IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMMY L. COHEN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10830 Trial Court No. 3AN-05-5570 CR MEMORANDUM OPINION No. 6109 — November 5, 2014

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Coats, Senior Judge, and Andrews, Senior Superior Court Judge.[*]

Judge MANNHEIMER, writing for the Court.
Judge COATS, dissenting in part.

Sammy L. Cohen appeals his convictions for unlawful exploitation of a minor (for taking nude and semi-nude photographs of his teenage daughter) and for

[*] Both senior judges are sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

second-degree sexual abuse of a minor (for engaging in sexual contact with his daughter when he posed her for these photographs). Each of these convictions is a consolidated conviction, based on jury verdicts finding Cohen guilty of several instances of the charged crimes.

Cohen raises two claims on appeal. First, he contends that the trial court committed error when it allowed the State to present evidence that Cohen had engaged in sexual behavior with several other teenage girls during the three decades preceding his abuse of his daughter. Second, Cohen contends that the evidence presented at his trial was legally insufficient to support the jury verdicts finding him guilty of second-degree sexual abuse.

For the reasons explained here, we uphold the trial court's evidentiary ruling, and we conclude that the evidence was sufficient to support the jury's verdicts on the sexual abuse charges.

A description of the State's evidence of Cohen's sexual behavior with his daughter, and a description of the jury's verdicts

Cohen's daughter, B.C., testified that Cohen developed a sexual interest in her when she entered puberty at the age of 13. According to B.C., Cohen began touching her inappropriately on her breasts, her buttocks, and her genitals.

Cohen engaged in sexualized conduct with B.C. — conduct such as buying lingerie for her and asking her to model the lingerie for him, trying to be in B.C.'s presence when she was undressed, offering to help her bathe, and telling her about daughters who became sexual partners of their fathers.

B.C. described an incident where Cohen asked her to do pull-ups without wearing a shirt. While she was doing this, he placed his hand on her breast, telling her that this would allow him to feel her pectoral muscles working. B.C. also described how

Cohen would engage in wrestling matches with her and her younger sister, and how he would encourage them to take their shirts off, telling them that this would prevent them from getting too hot. During this wrestling, Cohen would grab B.C.'s breasts, but pretend it was an accident.

B.C. also testified about an incident where Cohen asked to examine a birthmark that was on B.C.'s genitals. Cohen then touched the birthmark. And B.C. described an episode where Cohen came into her bedroom to say goodnight, then started rubbing B.C.'s stomach, gradually running his hand lower on her body until he touched her pubic hair.

B.C. further testified that Cohen took a series of photographs of her — photographs in which she was either topless or nude. According to B.C., Cohen posed her for these photographs "like [in] Playboy [magazine]"; he directed her how to hold her body, and where to place her hands and arms. B.C. testified that Cohen was visibly sexually excited while he was taking these photographs.

Dozens of these photographs, in the form of computer images, were found on computers or on computer storage media seized by the Anchorage police when they executed search warrants at Cohen's home, his office, and a storage unit.

Based on all this conduct, the State charged Cohen with ten counts of second-degree sexual abuse of a minor (sexual contact with his daughter).

Counts 1 and 2 were based on Cohen's acts of touching B.C.'s genitals during the episode involving the birthmark, and when Cohen came into B.C.'s bedroom to say goodnight. The next two counts (Counts 3 and 4) were based on Cohen's acts of touching B.C.'s breasts during the pull-up episode and during the wrestling.

Counts 5 through 10 were based on the theory that Cohen caused B.C. to touch her own breasts and genitals when he posed her for the topless and nude photographs.

(Under AS 11.81.900(b)(59)(A), "sexual contact" includes both (i) "knowingly touching ... the victim's genitals ... or female breast", and (ii) "knowingly causing the victim to touch ... [the] victim's genitals ... or female breast.")

The State also charged Cohen with five counts of unlawful exploitation of a minor (Counts 11 through 15) for taking the topless and nude photographs of his daughter. Finally, the State charged Cohen with five counts of possessing child pornography (Counts 16 through 20) for keeping these photographic images.

At trial, Cohen's defense to these allegations was that B.C. was lying, both about the sexual touchings and about the photographs. Cohen conceded that the digital photographs were real, but he asserted that he did not know that these computer images were in his possession, and he further asserted that B.C. was lying when she stated that he was the photographer.

The jury either acquitted Cohen or could not reach a verdict with respect to Counts 1 through 4 (the sexual abuse charges that were not connected to the photographs).

The jury found Cohen guilty of Counts 5 through 10 (the sexual abuse charges connected to the photographs) and Counts 11 through 15 (the charges of creating the sexual photographs).

The jury also found Cohen guilty of Counts 16 through 20 (the charges of possessing or keeping these sexual photographs), but the superior court later dismissed those charges on the theory that they were lesser offenses included within the charges that Cohen created the photographs.

In sum, the jury convicted Cohen of only those charges where B.C.'s allegations of sexual abuse were corroborated by the photographs found in Cohen's possession.

The challenged evidence of Cohen's sexual conduct with other teenage girls

During the pre-trial proceedings in this case, the State asked the superior court for permission to introduce the testimony of several other women who had known Cohen during the preceding 30 years. These women asserted that Cohen engaged in similar sexual behaviors with them when they were teenagers. Anticipating that Cohen would assert that B.C. had misinterpreted his actions, the State offered this evidence to corroborate B.C.'s testimony that his various acts of touching her were, in fact, sexual touchings, that the photographs he took of her were likewise sexually motivated, and that Cohen was the one who took the photographs.

(a) The evidence in question

In 1980, when Cohen was 26 years old, he began dating an 18-year-old high school senior, C.A.. Cohen then established relationships with C.A.'s two younger sisters, T.M. and S.M.. T.M. was 13 years old at the time, and S.M. was 11.

According to the testimony, Cohen assumed a semi-parental role in the lives of T.M. and S.M.. He attended their softball games and practices (often driving them to the games and practices). He helped S.M. with her paper route. He took the girls to restaurants and movies, and he bought them presents.

Cohen also engaged in conduct with T.M. of a more sexual nature. He bought her sexy lingerie, and he would often hug her. He would engage her in wrestling matches, and when Cohen was driving T.M. somewhere, he would place his hand on her knee or her leg.

Cohen also took photographs of T.M., although she was clothed for these photos. During these photography sessions, Cohen would tell T.M. what poses he wanted her to assume, and he would brush her hair while doing so.

In addition, Cohen gave T.M. massages: he told T.M. that he was an EMT, and that he had to practice giving massages. Over time, Cohen took more and more liberties during these massages: he would rub T.M.'s legs and thighs, he would pull up her shirt and massage the bare skin of her torso, and he would unfasten her bra strap because (he claimed) "it was in the way". Eventually, Cohen started having "accidents" where his hand would brush T.M.'s breasts and her buttocks.

On T.M.'s fourteenth birthday, Cohen took her out to dinner at an intimate restaurant and induced her to drink champagne from his glass. Cohen then took T.M. back to his apartment, where he gave her more champagne. Cohen then began to massage T.M. — but the massage progressed to overt sexual contact when Cohen began kissing and licking her breasts. Cohen told T.M. that these physical attentions were a "birthday present" — that she was beautiful, and that he loved her.

Following this incident, T.M. avoided Cohen, and she left Alaska the following year.

After T.M. moved out of state, Cohen began spending more time with T.M.'s younger sister, S.M. Cohen purchased gifts for S.M., including "Victoria's Secret-type" lingerie. Cohen took photographs of S.M. while she was posed in this lingerie. Cohen also gave S.M. back rubs that eventually became more intimate: his hand would regularly "slip" and touch the sides of her breasts.

On one occasion, while S.M. was showering, Cohen got into the shower with her, naked. Cohen told S.M. that he did this because she had been in the shower too long, and he needed to get ready for work.

The State also presented evidence that, over the course of several years in the late 1990s, Cohen engaged in similar grooming or courtship behavior with his teenage niece, S.R.. Cohen bought S.R. dresses, jewelry, and lingerie. He took her on outings to a shooting range, to tanning salons, to restaurants, and to the theater. Cohen also gave S.R. "full-body massages" — assuring her that this was proper because "he had been trained in medicine".

On one occasion, S.R. agreed — at Cohen's request — to allow Cohen to dress her in the clothing and jewelry he had purchased for her, starting with S.R. completely naked. Ultimately, S.R. ended her relationship with Cohen after Cohen propositioned her by offering to perform oral sex.

(b) The trial court's ruling

As we explained earlier, the State filed a pre-trial motion for permission to present this evidence. The State's motion contained a lengthy offer of proof concerning the details of the proposed testimony. (This offer of proof included a significant amount of additional evidence that was never introduced at Cohen's trial.)

In its motion, the State argued that this evidence was admissible under Alaska Evidence Rule 404(b)(1) because it established a "plan" or "pattern" of sexual behavior, relevant to prove that Cohen's various acts of touching B.C., and his acts of photographing her, were all sexual in nature.

The superior court ruled that the State's proposed evidence was admissible under Evidence Rule 404(b)(1). The court concluded that, if the jury found this evidence to be credible, it showed that Cohen had engaged in a long-term plan or pattern of grooming behavior with these other girls.

(c) An overview of Evidence Rule 404(b)(1)

On appeal, Cohen argues that the superior court committed error when it allowed the State to introduce this evidence. In particular, Cohen argues that this evidence was inadmissible under Evidence Rule 404(b)(1) because it had no relevance other than to establish Cohen's character — his propensity to sexually abuse minors.

Alaska Evidence Rule 404(b)(1) declares that "[e]vidence of [a person's] other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of [the] person in order to show that the person acted in conformity [with their character]." The rule then adds that this evidence (*i.e.*, evidence of a person's other crimes, wrongs, or acts) *is* admissible if it is offered "for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

As we explained in *Linehan v. State*, 224 P.3d 126, 146-47 (Alaska App. 2010), Evidence Rule 404(b)(1) is essentially an amalgam of the two concepts already codified in Evidence Rules 404(a) and 405.

Evidence Rule 404(a) states the general rule that evidence of a person's character is not admissible when it is offered as circumstantial evidence that the person acted in conformity with their character on a particular occasion. And Evidence Rule 405 states that, even when evidence of a person's character is admissible (under one of the several exceptions to the general rule), the person's character must be established by reputation or opinion evidence, not by evidence of specific instances of the person's behavior.

The first sentence of Evidence Rule 404(b)(1) combines and restates these two concepts. This first sentence declares that evidence of specific instances of a person's behavior is not admissible when the sole purpose of this evidence is to prove

the person's character, so that the person's character can then be used as circumstantial evidence that the person acted in conformity with their character on another occasion. [1]

(Indeed, as Professors Saltzburg, Martin, and Capra note in their treatise on the Federal Rules of Evidence, "The first sentence of Rule 404(b)[(1)] ... is probably unnecessary in light of [the general rule stated in] Rule 404(a).") [2]

On the other hand, Evidence Rule 404(b)(1) does not bar evidence simply because the evidence tends to demonstrate a person's bad character. Rather, Rule 404(b)(1) bars the evidence only if the *purpose* of the evidence is to prove, circumstantially, that the person acted true to character on the particular occasion being litigated. If the evidence is legitimately being offered for a different purpose, then Rule 404(b)(1) does not bar the evidence. [3]

In Cohen's case, the evidence of his conduct with the other teenage girls, if believed, obviously reflected badly on his character. But this alone does not mean that the evidence was barred by Evidence Rule 404(b)(1). Rather, as we stated in *Smithart v. State*, 946 P.2d 1264, 1270-71 (Alaska App. 1997), the question is whether the challenged evidence had "no genuine purpose other than to show the defendant's character and the consequent likelihood that the defendant acted in conformity with that character during the episode being litigated".

If the trial judge in Cohen's case could reasonably find that the proposed evidence was genuinely relevant for some purpose other than to prove Cohen's character,

---

[1] *Linehan*, 224 P.3d at 147; *Bingaman v. State*, 76 P.3d 398, 403 (Alaska App. 2003); *Beaudoin v. State*, 57 P.3d 703, 707-08 (Alaska App. 2002); *Smithart v. State*, 946 P.2d 1264, 1270-71 (Alaska App. 1997).

[2] Stephen A. Saltzburg, Michael M. Martin, and Daniel J. Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), Vol. 1, p. 404-20.

[3] See the cases cited in footnote 1.

then Rule 404(b)(1) would not bar the evidence — although the judge would still have to weigh the probative value of the evidence against its potential for unfair prejudice, pursuant to Evidence Rule 403. [4]

Why we uphold the trial court's decision to admit this evidence

In his brief to this Court, Cohen argues that the trial court erred in admitting the challenged evidence because the State's theory of admissibility does not fit within the judicial definitions of "plan" or "scheme" that this Court adopted and applied in cases such as *Pletnikoff v. State*, 719 P.2d 1039, 1041-43 (Alaska App. 1986); *Bolden v. State*, 720 P.2d 957, 959-961 (Alaska App. 1986); and *Velez v. State*, 762 P.2d 1297, 1298-1301 (Alaska App. 1988).

But even assuming this is true, this does not necessarily answer the question of whether the challenged evidence was admissible. Evidence Rule 404(b)(1) allows a court to admit evidence of a defendant's other bad acts if those acts are offered for *any* valid purpose other than proving the defendant's underlying character.

Although Rule 404(b)(1) lists several examples of valid, non-character purposes — "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" — this list is not exclusive. As we explained in *Petersen v. State*, 930 P.2d 414, 432 (Alaska App. 1996), evidence of other bad acts can be admissible under Rule 404(b)(1) even though the purpose for offering this evidence "[does] not fit neatly" into any of the categories listed in the rule.

When the Alaska Legislature amended Evidence Rule 404(b) in 1991, one of its stated reasons for amending the rule was to clarify that the non-propensity purposes

---

[4] *Smithart*, 946 P.2d at 1271.

listed in the rule are not exclusive — to clarify "that evidence can be admitted [even] if it is relevant to a purpose not listed in the rule." *See* SLA 1991, ch. 79, § 1(c).

But, in fact, this was the law in Alaska before the legislature amended Evidence Rule 404(b). For instance, in *Braham v. State*, 571 P.2d 631, 641 (Alaska 1977), the Alaska Supreme Court upheld the admission of evidence of the defendant's other crimes when this evidence was needed to explain the defendant's relationship with another person. And in *Dulier v. State*, 511 P.2d 1058, 1061 (Alaska 1973), the supreme court upheld the admission of evidence showing the defendant's long history of physically and mentally abusing the other adults who lived in his house — evidence that was offered on the theory that, through these acts of abuse, Dulier established psychological domination over these other people, to the point where two of them were willing to commit a homicide when Dulier ordered it.

The general rule is stated in *Beaudoin v. State*, 57 P.3d 703 (Alaska App. 2002):

> Evidence Rule 404(b)(1) bars the admission of evidence of a person's other bad acts if this evidence is introduced for a particular prohibited purpose: to prove a person's character so that this character can be used as circumstantial evidence that the person acted true to character during the incident being litigated. But Rule 404(b)(1) does not bar evidence of a person's bad acts if this evidence is introduced for *any other* valid purpose.

57 P.3d at 707-08 (emphasis added).

In Cohen's case, the superior court concluded that the challenged evidence established a complex and long-term pattern of sexual "grooming" behavior with a series of adolescent girls. Viewing the evidence in the light most favorable to the superior court's ruling, the evidence supports that ruling. Cohen purchased sexy lingerie for

several young girls. He repeatedly touched the girls in intimate ways, but generally in a context that offered him "plausible deniability": wrestling matches, physical training, massages, or placing a "friendly" hand on their knee or leg. And he created opportunities to see the girls unclothed.

As Cohen points out in his brief, even if all of this evidence is believed, many of Cohen's activities were lawful. But the admissibility of this evidence did not hinge on whether these other acts were illegal. Rather, the admissibility of the evidence hinged on whether these acts were probative of something aside from Cohen's character. [5]

We addressed an analogous evidentiary issue in *Smithart v. State*, 946 P.2d 1264 (Alaska App. 1997). [6] The defendant in *Smithart* was accused of abducting and murdering a young girl, M.L.. At trial, the State was allowed to introduce evidence of Smithart's contacts with two other young girls in the weeks prior to the abduction and murder. Here is a summary of that evidence:

> K.G., a 15-year-old girl, reported that she had been jogging near Copper Center in July 1991 when Smithart drove by in his truck. Driving alongside her, Smithart mouthed the words, "Would you like a ride?" K.G. recognized Smithart because he frequented her family's restaurant in Copper Center. When K.G. did not accept the offer, Smithart drove on. However, a short time later, Smithart (now heading in the opposite direction) drove by K.G. again, and he again mouthed the question, "Would you like a ride?" Again, K.G. did not accept the ride. Smithart drove by K.G. a third time; this time, he motioned for K.G. to

---

[5] Compare *Linehan v. State*, 224 P.3d 126, 147 (Alaska App. 2010) (holding that Evidence Rule 404(b)(1) "applies not just to acts that are intrinsically 'bad', but rather to any and all conduct that is offered as a specific manifestation of a person's character").

[6] *Reversed on other grounds in Smithart v. State*, 988 P.2d 583 (Alaska 1999).

come over to his truck. K.G. shook her head and kept on jogging.

One week later, Smithart went to the place where K.G. worked and told her that if she ever needed a ride, he would be happy to give her one.

On September 12th (eleven days after M.L.'s body was found), P.G., the mother of K.G., chanced to meet Smithart at a local restaurant. At that time, P.G. did not know anything about Smithart's attempt to get K.G. to accept a ride in his vehicle. However, P.G. did know that Smithart's mother had just undergone eye surgery, so she asked Smithart how his mother was doing. Smithart became upset and replied, "What the fuck does my god-damned mother have to do with this?" Smithart then told P.G., "By the way, I saw your daughter jogging, and I didn't pick her up because it wouldn't look right to the community." That night, because of Smithart's remark, P.G. asked her daughter if Smithart had ever tried to pick her up; this is how Smithart's approach to K.G. was revealed.

Another young girl, 14-year-old J.M., contacted the troopers after she recognized a photograph of Smithart that appeared in the newspapers in November 1991 (following his arrest). At trial, J.M. testified that she had been riding her bicycle on the Richardson Highway near Glennallen in August 1991 (before M.L.'s abduction) when she heard a truck come up behind her. The truck slowed down as it passed her, and the driver waved to her. The driver of the truck paced J.M. for a short distance, but he sped up when another vehicle came down the road.

After the other vehicle had gone, J.M. saw the truck's brake lights come on, and the truck started to turn around. J.M. turned her bike and headed in the opposite direction, toward her home. The truck came after her and pulled up

> even with her again. The driver waved again and mouthed, "Hello." At that point, another vehicle approached, and the driver of the truck sped up again. J.M. described the driver of the truck as "[a]n older Native-looking man" with "black hair and ... with a little bit of gray." She identified Smithart in a photographic line-up.

Smithart, 946 P.2d at 1269.

The prosecuting attorney in Smithart's case argued that Smithart's attempts to pick up K.G. and J.M. were evidence of his planning or preparation to abduct a young girl like M.L.. The prosecutor also argued that Smithart's attempts to pick up K.G. and J.M. showed Smithart's fixation with young girls of a particular physical description. From photographs contained in the record, it appears that both K.G. and J.M. bore a striking resemblance to M.L. — so great a resemblance that when K.G.'s mother saw a sketch of M.L. in the newspaper on the day after the disappearance, she thought the sketch was of her own daughter. [7]

This Court held that the evidence in question was admissible under Evidence Rule 404(b)(1). We acknowledged that Smithart's approaches to these two girls "potentially showed that he was a man of questionable character — a man who showed sexual interest in young girls." [8] But we concluded that the evidence had relevance beyond proving Smithart's general sexual interest in young girls:

> [T]he evidence tended to show that Smithart had a fixation on the type of young girl involved in this case. K.G., J.M., and M.L. all bore unusual physical resemblance to each other. All three were girls in their younger teens, all three were blond-haired, and all three had strikingly similar facial features. In the weeks just prior to M.L.'s abduction and

[7] *Smithart*, 946 P.2d at 1269.

[8] *Id.* at 1271.

> murder, Smithart approached both K.G. and J.M. while they were alone on sparsely-traveled roads; in each case, Smithart tried to convince the girls to accept a ride in his vehicle. M.L. had been walking alone along a sparsely-traveled road when she disappeared, and the State's evidence strongly suggested that M.L. had been enticed into a motor vehicle when she was abducted. After M.L.'s abduction, Smithart went out of his way to tell several people (including K.G.'s mother) that he would not try to pick up young caucasian girls in his truck.

Smithart, 946 P.2d at 1271-72.

Under these circumstances, we concluded that the relevance of Smithart's approaches to the other two girls "did not rest merely on the assumption that people having a certain general trait of character (people sexually interested in young girls) could be expected to act in conformity with that trait of character if given the opportunity to be alone with a young girl." [9] Rather, Smithart's approaches to the other two girls "share[d] so many case-specific similarities" with the abduction of the murder victim "that evidence of these approaches was admissible under Rule 404(b)(1)." [10]

In several other prior decisions, this Court has upheld the admission of evidence of a defendant's similar crimes under Evidence Rule 404(b)(1) when the evidence demonstrated more than simply the defendant's proclivity to engage in such crimes — when it showed that the defendant engaged in strikingly similar conduct, or used a strikingly similar method, when committing these other crimes. [11]

---

[9] *Id.* at 1272.

[10] *Id.* at 1273.

[11] *See Sharp v. State*, 837 P.2d 718, 725 (Alaska App. 1992); *Oswald v. State*, 715 P.2d 276, 279-280 (Alaska App. 1986); *Basurto v. State*, unpublished, 2003 WL 23011812, *2 (Alaska App. 2003).

We reach the same conclusion in Cohen's case. The contested evidence did not merely show that Cohen had a sexual interest in teenage girls, or merely that he had previously engaged in inappropriate or unlawful sexual conduct with teenage girls. Rather, as the trial judge noted when he issued his decision, the evidence also showed that, over the preceding three decades, Cohen had repeatedly engaged in a distinctive set of grooming or courtship rituals with teenage girls — rituals that, in the past, had led up to overtly sexual conduct. And according to B.C.'s testimony, much of that behavior was repeated in the present case.

Under these circumstances, the relevance of Cohen's interactions with the other teenagers did not rest merely on the assumption that people who have a certain trait of character can be expected to act in conformity with that trait of character if given the opportunity. Instead, this evidence had a case-specific relevance — *i.e.*, a non-propensity relevance — to the issues of whether Cohen sexually abused his daughter, and whether he took the sexual photographs of her. Accordingly, the evidence was not barred by Evidence Rule 404(b)(1).

Whether the trial judge should have excluded this evidence as overly prejudicial under the authority of Evidence Rule 403

Cohen argues in the alternative that even if the challenged evidence was admissible under Evidence Rule 404(b)(1), the trial judge still should have excluded it under Evidence Rule 403 because (according to Cohen) its potential for unfair prejudice outweighed its probative value.

As Cohen notes in his brief, the introduction of this evidence took up a significant amount of time at trial, both in the presentation of the evidence itself, and also because Cohen had to address this evidence when he took the stand.

Cohen argues that the introduction of all this evidence must have prejudiced the jury against him — by convincing the jurors, at a minimum, that Cohen had inappropriate boundaries in his dealings with adolescent girls. Indeed, as Cohen notes in his brief, the trial judge at one point referred to this evidence as "utterly devastating".

But the trial judge understood the potential unfair prejudice of this evidence. He gave the jurors a cautionary instruction that identified the limited purpose for which this evidence was introduced, and which forbade the jurors from considering the evidence for any other purpose. [12]

This cautionary instruction was supplemented by the parties when they delivered their summations to the jury. Both the prosecutor and the defense attorney emphasized that the real issue confronting the jurors was whether to credit B.C.'s testimony concerning the acts of sexual contact and the sexually oriented photographs. We note, in particular, the following portion of the prosecutor's summation:

---

[12] Jury Instruction No. 19(a) read:

> Evidence has been introduced for the purpose of showing that the defendant committed bad acts other than those for which the defendant is on trial. Such evidence may not be considered by you to prove that the defendant is a person of bad character or that he has a tendency to commit crimes.
>
> Such evidence may be considered by you only for the limited purpose of deciding if it tends to show that the defendant had a plan or engaged in a pattern of behavior with females culminating in sexual behavior. For the limited purpose for which you may consider such evidence, you should weigh it in the same manner as you do all other evidence in the case, and give it the weight, if any, to which you find it entitled on the question of if the defendant had a plan or engaged in a pattern of behavior with females culminating in sexual behavior.
>
> Do not consider or discuss such evidence for any other purpose. It would be improper and unfair for you to do this.

> *Prosecutor*: Do you believe [B.C.]? It's as simple as that. ... If you don't believe her, then [you should] say that Mr. Cohen's not guilty, and we can all go home. But if you do believe her, then you know what you have to do. ... [A]ll of the evidence that's been presented to you ... [has just one purpose]. It's to help you evaluate [whether to] believe [B.C.].
>
> . . .
>
> Mr. Cohen is ... not on trial for what he did to [the other young women]. ... All of that evidence is there to help you decide, 'Did he engage in a common scheme or plan? Was there a pattern of behavior that Mr. Cohen exhibited?' Because if there was, [then] that's support [and] corroboration for what [B.C.] told you[.]

Finally, we note that, despite the trial judge's characterization of this evidence as "devastating", the jury's verdicts strongly suggest that the jurors were not swayed by this evidence — that their decision of Cohen's case was not influenced by the testimony they heard concerning Cohen's interactions with the other young women.

As we explained earlier, the State charged Cohen with ten counts of sexual abuse of a minor.

The first four of these counts hinged primarily on B.C.'s testimony, as corroborated by the evidence of Cohen's conduct with the other girls. These counts encompassed the allegations that Cohen touched B.C.'s genitals during the birthmark episode (Count 1), that he touched her genitals when he came into her bedroom, ostensibly to say goodnight (Count 2), that he touched B.C.'s breasts during the pull-up episode (Count 3), and that he touched her breasts while wrestling with her (Count 4).

With respect to these four counts, the jurors were unable to reach a verdict on three of them, and they acquitted Cohen of the fourth count.

The remaining six counts were based on B.C.'s acts of self-touching that were depicted in the photographs found in Cohen's possession (either directly on his computer or on computer storage media). The jury convicted Cohen of these six counts.

In other words, the jury only convicted Cohen of the counts that were corroborated by *physical* evidence.

For purposes of Evidence Rule 403, evidence is "unfairly prejudicial" if it has an "undue tendency to suggest a decision on an improper basis" — most commonly, an emotional basis. [13] In cases like Cohen's, the danger of "other acts" evidence is that the jury will be roused to "overmastering hostility" toward the defendant because of the defendant's other misconduct [14] — a hostility that prompts them to ignore or relax the State's burden of proving the current charges beyond a reasonable doubt.

But here, the jury's verdicts on Counts 1 through 4 provide strong confirmation that the trial judge acted reasonably when he concluded that the challenged evidence was *not* unfairly prejudicial — that the jurors could limit their consideration of this evidence to its proper purposes, and that they could fairly adjudicate the charges against Cohen in conformity with the law.

For all of these reasons, we uphold the trial judge's decision to admit this evidence.

---

[13] *Teamsters Local 959 v. Wells*, 749 P.2d 349, 359 n. 19 (Alaska 1988); *Johnson v. State*, 268 P.3d 362, 367 (Alaska App. 2012) (both citing the Commentary to Alaska Evidence Rule 403, fifth paragraph).

[14] *Adkinson v. State*, 611 P.2d 528, 532 (Alaska 1980).

The sufficiency of the evidence to support Cohen's convictions on Counts 5 through 10 — the sexual abuse counts based on the touchings portrayed in the photographs

As we have explained, the acts of sexual contact alleged in Counts 5 through 10 were based on the theory that, when Cohen took the topless and nude photographs of B.C., he "posed" her in ways that involved her own touching of her breasts and genitals. The definition of sexual contact codified in AS 11.81.900-(b)(58)(A) includes "knowingly causing the victim to touch ... [the] victim's [own] genitals ... or female breast". Based on this provision of the statute, the State alleged that when B.C. complied with Cohen's directives about the posing of the photographs, Cohen committed the crime of sexual abuse of a minor.

Cohen does not challenge the State's theory of prosecution or its underlying construction of this statute. Nor does he challenge the fact that several of the photographs depict B.C. touching her own breasts and genitals. However, Cohen argues that the evidence at his trial was legally insufficient to establish that Cohen did, in fact, *direct* B.C. to assume the poses that involved touching her breasts and genitals.

At trial, B.C. testified that there were several occasions where Cohen asked her to pose for photography sessions. In some of these sessions, B.C. was clothed. But B.C. testified about occasions where Cohen took photographs of her while she was topless. And on one occasion (in June 2000, while B.C.'s mother was out of town), Cohen took photographs of B.C. while she posed for him nude in her bedroom. B.C. described that session as "like a Playboy spread".

B.C. testified that, during this photo session, Cohen told her how to position her arms and legs, and he also insisted that she smile. For some of these photographs, B.C. is posed with her left hand on her genitals and her right forearm diagonally across

both of her breasts. For other photographs, B.C. has her forearms extended and pressed against the sides of her breasts so that her breasts were lifted into prominent display.

The State's evidence also included photographs from one of the sessions where B.C. was clothed, but she was standing in poses that are similar to some of the poses depicted in the topless and nude photographs.

It is true that B.C. did not describe Cohen's instructions to her with regard to each pornographic photograph. But she generally asserted that Cohen told her how to pose for all the photographs he took, and she testified that she posed for the topless and nude photographs because Cohen told her to.

When we assess the sufficiency of the evidence to support a criminal conviction, we view the evidence — and all reasonable inferences to be drawn from the evidence — in the light most favorable to the jury's verdict, and we ask whether this evidence and these inferences would be sufficient to convince a fair-minded juror that the State had proved its case beyond a reasonable doubt. [15]

When we evaluate the evidence presented at Cohen's trial in this manner, we conclude that it is legally sufficient to support his convictions for sexual abuse of a minor as alleged in Counts 5 through 10.

Conclusion

The judgement of the superior court is AFFIRMED.

---

[15] *See*, *e.g.*, *Wiglesworth v. State*, 249 P.3d 321, 325 (Alaska App. 2011); *Rantala v. State*, 216 P.3d 550, 562 (Alaska App. 2009).

COATS, Senior Judge, dissenting.

Introduction

The police found nude and semi-nude photographs of Sammy Cohen's 14-year-old daughter, B.C., on compact discs in Cohen's home. Cohen was convicted of several crimes for taking and possessing these photographs; he was also convicted of sexual abuse of a minor on the theory that, by directing B.C. to pose for the photographs, he caused her to touch her own breasts and genitals.[1]

---

[1] Cohen was convicted of unlawful exploitation of a minor and sexual abuse of a minor. His convictions rest on the State's interpretations of the statutes criminalizing these offenses.

Cohen was charged with unlawful exploitation of a minor under the theory that Cohen, with the intent of producing a photograph depicting "the lewd exhibition of [B.C.'s] genitals," knowingly induced B.C. to engage in the lewd exhibition of her genitals. *See* AS 11.41.455(a)(6).

We have never decided under what circumstances a child's act of posing nude for photographs would constitute "the lewd exhibition of the child's genitals." In *Braun v. State*, 911 P.2d 1075, 1082 n.7 (Alaska App. 1996), we declined to decide a similar issue because the defendant in that case had not raised it. For this same reason, I conclude that there is no need for this Court to address this issue in Cohen's case.

In addition, Cohen was convicted of second-degree sexual abuse of a minor under the theory that, when he took the nude photographs of B.C., he directed her poses, and her poses involved her touching her own breasts or genitals.

This conviction rests on the State's interpretation of AS 11.81.900(b)(59)(A), which defines "sexual contact" to include "knowingly causing the victim to touch, directly or through clothing, ... [the] victim's genitals, anus, or female breast."

The poses in question included poses where B.C. placed her arm over her chest, covering her breasts, and other poses where B.C. covered her genital area with her hand. Under the State's interpretation of the statute, when Cohen directed B.C. to pose in a more modest manner — covering her breasts or genital area — the "sexual contact" element of the crime was met.

In my view, the State's interpretation of the statute is questionable. Alaska Statute 11.81.900(b)(59)(A) makes no distinction between sexual contact that occurs "directly" on a minor's skin and sexual contact that occurs "through clothing." Thus, under the State's interpretation, a photographer who was taking school photographs or publicity photographs

(continued...)

Cohen was also charged with sexual abuse of a minor for unlawfully touching B.C. — but the jury either acquitted him or was unable to reach a verdict on those charges.

A substantial part of the State's evidence against Cohen was the admission of evidence of prior misconduct involving other young women or girls. I conclude that Cohen's convictions should be reversed, because this prior conduct was too remote and dissimilar to the charged offenses to be relevant, and because Cohen was unfairly prejudiced by the admission of the evidence.

The law pertaining to the admission of a defendant's other bad acts

One of the oldest principles of Anglo American law is that a defendant should not be convicted based on evidence of his character. For this reason, evidence that the defendant committed bad acts in the past is generally not admissible to show that the defendant had a propensity to commit the charged offense. This evidence of prior bad acts might be highly relevant — it is certainly the kind of information we use when we make judgments in our daily lives. But the law excludes character evidence, not because it is irrelevant, but because of its high danger of unfairly prejudicing the accused. As Dean Wigmore explained in his treatise on evidence, propensity evidence is normally excluded because it has "too much" probative value:

> The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof

---

[1] (...continued)
of a fully clothed girl could be prosecuted for sexual abuse if the photographer asked the girl to pose with her arms crossed in front of her.

Cohen has not raised this issue, however, and so I conclude that this Court should not address it.

> of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.[2]

Admitting evidence of a defendant's prior bad acts has the potential to confuse the issues at trial, and to deny the defendant a fair opportunity to defend himself against the particular offense with which he is charged.[3] This principle is embodied in Alaska Evidence Rule 404(a), which sets out the general rule prohibiting character evidence, and Evidence Rule 404(b)(1), which declares that evidence of specific bad acts cannot be admitted solely to show that the defendant has a propensity to engage in such acts, and that the defendant acted in conformity with that propensity during the incident at issue. For prior misconduct to be admissible under Rule 404(b)(1), it must be relevant for some other non-propensity purpose, and not unduly prejudicial under Evidence Rule 403.

The case law in our jurisdiction has shown particular concern for the prejudice that may arise from the admission of evidence of a defendant's other sexual misconduct. In *Burke v. State*,[4] the Alaska Supreme Court held that evidence of the defendant's prior sexual misconduct with the same victim was admissible to show the defendant's "lewd disposition."[5] But in *Moor v. State*,[6] we declined to construe *Burke* to mean that evidence of prior sexual misconduct was always admissible for this

---

[2] IA John H. Wigmore, *Evidence in Trials at Common Law* § 58.2, at 1212 (Tillers rev. 1983).

[3] *Freeman v. State*, 486 P.2d 967, 972 (Alaska 1971); *Bingaman v. State*, 76 P.3d 398, 408-09 (Alaska App. 2003).

[4] 624 P.2d 1240 (Alaska 1980).

[5] *Id.* at 1249.

[6] 709 P.2d 498 (Alaska App. 1985).

purpose.[7] We observed that "[w]hen evidence of the defendant's sexual conduct with someone other than the victim is introduced, such evidence of 'lewd disposition' is conceptually indistinguishable from evidence of 'propensity.'"[8] We therefore directed courts to "carefully scrutinize such evidence to ensure that it does come within one of the exceptions to the rule of exclusion, and that it is not disguised propensity evidence."[9]

We have previously disapproved the admission of evidence of a defendant's prior sexual misconduct where the State failed to establish a valid non-propensity purpose. In *Bolden v. State*,[10] the defendant was charged with sexually abusing his teenage daughters. At his trial, the superior court admitted evidence that the defendant had sexually abused other young teenage girls who visited his home during the same time frame.[11]

The State contended that Bolden's prior uncharged acts of sexual abuse were admissible under the "common scheme or plan" exception to Evidence Rule 404(b) (now 404(b)(1)). It asked this Court to adopt the reasoning of *People v. Thomas*,[12] a California Supreme Court case holding that sex offenses committed against persons other than the prosecuting witness, though "often unreliable and difficult to prove," were admissible under the "common scheme or plan" exception if certain conditions were met: (1) the other acts were not too remote in time, (2) the other acts were similar to the offense charged, and (3) the other acts were "committed upon persons similar to the

---

[7] *Id.* at 506.

[8] *Id.*

[9] *Id.* at 506-07.

[10] 720 P.2d 957 (Alaska App. 1986).

[11] *Id.* at 959.

[12] 573 P.2d 433 (Cal. 1978), *overruled by People v. Tassell*, 679 P.2d 1 (Cal. 1984).

prosecuting witness."[13] The *Thomas* court described the core test for admissibility as follows:

> [W]hether there is some clear connection between that [prior] offense and the one charged so that it may be logically inferred that if [the] defendant is guilty of one he must be guilty of the other. Or as the matter is sometimes stated, the other offenses … [must be] sufficiently similar and possess a sufficiently high degree of common features with the act charged [to] warrant the inference that if the defendant committed the other acts he committed the act charged.[14]

The California Supreme Court later rejected this reasoning in *People v. Tassell*,[15] concluding, under facts similar to those presented in Bolden's case, that evidence of the defendant's prior similar sexual acts with another victim was inadmissible propensity evidence.[16]

In *Bolden*, we concluded, like *Tassell*, that evidence of the defendant's prior sexual misconduct was inadmissible character evidence:

> Essentially, the evidence introduced at Bolden's trial showed that, in addition to his daughters, Bolden had a propensity to sexually assault many of the young women who came to his house. Neither intent nor identity were at issue in his trial. Because the acts did not constitute an admissible common scheme or plan, or prove facts in dispute, we believe that the evidence concerning alleged assaults on victims other than Bolden's daughters was improper propensity evidence,

---

[13] *Id.* at 436-37.

[14] *Id.* at 437 (citation omitted).

[15] 679 P.2d 1 (Cal. 1984), *overruled by People v. Ewoldt*, 867 P.2d 757 (Cal. 1994).

[16] *Id.* at 8.

> forbidden from inclusion at trial by Evidence Rule 404(b). We therefore reverse Bolden's conviction.[17]

We reached a similar conclusion in *Velez v. State*,[18] a sexual assault case involving two victims. In *Velez*, the superior court admitted evidence that Velez had previously coerced a woman to have sex with him, to rebut Velez's claim that his sexual conduct with the victims was consensual.[19] When we reviewed that decision on appeal, we conceded that the evidence of Velez's prior misconduct was "marginally relevant to show how he conducted himself with each of his victims."[20] But we ruled that the evidence was nevertheless inadmissible because it was "pure propensity evidence, absolutely forbidden by [former] Evidence Rule 404(b)."[21] We explained:

> [T]he State cannot offer evidence that Velez coerced [one victim] to support an inference that he had a disposition to force his affections on unwilling women, and then [ask the jury to] infer from that disposition that he forced his affections on [another victim]. Despite its relevance, this evidence is absolutely precluded.[22]

In 1988, the Alaska Legislature amended former Evidence Rule 404(b), renumbering the rule as 404(b)(1) and creating a new rule, 404(b)(2). Evidence Rule 404(b)(2) created an exception to the normal prohibition against the admission of prior bad acts evidence in prosecutions involving the sexual or physical abuse of children. To

---

[17] *Bolden v. State*, 720 P.2d 957, 961 (Alaska App. 1986).

[18] 762 P.2d 1297 (Alaska App. 1988), *superseded by rule as stated in Hess v. State*, 20 P.3d 1121 (Alaska 2001).

[19] *Id.* at 1300-04.

[20] *Id.* at 1303.

[21] *Id.* at 1303-04.

[22] *Id.* at 1304.

admit propensity evidence under this rule, however, the State must show the relevance of the evidence by proving: (1) that the prior act occurred within the preceding ten years; (2) that the prior act involved conduct similar to the offense charged; and, (3) that the prior act was committed upon a person similar to the victim of the present offense.[23]

Six years later, in 1994, the legislature added Evidence Rule 404(b)(3). That rule, enacted in response to our decision in *Velez*, authorizes courts in sexual assault cases to admit evidence of the defendant's prior sexual assaults, or attempted sexual assaults, if the defendant claims the victim consented.[24] In prosecutions for attempted sexual assault, the rule authorizes the admission of other sexual assaults, or attempted sexual assaults, regardless of whether the defendant raises a defense of consent.[25]

Finally, in 1997, the legislature adopted Evidence Rule 404(b)(4), which authorizes the admission of evidence of prior acts of domestic violence to prove that the defendant has a propensity to commit crimes of that type.[26]

In *Bingaman v. State*, we recognized that even when evidence is admissible to prove propensity under Evidence Rules 404(b)(2), 404(b)(3), and 404(b)(4), the trial court must carefully analyze the offered evidence under Evidence Rule 403 to ensure that the probative value of the evidence outweighs the danger that the evidence will lead the jury to decide the case on improper grounds.[27] We emphasized that the danger of unfair

---

[23] *Bingaman v. State*, 76 P.3d 398, 404 (Alaska App. 2003).

[24] *Id.*

[25] *Id.* at 404-05.

[26] *Id.* at 405-07.

[27] *Id.* at 413.

prejudice from evidence of a defendant's propensity is particularly high when the evidence consists of testimony about specific bad acts.[28]

In *Bingaman*, we set out a number of factors for trial courts to consider in evaluating whether evidence of other bad acts is admissible under Rule 403. These same factors should guide a trial court's decision on whether to admit other bad act evidence as proof of a common scheme or plan under Rule 404(b)(1):

> 1. How strong is the government's evidence that the defendant actually committed the other acts?
>
> 2. What character traits do the other acts tend to prove?
>
> 3. Is this character trait relevant to any material issue in the case? How relevant? And how strongly do the defendant's other acts tend to prove this trait?
>
> . . . .
>
> 4. Assuming that the offered character evidence is relevant to a material issue, how seriously disputed is this material issue? Does the government need to offer more evidence on this issue? ...
>
> 5. How likely is it that litigation of the defendant's other acts will require an inordinate amount of time?
>
> 6. And finally, how likely is it that evidence of the defendant's other acts will lead the jury to decide the case on improper grounds, or will distract the jury from the main issues in this case?[29]

We also explained in *Bingaman* that,

> In answering these questions, a trial judge should analyze whether the defendant's other acts demonstrate the same type of situational

---

[28] *Id.* at 416.

[29] *Id.* at 415-16.

> behavior as the crime currently charged. ... [E]vidence of another act … will generally have a probative force proportional to the similarity between this other act and the act that the defendant is currently charged with committing. Further, the trial court should take into account the recency or remoteness of the other act. On this point, see the Supreme Court's decision in *Freeman v. State*, 486 P.2d 967, 978-79 (Alaska 1971) (holding that it was error to admit proof of the defendant's prior sex offense, in part because the prior offense was committed almost twenty years before, when the defendant was a teenager, and because the prior offense involved quite different facts — an eighteen-year-old boy making improper sexual advances to a fourteen-year-old girl in a car).[30]

Application of the law to Cohen's case

The State sought to admit evidence of Cohen's interactions with other young women or girls as evidence that Cohen engaged in a plan or pattern of grooming behavior that, the State alleged, was similar to the charged conduct Cohen engaged in with his daughter, B.C. The State acknowledged that the evidence was inadmissible under Rule 404(b)(2), but contended that it was admissible to show a common plan under Rule 404(b)(1). Without an evidentiary hearing, the superior court accepted the State's offer of proof and admitted this evidence at trial.

In *Bingaman*, we held that the trial judge "failed in his role as a gate keeper under Evidence Rule 403" by admitting into evidence numerous other allegations of other bad acts. We concluded that evidence of the other bad acts "overtook and overwhelmed the State's proof concerning the ... crimes charged in the indictment."[31]

Likewise in Cohen's case, the superior court, with minimal examination, allowed the State to present virtually all of the allegations of Cohen's other bad acts the

---

[30] *Id.* at 415.

[31] *Id.* at 417.

State sought to introduce. An adequate screening of this evidence would have shown that it was insufficiently probative to establish that Cohen had a common scheme or plan to molest underage girls, much less to show that he molested his daughter, B.C., or took lewd photographs of her.

The first set of alleged bad acts took place before B.C. was born. In addition to being remote in time, the evidence in support of these alleged bad acts was hotly contested and took up a large portion of the trial, taking the jury's attention away from the actual charges involving Cohen's relationship with his daughter.

The other set of allegations involved Cohen's relationship with S.R., who was an adult. This evidence was not relevant to establish that Cohen had a common scheme or plan to molest underage girls.

(When I refer in this dissent to the women who testified to prior acts at Cohen's trial, I use their initials instead of their full names, just as the majority opinion does. I do this to protect the women's privacy. But I note that, in a case like Cohen's, the law only requires that I refer to people by their initials when they were victims of a sexual offense. Two of the women who testified to Cohen's prior acts, and to whom I refer by their initials, were not — even allegedly — victims of a sexual offense.)

The court admitted these prior bad acts in spite of the age of the evidence and its questionable probity. I conclude that the trial judge in Cohen's case "failed in his role as a gate keeper under Evidence Rule 403."[32]

Events that took place before Cohen's daughter, B.C., was born

The first set of uncharged allegations against Cohen arose from his relationship with C.A. Cohen began dating C.A. when he was twenty-six and she was eighteen; their relationship lasted from 1980 until 1985. C.A. had two younger sisters,

---

[32] *Bingaman*, 76 P.3d at 417.

T.M. and S.M., who came to spend the night with them at least once a week. According to S.M., she came from a big and somewhat dysfunctional family that had some drug and alcohol problems. Cohen did not drink much, was against drugs, and S.M. considered him to be a positive influence.

Cohen bought presents for C.A. and her sisters. He bought each of the sisters matching suede coats and other presents. Cohen also gave C.A. and her sisters back rubs. Both T.M. and S.M. testified that sometimes Cohen's hands would "slip" and touch the sides of their breasts. According to C.A., Cohen gave these back rubs in front of other people, and she did not think anything about them at the time.

S.M. also testified to an incident where she was in bed with C.A. and Cohen, and Cohen touched S.M.'s breast. But S.M. testified that she had no idea whether this touching was intentional. C.A. testified that S.M. sometimes slept in the bed with Cohen and C.A., but that C.A. always slept in the middle. C.A. did not see the incident as important, or as anything other than an accident at the time.

S.M. also testified about an incident when she was in the shower, Cohen was late for work, and he kept telling her to hurry. According to S.M., Cohen jumped into the shower with her, and she jumped out. Cohen had a significantly different recollection of the incident. Cohen had been warned to get to work on time and S.M. was in the shower. He kept yelling at her to hurry up and he shook the shower curtain. S.M. jumped out of the shower and ran off to the bedroom. According to Cohen, he was fully dressed and he never got into the shower with S.M.

The most serious allegations came from T.M. T.M. turned fourteen in May 1981. On her birthday, she had planned to spend the night at C.A.'s and Cohen's apartment. But C.A. was working that night, so Cohen took T.M. out to a nice restaurant for dinner. T.M. claimed that Cohen shared a glass of champagne with her and that, after dinner, they returned to Cohen's apartment, where he gave her a massage and then

fondled her breasts. She testified that she had more champagne, blacked out, and remembered seeing Cohen's face between her legs. According to T.M., the next thing she knew she was sitting on a couch on the other side of the room wearing a robe. The next day she was sick and vomited. T.M. did not tell anyone about this alleged incident for several years.

In high school, T.M. had friends who were a bad influence. She ran away and dropped out of high school. She left Alaska at age fifteen, and moved to Florida with an older boyfriend. She returned at age seventeen to her mother's home in Alaska.

In 1985 Cohen and C.A. broke up. According to Cohen, they split up because C.A. wanted to date other people. According to C.A., they split up because Cohen was cheating on her with Marti Smith, whom Cohen later married and who became the mother of the complaining witness, B.C. C.A. was apparently very upset about the breakup.

At this point, T.M., now eighteen, told her mother about the alleged incident involving Cohen. Cohen vehemently denied the incident to C.A. and T.M.'s mother, and later at trial.

Our prior cases, in particular *Burke*, *Moor*, *Bolden*, and *Velez*, make clear that the allegations of misconduct against Cohen that arose during his 1980 to 1985 relationship with C.A. were inadmissible under Evidence Rule 404(b)(1). As the Alaska Supreme Court explained in *Hess v. State*,[33] prior acts of sexual assault may be highly prejudicial in spite of their "undoubted relevance."[34] In Cohen's case, the State never attempted to admit this evidence under Evidence Rule 404(b)(2). Therefore, the State had to clear the high bar set in our cases decided under Rule 404(b)(1).

---

[33] 20 P.3d 1121 (Alaska 2001).

[34] *Id.* at 1128.

As explained earlier, Cohen was charged with taking nude or semi-nude photographs of his daughter, B.C., when she was around fourteen years old. He was also charged with sexual abuse of a minor for causing B.C. to touch her own breasts and genitals when he had her pose for the photographs, and with sexual abuse of a minor for unlawfully touching B.C. The evidence of Cohen's alleged prior bad acts was admitted to show that Cohen engaged in a similar pattern of behavior with other young women.

T.M. and S.M. were not similar to B.C., except in age.[35] T.M. and S.M. were the sisters of C.A., Cohen's girlfriend. They were occasional visitors. B.C. was Cohen's daughter who lived with him.

More importantly, the allegations made by T.M. and S.M. were not similar to the allegations B.C. made. T.M.'s allegations, if true, were certainly shocking and highly prejudicial. According to T.M., Cohen got her drunk and then molested her. But the trial court could not reasonably find that this conduct was similar to anything B.C. alleged. The incident in which Cohen touched S.M.'s breast was treated as an accident at the time it occurred. The incident in which Cohen tried to get S.M. out of the shower did not involve any touching or attempted touching, and there was no evidence that it was considered important at the time, or that it involved anything other than poor judgment on Cohen's part.

The more fundamental problem with the allegations of Cohen's prior bad acts is that they were based on incidents that took place fifteen to twenty years before Cohen's alleged abuse of B.C. Without a powerful link to what happened fifteen to twenty years later, the trial court could not reasonably find that the evidence established any sort of consistent pattern of behavior on Cohen's part. Furthermore, given the age of the incidents underlying the allegations, the testimony was subject to the usual problems of human memory. For example, S.M. was forty at the time she testified at

---

[35] *See Bolden v. State*, 720 P.2d 957, 960-61 (Alaska App. 1986).

Cohen's trial. It was therefore predictable that the State would not be able to establish with any accuracy what had occurred, and that Cohen would be at a disadvantage in defending himself against the allegations.

Evidence Rule 404(b)(2) authorizes the admission of evidence of a defendant's prior acts in a case in which the defendant is being prosecuted for sexual abuse of a minor. But the rule requires the State to show the relevance of the prior bad acts to the charged offense — by showing that the prior acts involved a similar victim and similar conduct, and were not unduly remote in time.[36] In Cohen's case, the State conceded that the evidence of other acts it sought to introduce was not admissible as propensity evidence under Rule 404(b)(2).

As we explained in *Bingaman*, even when propensity evidence is admissible under Evidence Rules 404(b)(2), 404(b)(3), and 404(b)(4), the evidence should be admitted with caution because of the high danger of unfair prejudice.[37] We pointed out that proving character through specific instances of conduct poses a great danger of arousing prejudice, causing confusion and surprise, and consuming time. We stated that before admitting this evidence trial judges must balance the probative value of the evidence against its potential for prejudice under Evidence Rule 403, and must explain the decision on the record.[38] As already mentioned, in Cohen's case, the superior court did not conduct an evidentiary hearing and, when faced with the State's motion to admit numerous prior bad acts by Cohen, granted the State's request based only on the State's offer of proof and Cohen's written opposition.

---

[36] *Bingaman*, 76 P.3d at 404.

[37] *Id.* at 416.

[38] *Id.*

Bingaman sets out a number of factors for trial judges to consider before allowing testimony about other bad acts to prove a defendant's character.[39] I set out these factors in detail earlier in this opinion, but I will highlight some of them here. The trial judge should consider the strength of the government's proof that the defendant committed the other acts and whether the other acts are similar to the charged offenses.[40] The trial judge should also consider the recency or remoteness of the other acts, whether litigating the prior conduct will require an excessive amount of time, and whether the evidence will distract the jury from the main issues in the case.[41]

T.M.'s allegation that, on her fourteenth birthday, Cohen took her out to dinner, gave her alcohol, and then took her back to his apartment and molested her was extremely serious. But the admission of this testimony was in conflict with the standards we set out in *Bingaman*. First, even assuming T.M.'s accusation was true, the conduct was not similar to the charges that Cohen improperly touched and photographed his daughter, B.C. Second, the accusation was based on an incident that occurred fifteen to twenty years prior to the conduct at issue in this case. And third, T.M.'s allegations were hotly disputed — in fact, they became a major focus of Cohen's trial.

T.M. dropped out of high school and ran away at age fifteen, moving to Florida with an older boyfriend. She returned to Alaska at age seventeen. After C.A. and Cohen broke up, C.A. was very upset, believing Cohen had cheated on her. It was only after Cohen and C.A. broke up that T.M. alleged that Cohen had molested her. T.M. testified that she believed telling C.A. that Cohen had molested her would make the breakup easier. Cohen strongly denied the charges to both C.A. and T.M.'s mother.

---

[39] *Id.* at 415-16.

[40] *Id.* at 415.

[41] *Id.*

T.M. first reported Cohen's alleged molestation to the police in 2005, almost twenty-five years after she claimed it occurred. At trial, T.M. claimed that the assault happened on her fourteenth birthday. But the evidence showed that, at the time of T.M.'s fourteenth birthday, Cohen did not live in the residence where T.M. said the molestation occurred, and did not have the vehicle she said he used to drive her to and from the restaurant. T.M. denied that the assault occurred on her thirteenth birthday, and Cohen established that the assault could probably not have taken place on her fifteenth birthday.

Confronted with this evidence, in final argument the prosecutor contended that T.M. was mistaken when she said the assault happened on her fourteenth birthday — that it probably happened on her fifteenth birthday. And he argued that it was not important whether the jury actually believed her — that the incident was important to demonstrate Cohen's grooming behavior.

If the trial court had engaged in a more rigorous gatekeeping role, it would have concluded that admitting T.M.'s testimony violated Evidence Rule 403 and the prophylactic rules we set out in *Bingaman*. The incident was not similar to the conduct Cohen was charged with committing. The parties hotly contested whether the incident actually took place, and the litigation of this issue took up a considerable amount of trial time. Because the alleged conduct was so remote in time, it was difficult to defend against. The jurors may have found it difficult to decide whether the inconsistencies in T.M.'s testimony reflected on her credibility, or were an inevitable by-product of recalling events that occurred nearly thirty years earlier. At sentencing, the court commented on how difficult it must have been for the jury to sort out all the discrepancies in the testimony to determine what really happened — and when.

T.M.'s accusation that Cohen molested her on her fourteenth birthday had substantial potential to prejudice the jury. Even if the jury had serious doubts about T.M.'s credibility, the evidence might have swayed it to convict Cohen in an otherwise

weak case, particularly given the other prejudicial other acts evidence that was admitted at his trial.

Evidence of Cohen's relationship with S.R.

S.R. was the daughter of Cohen's ex-stepsister, T.R. Cohen's father had been married to T.R.'s mother, but Cohen and S.R. were not related by blood. Cohen had known S.R. from the time she was born.

(I am using initials to protect S.R.'s privacy, even though she was not — even allegedly — the victim of a sexual offense.)

S.R. was born in January 1982. She had been living out of state, but moved back to Alaska shortly before she turned sixteen to live with her mother. S.R. testified that "apparently my mom had told him I needed some sort of father figure" and had asked Cohen to spend time with her.

Just before her sixteenth birthday, S.R. and a friend shoplifted some bras from a department store. They performed the theft by taking the bras to a fitting room, putting several bras on, and then leaving the store. They were caught by a security guard. Cohen, who was at this point an Anchorage police officer, was summoned to the scene. Cohen speculated that S.R.'s mother, T.R., suggested that he handle the situation. Cohen had S.R. lift her shirt to show him that she was only wearing her own bra, not any stolen ones. After Cohen established that S.R. did not have any stolen property on her, she was released to him. S.R. testified that Cohen never touched her, never said anything inappropriate, and never did anything other than ensure that she did not have stolen property.

A short time later, S.R. refused to go back to school. Her mother told her that if she was not going to be in school, she needed to get in some sort of program. So S.R. went to Job Corps, which she described as "a modified prison" where she was very

restricted. Cohen would take her out for various activities: he took her horseback riding, flying in a small plane, and to the shooting range. Ted Smith, a police officer who had been friends with Cohen for many years, accompanied Cohen on several of these outings. He testified that he did not see anything unusual about the relationship. And S.R. did not allege that anything unusual happened on these outings.

S.R.'s more frequent contact with Cohen was between the years 2000 and 2003, when she was between eighteen and twenty-one years old. When S.R. turned eighteen, in 2000, she had a daughter, Neveh. Neveh's father did not take part in raising the child, and S.R. was living in a small cabin behind her mother's house. During the summer of 2000, Cohen helped her lay shingles, paint the cabin, and dig a gas line connecting S.R.'s cabin to her mother's home.

When S.R. was eighteen, she became involved in a relationship with Leon, a thirty-six-year-old married man with children. Cohen disapproved of the relationship, but S.R. testified that everyone she knew disapproved of the relationship, particularly her mother.

Cohen would buy S.R. groceries and work clothes, he paid for her cell phone, and he provided her with a gas card. S.R. testified that, when she was eighteen, Cohen bought a full outfit for her, and then he asked her to strip naked and allow him to put on each piece of clothing. S.R. agreed, but she testified at trial that this incident "just weird[ed] me out."

In February 2002, when S.R. was twenty and Neveh was two, Cohen took them both to Seattle for a couple of days of shopping. They stayed in the same hotel room. Cohen paid for the trip. S.R. used a Victoria's Secret card that Cohen had given her to buy some clothing. Cohen described this as a babysitting weekend for him. S.R. corroborated that Cohen had not made any sexual advances toward her during this trip.

S.R. also testified that Cohen used to give her "killer" back massages, but that "he knew the limits."

During the trial, the prosecutor asked S.R. whether Cohen had ever asked her to engage in any sort of sexual act with him. S.R. replied that one time Cohen said something about "the fact that he could please me without ever touching me ... ." S.R. stated that she believed Cohen was referring to oral sex, and was "horrified." Cohen provided a different version of this incident: he testified that S.R. had been complaining about boys chasing her around, and that he had replied that she did not have to worry about that from him because they had an "oral friendship." Cohen stated that he intended this comment as a double entendre, and that S.R. had taken offense.

Again, if the superior court had engaged in more thorough gatekeeping, it would have concluded that Cohen's relationship with S.R. was not relevant to prove that Cohen sexually abused his thirteen-year-old daughter, B.C., or took nude pictures of her. Apparently Cohen, at the request of S.R.'s mother, took S.R. out for various activities before she turned eighteen years old, when she was in Job Corps. There was no suggestion that Cohen did anything improper. S.R. never testified to anything that sounded suspicious, and Cohen presented witnesses who testified that the relationship seemed entirely normal.

The other incidents took place when S.R. was between the ages of eighteen and twenty-two. At that time, S.R. was of legal age, was a single mother, and was involved in a sexual relationship with a married man who was twice her age. There was no biological relationship between S.R. and Cohen. Cohen could have legally had a sexual relationship with her.

And yet the admission of evidence of Cohen's relationship with S.R. had the potential to prejudice the jury. Cohen was considerably older than S.R. And although he was not related to S.R. by blood, there was a family relationship.

Had Cohen had a sexual relationship with S.R., a young woman of legal age who had been involved in other serious sexual relationships, it would have been more clear that the evidence of her relationship with Cohen was not relevant. The State advanced the evidence that Cohen did favors for S.R., looked out for her, bought her gifts, but never had a sexual relationship with her to show that Cohen had engaged in "grooming" behavior. But since S.R. was of legal age when this conduct occurred, even if Cohen had hoped to have a sexual relationship with her, his conduct would have been an attempt at seduction, not "grooming."

The opinion of the Court states that "despite the trial judge's characterization of this evidence as 'devastating', the jury's verdicts [acquitting Cohen of most of the charges] strongly suggest that the jurors[']... decision of Cohen's case was not influenced by the testimony they heard concerning Cohen's interactions with the other young women."

More precisely, the trial judge characterized the evidence as "devastating on issues of character." Cohen's character was not at issue in this case; the evidence of his prior acts was offered not to prove his propensity to commit sexual crimes, but to establish a plan or pattern of behavior. Yet this statement by the trial judge appears to recognize that the jury likely viewed the other acts evidence as propensity evidence, which is not admissible under Evidence Rule 404(b)(1).

It may be that Cohen was not prejudiced by this impermissible propensity evidence, given his strong defense at trial. The jury may have discounted the allegations involving C.A.'s sister S.M. as innocuous and remote in time. The defense case cast considerable doubt on T.M.'s allegation that Cohen molested her. In addition, the jury might have concluded that Cohen only acted as a mentor to S.R. at her mother's request. And even if the jury viewed Cohen's relationship with S.R. as having sexual overtones,

it might have concluded that this evidence had no relevance to whether Cohen molested his daughter, given that S.R. was an adult at the time.

Cohen presented evidence that he was a generous person who frequently bought gifts for people to rebut the suggestion that his gift-buying established a pattern of "grooming" behavior. Ted Smith, who had been employed as an Anchorage police officer for twenty-seven years, and had known Cohen as a friend for thirty years, described Cohen as a very generous person who gave gifts to many people, including Smith's wife, son, and daughter. Carol Scoles, an in-court clerk at the Anchorage court house, testified that she had known Cohen since 1989 or 1990 and frequently interacted with him and his family, including B.C. She testified that she had three sons and a daughter who had interacted with Cohen over the years. She said Cohen was a very generous person who had given many gifts to her and her children. Cohen called other witnesses who gave similar testimony.

But it would be a stretch to conclude that the jury discounted all the prejudicial character evidence that the superior court improperly admitted. This trial was supposed to be about whether Cohen had molested B.C. and taken nude photographs of her when she was about fourteen years old. Cohen was able to show numerous inconsistencies in B.C.'s testimony, and it seems clear from the jury's verdicts that the jurors had serious questions about her credibility. It appears to me that the jury likely failed to convict Cohen on most of the charges because the jury had serious questions about B.C.'s credibility, not because the jury gave little weight to the evidence of Cohen's interactions with other young women and girls. The trial judge, who actually saw the evidence of uncharged conduct, appears to have concluded that the evidence contributed to Cohen's convictions. As I noted earlier, the trial judge described the evidence of uncharged conduct as "devastating on issues of character."

A large portion of the trial was consumed by Cohen having to defend himself against these uncharged allegations. Moreover, admission of this evidence conflicted with our prior case law applying Evidence Rule 404(b)(1), which requires a closer connection between the allegations of uncharged sexual conduct and the offenses for which the defendant is on trial. And even if the evidence had qualified for admission under Rule 404(b)(2), none of it should have been admitted under the standards we set out in *Bingaman v. State*.

I would accordingly hold that the superior court erred in admitting the evidence of this uncharged misconduct, and that Cohen is entitled to a reversal of his conviction. I therefore respectfully dissent.