, arguing that RCW 10.58.090 was unconstitutional and that VC's testimony was inadmissible under ER 404(b). The trial court ruled that RCW 10.58.090 was constitutional and that VC's testimony was admissible under that statute. The court further ruled that VC's testimony was admissible under ER 404(b) to show a common scheme or plan.[3]

At trial, CM and VC testified to the facts noted above. Schmus presented an alibi defense based on the testimony of his fiancée. The jury found Schmus guilty as charged. Schmus appeals.

ANALYSIS

I. Constitutionality of RCW 10.58.090

Schmus first argues that RCW 10.58.090 is unconstitutional and was thus an invalid basis for admitting VC's testimony. In *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207, (2012), our Supreme Court held that RCW 10.58.090 is unconstitutional because it violates the separation of powers.

[3] After trial, the trial court issued written findings of fact and conclusions of law that reflected CM and VC's testimony as proffered. Although Schmus purports to assign error to many of these findings of fact, he does so only on the grounds that they invaded the province of the jury. He does not argue that the findings were unsupported by substantial evidence. They are, consequently, verities on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Gresham is binding on this court. Because RCW 10.58.090 is unconstitutional, it was not a proper basis on which to admit VC's testimony. But the trial court here relied alternatively on ER 404(b) to admit VC's testimony. And as we hold below, the evidence was properly admissible under ER 404(b).

II. ER 404(b)

Schmus next argues that VC's testimony was inadmissible under ER 404(b). We hold that the evidence was properly admissible to show a common scheme or plan.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). 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.

Evidence of a prior act is admissible to show a common scheme or plan under ER 404(b) only "(1) if 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). Schmus disputes only the second element, that VC's testimony shows a common scheme or plan.[4]

There are two types of evidence admissible to show a common scheme or plan under ER

[4] The State argues that VC's testimony was relevant because it refuted Schmus's general denial, established identity, and established motive. But Schmus does not contest the relevance of VC's testimony and we do not address the issue.

404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. *DeVincentis*, 150 Wn.2d at 19. The instant case deals with the second type of common scheme or plan, a single plan followed to commit separate but very similar crimes. Such a common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Evidence of such a plan "'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are individual manifestations.'" *DeVincentis*, 150 Wn.2d at 19 (quoting *Lough*, 125 Wn.2d at 860). But such common features need not show a unique method of committing the crime. *DeVincentis*, 150 Wn.2d at 20-21.

In order to determine whether VC's rape is sufficiently similar to CM's rape to demonstrate a common scheme or plan, we review other cases in which our courts have upheld the admission evidence of past sexual misconduct for that purpose. In *Lough*, our Supreme Court upheld the admission of prior rapes to establish that Lough drugged and raped the complaining witness. 125 Wn.2d at 861. In each prior instance, Lough drugged the victim and raped her. 125 Wn.2d at 849-51. Lough followed this plan to commit rape in slightly different ways each time—for instance, Lough met the complaining witness at a class he was teaching and later came to her home where he drugged her drink. 125 Wn.2d at 849-50. In another instance, Lough told

the victim she looked tired and needed an iron supplement, and thus got her to drink some drugged orange juice. 125 Wn.2d at 850. In yet another instance, Lough gave the victim pain medication for a broken arm that put her to sleep. 125 Wn.2d at 851. Our Supreme Court determined that Lough's "history of drugging women, with whom he had a personal relationship, in order to rape them while they were unconscious or confused and disoriented evidences a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual intercourse." 125 Wn.2d at 861.

Our Supreme Court likewise upheld the admission of evidence of a prior act of child molestation to show a common scheme or plan to commit the same in *DeVincentis*, 150 Wn.2d at 22-24. In both situations, the victims were girls between 10 and 13 years old. 150 Wn.2d at 22. DeVincentis used a similar method to get to know the victims, using his daughter to get to know his daughter's friend, and using a neighbor girl to get to know the neighbor girl's friend. 150 Wn.2d at 13, 15, 22. Also in both circumstances, he wore unusual underwear to get the victims used to his near-nudity. 150 Wn.2d at 22. Moreover, he asked both victims for massages in a secluded spot in his home, having them perform the same sex act on him. 150 Wn.2d at 22.

In *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007), Division Three of this court also upheld the admission of evidence of prior acts of child molestation under ER 404(b) to show a common scheme or plan. There, Sexsmith was in a position of authority over both victims, the victims were the same age when Sexsmith molested them, and Sexsmith isolated the victims when he molested them. 138 Wn. App. at 505. He further forced both victims to take

nude photographs, to watch pornography, and to fondle him. 138 Wn. App. at 505.

Furthermore, in *Gresham*, our Supreme Court upheld the admission of prior acts of child molestation to show a common scheme or plan when in each instance, "Scherner took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals." 173 Wn.2d at 422. The court held that differences between the crimes, such as the presence or absence of oral sex and the fact that only some of the prior acts occurred in Scherner's home, did not render the decision to admit the evidence an abuse of discretion. 173 Wn.2d at 423.

The above cases show that courts have not limited the common scheme or plan exception to ER 404(b) to extremely narrow or unique circumstances. Schmus argues to the contrary, citing *State v. Smith*, 106 Wn.2d 772, 777-78, 725 P.2d 951 (1986), for the proposition that both the prior act and the charged crime must be distinctive or unusual, not merely similar. But our Supreme Court explicitly rejected this proposition in *DeVincentis*, holding that the proper analysis turns on the similarity of the acts, *not* on uniqueness. 150 Wn.2d at 20-21. And as the cases above illustrate, Schmus's crimes against VC and CM were sufficiently similar to demonstrate a common scheme or plan.

Here, the trial court found that Schmus's prior conduct with VC was similar to the charged rape of CM because the victims were of the same age, because he used similar methods to get to know them, and because he got himself into situations where he was alone with both victims.[5] Schmus argues that the trial court's conclusion is so broad as to encompass "nearly

[5] The trial court's written conclusions of law simply state without explanation that VC's testimony

every conceivable method of committing rape." Br. of Appellant at 45. While this claim is overblown, there are some differences between Schmus's rape of CM and his prior conduct with VC.

For instance, Schmus got to know VC through school, while he got to know CM through a square dancing club that he attended with his fiancée. Furthermore, Schmus entered VC's home through a window at night, uninvited. In contrast, he came to CM's home in the midmorning after CM invited him over. Moreover, Schmus used a condom with CM but not with VC. And he had VC perform oral sex on him and performed it on her, which he did not do with CM. Additionally, Schmus gained VC's compliance by threatening to harm a family member, but did not use threats with CM.

On balance however, Schmus's acts against both VC and CM are "markedly similar acts of misconduct against similar victims under similar circumstances." *Lough*, 125 Wn.2d at 852. This case is largely analogous to *Sexsmith*, where the defendant there had the same relationship with both victims, the victims were of similar ages, the defendant isolated the victims, and the defendant had the victims perform similar sex acts on him. 138 Wn. App. at 505. Similarly here, Schmus had the same relationship as a casual acquaintance of both victims, the victims were children of similar ages, and Schmus had sexual intercourse involving both digital penetration and vaginal intercourse with the victims in their own bedrooms.

The instant case is also analogous to *Lough*, where the defendant used a common plan to

---

was admissible to show a common scheme or plan under ER 404(b). However, when findings of fact and conclusions of law are incomplete, this court may look to the trial court's oral ruling to aid its review. *State v. Bynum*, 76 Wn. App. 262, 266, 884 P.2d 10 (1994).

drug women with whom he had a personal relationship, although his method of getting the women to take the drug differed from crime to crime. 125 Wn.2d at 849-51, 861. Although Schmus's method of getting to know his victims and getting them alone was different in each instance, both crimes still involved Schmus isolating girls of similar ages in their own homes and raping them.

These common features show "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." *DeVincentis*, 150 Wn.2d at 19 (quoting *Lough*, 125 Wn.2d at 860). That Schmus's method of committing child rape might be common to other child rapists does not, per *DeVincentis*, weigh against admitting VC's testimony. The crimes were sufficiently similar; it is not necessary that they were also unique.

Schmus cites no valid case law suggesting a contrary result. We hold that the trial court did not abuse its discretion in ruling that VC's testimony was admissible under ER 404(b) to show a common scheme or plan.

III. Invading Province of Jury

Schmus finally argues that because the trial court's written findings of fact regarding the admissibility of VC's testimony are "findings that Mr. Schmus is guilty of the crimes charged," they invaded the province of the jury. Br. of Appellant at 46. He argues that the findings go beyond rulings on the admissibility of evidence. We disagree.

The trial court here found facts that, if proved beyond a reasonable doubt, would be

sufficient to show that Schmus committed third degree child rape against CM and VC. But the trial court entered these findings of fact only to determine whether VC's testimony was admissible under ER 404(b) and RCW 10.58.090, not to adjudicate Schmus's guilt.

Taking Schmus's argument to its logical conclusion, he claims that when admission of evidence is conditioned on the preliminary fact that the defendant committed a charged crime, the trial court may not admit such evidence because ruling on the admissibility of such evidence invades the province of the jury. This is contrary to ER 104(b), which provides that when the relevance of evidence depends on fulfillment of a condition of fact, the court shall admit it on the introduction of sufficient evidence. It further contradicts ER 404(b), which allows admission of evidence to show a common scheme or plan when a prior crime and a charged crime are sufficiently similar. *DeVincentis*, 150 Wn.2d at 21.

If trial courts were forbidden to rule on preliminary questions of fact that bear upon the elements of the crime charged, it would be impossible for them to determine the admissibility of evidence to show a common scheme or plan under ER 404(b). This result is plainly contrary to case law and Schmus cites no on-point authority to support his argument. Accordingly, Schmus's claim on this point fails.

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 in accordance with RCW 2.06.040, it is so ordered.

_____

Worswick, C.J.

I concur:

_____

Hunt, J.

Quinn-Brintnall, J. (dissenting) — I agree with the majority holding that under *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), V.C.'s testimony is not admissible under RCW 10.58.090. However, because the rape of V.C. and the rape of C.M. are not sufficiently similar to constitute a common scheme or plan, V.C.'s testimony is not admissible under ER 404(b). The erroneous admission of V.C.'s testimony was not harmless. Therefore, I respectfully dissent.

An appellate court reviews 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 (1971). This court 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." To properly admit evidence of a common scheme or plan, i.e., a plan to commit similar crimes repeatedly, there must be 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.

The purpose of admitting evidence of a common scheme or plan is "to show that the

defendant has developed a plan and has again put that particular plan into action." *Gresham*, 173 Wn.2d at 422. This standard is not new, as our Supreme Court explained in *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995) (citing *People v. Ewolt*, 7 Cal. 4th 380, 402, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)),

> 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.

Although the similarity between the victims is one factor in determining whether the defendant's acts are part of a common scheme or plan, it is the similarity in the perpetrator's *conduct* which establishes a common scheme or plan. *See DeVincentis*, 150 Wn.2d at 19 ("includes the requirement that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances" (internal quotation marks omitted) (quoting *Lough*, 125 Wn.2d at 856)). Therefore, a proper inquiry focuses on the similarities in the defendant's conduct, not on the similarities of the victims. In Brett Anthony Schmus's case, the crimes are not sufficiently similar to be evidence of a common scheme or plan.

The majority asserts that because "Schmus had the same relationship as a casual acquaintance of both victims, the victims were children of similar ages, and Schmus had sexual intercourse involving both digital penetration and vaginal intercourse with the victims in their own bedrooms," the crimes are sufficiently similar to constitute a common scheme or plan. Majority at 8. However, in my opinion, the only similarity between Schmus's rape of V.C. and his rape of

C.M. is that Schmus had sexual intercourse with two 15-year-old girls.

Although Schmus's relationships with V.C. and C.M. could be generally termed casual acquaintance, there are marked differences which make Schmus's relationships with the victims dissimilar and no similarities that suggest a commonality of plan. Schmus met V.C. in 2007 when they were attending the same high school, although he apparently did not have any social relationship with her.[6] In contrast, in 2009, Schmus and his fiancée met C.M. at a square dancing club. C.M. spent time socially with Schmus and his fiancée prior to the rape. C.M. was 15; Schmus was 21.

The circumstances of each rape significantly differ. Schmus entered V.C.'s bedroom through a window without permission; C.M. called and expressly invited Schmus to her house when she was home alone. V.C. testified that Schmus raped her repeatedly over several months while Schmus had sexual intercourse with C.M. only once. Furthermore, according to V.C.'s testimony, Schmus coerced her into having intercourse and ensured her silence by threatening V.C.'s father. There were no allegations that Schmus used threats to coerce C.M.

In prior cases, courts have required at least one substantial similarity, in addition to the victims' age, to admit the evidence of a common scheme or plan. In *DeVincentis*, the victims were not only of similar ages, but DeVincentis also used his daughter and the neighbor girl to get to know the victims, wore unusual underwear, and had them perform the same sex act. 150

[6] V.C. testified that in the 2006-2007 school year, while she was a freshman and Schmus was a senior, she and Schmus had one geometry class together and sometimes spoke during or after class and at lunch. However, the sexual assault did not occur until July 2007, after the school year had ended and, presumably, Schmus had graduated or was no longer attending high school. It appears that V.C. transferred to a different high school the next year.

Wn.2d at 22. In *State v. Sexsmith*, 138 Wn. App. 497, 502-03, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008), in addition to the victims being the same age, Sexsmith was one victim's father and the other victim's step-father. Sexsmith also took nude pictures of both victims and forced them to watch pornography. *Sexsmith*, 138 Wn. App. at 502. In *Gresham*, the court held that Scherner's crimes were "markedly similar" because Scherner took a trip with young girls and fondled them after all the adults went to sleep. 173 Wn.2d at 422. *See also Lough*, 125 Wn.2d at 849-51 (defendant had a personal relationship with all the victims and drugged them in order to rape them). The victims' age similarity in this case is not sufficient to establish that Schmus acted with a common scheme or plan.

Moreover, the purpose of offering evidence of a common scheme or plan is "to show that the defendant has developed a plan and has again put that particular plan into action." *Gresham*, 173 Wn.2d at 422. Here, the fact that Schmus had sexual intercourse with two 15-year-old girls is not sufficient to demonstrate that he had a particular plan he put into action, especially considering the significantly different circumstances by which he met, gained access, and interacted with each victim. Accordingly, I cannot hold that the trial court properly admitted V.C.'s testimony as evidence of a common scheme or plan.

The trial court's erroneous admission of V.C.'s testimony was not harmless error. An error is not harmless if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Gresham*, 173 Wn.2d at 433 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Although

C.M.'s testimony was legally sufficient to support the jury's verdict, I cannot conclude that the erroneous admission of V.C.'s testimony regarding Schmus's repeated and coercive sexual contact with her had no effect on the jury's consideration of C.M.'s testimony. V.C.'s testimony was the only evidence that corroborated C.M.'s testimony. Therefore, there is a reasonable probability that, without V.C.'s testimony, the outcome of the trial would have differed.

Because V.C.'s testimony was not properly admitted under ER 404(b) as evidence of a common scheme or plan and the erroneous admission was not harmless, I would reverse Schmus's conviction and remand for a new trial. Accordingly, I respectfully dissent.

_____

QUINN-BRINTNALL, J.