

230 Conn. 43, *; 644 A.2d 887, **;
1994 Conn. LEXIS 205, ***

on the ground that the charges were time-barred under General Statutes (Rev. to 1987) § 53a-69. ²⁰ The defendant [*77] further claims that combining the time-barred charges in the Meriden case in the same trial as the charges in the Southington case, which were not time-barred, prejudiced his trial on the latter charges. The defendant cannot prevail on this unreserved claim.

20 General Statutes (Rev. to 1987) § 53a-69 provides: "No prosecution may be instituted or maintained under this part unless the alleged offense was brought to the notice of public authority within one year of its occurrence or, where the alleged victim was less than sixteen years old or incompetent to make complaint, within one year after a parent, guardian or other competent person specially interested in the alleged victim learns of the offense." This statute has since been repealed. See Public Acts 1987, No. 87-223.

***52] Both C and K testified that they had told their mother of some of the incidents in Meriden at the time they had occurred. The victims' mother, however, testified that she had not heard about the allegations until after they had been reported to the police. Although all the assaults in the Meriden case occurred before December, 1986, no assaults were reported to the police until early in 1988, more than one year after the last assault had occurred.

Section 53a-69, which was in effect at the time of trial, barred sexual assault prosecutions involving minor victims if the allegations were not brought to the attention of the police within a year after a parent learns of the alleged assault. See *State v. Whiteman*, 204 Conn. 98, 102, 526 A.2d 869 (1987). The defendant did not object to the prosecution on the basis of this statute at the time of trial.

Because the defendant failed to

raise this claim at trial, he seeks review under the plain error rule. "It is also well established that plain error review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial ***53] proceedings." (Internal quotation marks omitted.) *State v. Boles*, 223 Conn. 535, 551, 613 A.2d 770 (1992); *State v. Hinckley*, 198 Conn. 77, 87-88, 502 A.2d 388 (1985). [*78]

The record in this case does not reveal an obvious error that would undermine public confidence in the fairness and integrity of the judicial proceedings. First, § 53a-69, on its face, only applied to part VI of the penal code, which covers *General Statutes §§ 53a-65 through 53a-90*. Thus, in the absence of a contrary construction by the trial court, the time limitation would not have affected counts eight, eleven, sixteen, seventeen or eighteen of the Meriden information. **905] See footnote 1. Second, the victims' mother testified that she had not been notified of the offenses until after they had been reported to the police. With this testimony, and without a ruling by the trial court on the mother's credibility, we cannot find plain error in the trial court's failure to apply § 53a-69 to any of the charges against the defendant.

The judgments of the trial court are affirmed.

In this opinion PETERS, C. J., and NORCOTT, J., concurred.

DISSENT BY: BERDON; KATZ ***54]

DISSENT

BERDON, J., dissenting. I agree with Justice Katz' well reasoned dissent concerning parts III and VIII of the majority opinion. Although the defendant raises other claims that trouble me, I need not reach them, because the improper admission of the uncharged misconduct evidence would re-

230 Conn. 43, *; 644 A.2d 887, **;
1994 Conn. LEXIS 205, ***

quire a new trial on all counts.

KATZ, J., with whom BERDON, J., joins, dissenting. I disagree with the conclusions reached in parts III and VIII of the majority opinion. First, I believe that the trial court abused its discretion in admitting S's testimony that the defendant had molested her. Second, I believe that the defendant's constitutional rights were violated when the trial court improperly instructed the jury on a method of committing the crime charged that was not supported by the evidence. On this point, I refer [*79] to Justice Berdon's dissenting opinion in *State v. Chapman*, 229 Conn. 529, 548, 643 A.2d 1213 (1994), in which I joined.

With regard to the misconduct evidence, S testified that the defendant had sexually assaulted her on several occasions when she was ten or eleven years old. The assaults consisted of the defendant kissing her, rubbing her breasts, touching [***55] her genitals and forcibly placing her hand on his genitals. At the time, the defendant was married to S's sister and lived in the same building as S's family. The trial court concluded that this evidence was probative of the defendant's "common scheme sexually to abuse young girls," and that its probative value substantially outweighed its prejudicial effect. I believe that this conclusion was incorrect and that the trial court abused its discretion.

The rule in Connecticut is that prior misconduct evidence is inadmissible to prove that a defendant is guilty of the crime charged; *State v. Baldwin*, 224 Conn. 347, 354, 618 A.2d 513 (1993); *State v. Falby*, 187 Conn. 6, 23, 444 A.2d 213 (1982); *State v. Holliday*, 159 Conn. 169, 172, 268 A.2d 368 (1970); and may not be used to suggest that the defendant has a propensity for criminal behavior. *State v. Morowitz*, 200 Conn. 440, 442, 512 A.2d 175 (1986); *State v. Brown*, 199 Conn. 47, 56, 505 A.2d 1225 (1986). I agree with the majority that Connecticut, like many other states and the federal courts, recognizes an

exception to the general rule of inadmissibility for misconduct evidence that "is particularly [***56] probative in showing such things as intent, an element in the crime, identity, malice, motive or a system of criminal activity" (Internal quotation marks omitted.) *State v. Baldwin*, supra, 354. Nevertheless, I disagree with the majority's conclusion that S's testimony falls within an exception because it "was probative of a common scheme of behavior toward young girls." I believe that the majority is bending the [*80] rules of evidence in order to carve out, for sexual assault cases, a special exception to the rule against admitting misconduct evidence.

In *State v. Esposito*, 192 Conn. 166, 172, 471 A.2d 949 (1984), this court discussed, in detail, the requirements for the common scheme exception: "When evidence of other offenses is offered to show a common plan or design the marks which the uncharged and the charged offenses have in common must be such that it may be logically inferred that if the defendant is guilty of one he must be guilty of the other. . . . It is apparent that the indicated inference does not arise, however, from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks [***57] in question are of such common occurrence that they are shared not only by the charged crime and [the] defendant's prior offenses, but also by numerous other crimes committed by persons other than [the] defendant." [**906] (Citation omitted; internal quotation marks omitted.) The majority, relying on *Esposito*, concludes that S's testimony was properly admitted under the "common scheme" exception because: (1) it "resembled" the testimony of C and K; (2) the defendant had maintained a close relationship with the families of all three girls; and (3) all three girls had been young when the alleged assaults had commenced, ranging from nine to eleven years old. I believe

230 Conn. 43, *, 644 A.2d 887, **,
1994 Conn. LEXIS 205, ***

that these very broad similarities are clearly inadequate to bring S's testimony within the common scheme exception.

First, the similarities relied on by the majority are not in any way distinctive. Two of the three "similarities" --the ages of the victims and the defendant's close relationship with the victims' families--are of such common occurrence that they apply to pedophiles generally. See Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association [*81] 3d Ed. Rev. 1987) [***58] § 302.20, p. 284. The third "similarity"--i.e., the types of sexual activities alleged by the victims--is not really a similarity at all. C and K accused the defendant of sexual activities ranging from fondling, to vaginal and anal intercourse, to digital penetration, to attempted oral sex. All of these activities, as well as those alleged by S, are common to pedophiles generally. See *id.* Moreover, almost any sexual activity would "resemble" the testimony of C and K because of the broad range of conduct they described. The only specific acts that S's testimony had in common with that of C and K was the defendant's alleged touching of their breasts and pubic areas. In *State v. Rogers*, 293 S.C. 505, 507, 362 S.E.2d 7 (1987), the court held that the trial court had erred in admitting uncharged misconduct evidence from the victim's sister, when "the only connection between the testimony of the two [sisters] was [that the defendant had] touched them both."

Second, even if the alleged assaults on S and C and K were more similar and therefore shared more in "common," there is no evidence whatsoever that these assaults were connected as part of an overall plan. To be admissible, [***59] the uncharged act of misconduct must be "so intertwined with the crime charged as to indicate that they are separate components of a general plan." *United States v. Dothard*, 666 F.2d 498, 504 (11th Cir. 1982). "Courts have admit-

ted extrinsic act evidence to show a defendant's design or plan to commit *the specific* crime charged, but never to show a design or plan to commit *crimes of the sort* with which he is charged." (Emphasis in original; internal quotation marks omitted.) *Id.*, 502. This court adopted that principle in *State v. Conroy*, 194 Conn. 623, 626, 484 A.2d 448 (1984), which held that "evidence of *similar but unconnected* crimes is generally not admissible to prove a criminal defendant's guilt. Such evidence can [*82] show no more than the defendant's bad character or an abstract disposition to commit a crime; it provides no proof of guilt of the specific offense in question. *State v. Gilligan*, 92 Conn. 526, 531, 103 A. 649 (1918); see *State v. Esposito*, [*supra*, 192 Conn. 166, 471 A.2d 949]. " (Emphasis added.) Because the only possible connection between the alleged assaults on S and the alleged assaults on C and K [***60] seven years later is that the defendant has a disposition to molest young girls whom he knows, S's testimony should not have been admitted.

Professor Edward Imwinkelried of the University of California at Davis has divided cases under the common plan exception into two categories, "true plan" cases and "spurious plan" cases. He writes that "in a true plan case, the courts hold that the prosecutor may prove any uncharged crime by the defendant which shows that the defendant in fact and in mind formed a plan including the charged and uncharged crimes as stages in the plan's execution. . . . Both crimes must be inspired by the same impulse or purpose. Both crimes must be steps toward the accomplishment of the same final goal. They are different stages of the plan." E. Imwinkelried, *Uncharged Misconduct Evidence* (1984) § 3:21, pp. 53-54. Moreover, "it is not enough to show mere similarity between the crimes. Standing alone, a series of similar acts does not establish the existence of a true plan. A series of similar robberies could be the result of separate decisions to rob. There

230 Conn. 43, *, 644 A.2d 887, **,
1994 Conn. LEXIS 205, ***

must be a permissive inference that both crimes were related to an overall goal in the defendant's mind." [***61] *Id.*, § 3:22 p. 58; [**907] see also 1 C. McCormick, *Evidence* (4th Ed. 1992) § 190, pp. 800-801 (to fall within common plan exception, "each crime should be an integral part of an over-arching plan explicitly conceived and executed by the defendant").

Professor Imwinkelried is critical of "spurious plan" cases, in which "[the] courts are quite liberal in admitting [*83] uncharged misconduct If the proponent can show a series of similar acts, these courts admit the evidence on the theory that a pattern or systematic course of conduct is sufficient to establish a plan. Similarity or likeness between crimes is a sufficient showing. In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory. . . . In reality, the courts are permitting the proponent to introduce propensity evidence in violation of the prohibition [against the admission of misconduct evidence]. Proof of a number of similar [crimes] may be probative of the defendant's status as a professional criminal. However, if . . . there is no inference of a true plan in the defendant's mind, the proponent is offering the evidence on a forbidden theory of logical relevance. [***62] It is immaterial that there are many instances of similar acts by the defendant; the number of the acts increases the acts' probative value on the issue of the defendant's propensity, but standing alone the number of acts cannot change the propensity quality of the theory of relevance. The courts are illicitly allowing the proponent to prove the defendant's character, disposition, or propensity." E. Imwinkelried, *supra*, § 3:23, pp. 61-62.

In recent years, appellate courts have relied on Professor Imwinkelried's cogent analysis to reverse trial court decisions admitting prior misconduct evidence in sexual assault cases. *Ali v. United States*, 520 A.2d

306 (D.C. 1987), is precisely on point. In *Ali*, the victim claimed that the defendant, who had been her mother's boyfriend, had molested her over a two year period starting when she was thirteen. The victim testified that the defendant had touched her breasts, and had engaged in vaginal and anal intercourse with her. *Id.*, 308. Over the defendant's objection, the trial court allowed the government to introduce evidence under the common scheme or plan exception that on a few [*84] occasions, the defendant had touched [***63] the breasts of the victim's younger sister. *Id.*, 309. The defendant was convicted.

On appeal, the District of Columbia Court of Appeals held that the introduction of the evidence concerning the sister was reversible error, because that evidence "is relevant to charges that [the] appellant engaged in sexual intercourse and sodomy with an entirely different individual on separate occasions only by means of one inference: because [the] appellant did so with [the sister], he did so with [the victim]. That is precisely the 'propensity' inference forbidden by [the rule against admitting uncharged misconduct evidence]." *Id.*, 311. The court agreed with Professor Imwinkelried that "[t]he distinguishing characteristic of the common scheme or plan exception to inadmissibility is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution: the series of crimes must be mutually dependent." *Id.*, 312; see also *Government of the Virgin Islands v. Pinney*, 967 F.2d 912, 916 (3d Cir. 1992) (evidence of uncharged sexual misconduct inadmissible under common plan exception, because "the government has been [***64] unable to articulate any theory that united these isolated events which occurred six years apart, without resorting to the kind of character-based inference prohibited by [the rule against admitting uncharged misconduct evidence]"); *People v. Engelman*, 434 Mich. 204, 221, 453 N.W.2d 656 (1990)

(trial court erred in admitting evidence of uncharged sexual misconduct because the defendant "did not have a single plan which encompassed both of these acts, and it does not appear on this record that the acts were in different stages of the same, comprehensive plan"); *State v. Eubank*, 60 Ohio St. 2d 183, 186, 398 N.E.2d 567 (1979) (trial court erred in admitting evidence of uncharged sexual misconduct under the common plan [*85] exception because the uncharged acts were not "inextricably related" to the charged crime, but instead were "chronologically and factually separate occurrences").

[**908] In the case before us, there is absolutely no evidence that there existed "a true plan in the defendant's mind" that included the alleged assaults on S and on C and K as stages in its execution. Indeed, the facts before us present a much weaker basis for drawing the inference [***65] of a common plan than the facts of *Ali*. In *Ali*, the victims of the charged and uncharged misconduct were sisters, and all the misconduct occurred within the same time frame. In contrast, in the present case, seven years separated the charged and the uncharged misconduct, and S and C and K were not related. Even if we assume that the defendant molested S, it is unreasonable to infer that at the time he did so, he had a plan in his mind that encompassed the molestation of two unrelated individuals several years in the future. ¹ [*86]

1 In establishing the requirements for the common plan exception, the majority in *State v. Esposito*, *supra*, 192 Conn. 170, relied, in part, on *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978). In *Thomas*, the defendant was convicted of molesting and having sexual intercourse with his stepdaughter and his natural daughter when they were twelve years old and nine years old, respectively. *People v. Thomas*, *supra*, 463. The

stepdaughter testified that the defendant had begun molesting her when she was eight years old. *Id.*, 474 n.1 (Clark, J., dissenting). The trial court permitted an older natural daughter of the defendant to testify that, when she was between the ages of six and fourteen, the defendant had molested and had sexual intercourse with her. *Id.*, 463. Although the conduct with the older natural daughter predated the charged offenses by ten years, it predated the molestation of the stepdaughter by only six years. *Id.*, 474 n.1 (Clark, J., dissenting). The California Supreme Court held that the conduct with the older natural daughter was "too remote in time" to establish that the defendant had "a continuing common plan or scheme to molest all of his daughters." *Id.*, 466; see also *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987) (evidence of similar uncharged sexual misconduct that occurred five years before the charged offense was too remote to establish a common plan or scheme); *Government of the Virgin Islands v. Pinney*, *supra*, 967 F.2d 916 (six years). I believe that the defendant's alleged misconduct with S is similarly too remote in time to be considered to be part of a continuing plan encompassing the alleged assaults on C and K.

[***66] The majority cannot and does not claim that the charged and uncharged acts of misconduct in this case were connected by a true plan in the defendant's mind. Indeed, the only connection they claim between the charged and uncharged acts is the defendant's desire to sexually abuse young girls. Such a desire does not amount to a plan: "Characterizing a plan in terms of a general bad motive may be probative of an accused's status as a bad person, but if there is no inference of a specific plan in the accused's mind which interconnects the

230 Conn. 43, *, 644 A.2d 887, **;
1994 Conn. LEXIS 205, ***

uncharged and charged acts, then the other crimes evidence is offered for nothing other than the accused's propensity to commit a series of similar but discrete bad acts." (Emphasis in original.) *Ali v. United States*, *supra*, 520 A.2d 311; see also *United States v. Brown*, 880 F.2d 1012, 1015 (9th Cir. 1989) (to be admissible, a prior act of misconduct "must establish a motive to commit the crime charged, not simply a propensity to engage in criminal activity").

I believe that the majority is bending the rules of evidence in order to carve out, for sexual assault cases, a special exception to the rule against admitting misconduct [***67] evidence. This is indicated by the statement in the majority opinion that "we are more liberal in admitting evidence of other criminal acts to show a common scheme or pattern in sex related crimes than other crimes." Some states have established such a special exception explicitly, rather than distorting, in sexual misconduct cases, the common plan exception or the other exceptions. See, e.g., *State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87 (1973) (creating an "emotional propensity" exception for cases involving sexual aberration, such as child molestation); *Brackens v. State*, 480 N.E.2d 536, 539 (Ind. 1985) ("evidence of past acts involving or showing a depraved sexual instinct are admissible to establish that a defendant committed a sex crime").

[*87] The problem with creating such a special exception is that two similar but distinct acts of sexual misconduct, separated in time, do not necessarily establish a propensity or disposition on the part of the defendant. In [**909] *State v. Treadaway*, 116 Ariz. 163, 167, 568 P.2d 1061 (1977), the Arizona Supreme Court recognized that "the admissibility of the prior act depends upon its relevancy, [***68] which involves complicated questions of sexual deviancy in a sophisticated area of medical and scientific knowledge. . . . In addition, statistical evidence generally indi-

cates that, in relation to other classes of criminal offenses, sexual offenses as a group have a low rate of recidivism This information would indicate that evidence of prior similar acts may be less probative for sex crimes than for other kinds of crimes, and it supports the criticism of this exception." The *Treadaway* court held that the defendant's conviction for sodomizing a young boy had to be reversed because the state had introduced evidence that the defendant had sodomized another young boy three years before the charged crime, but had not introduced expert medical testimony establishing that the uncharged misconduct demonstrated a continuing emotional propensity to commit the charged crime. *Id.* In light of the remoteness of the uncharged misconduct in this case, and the fact that many of the acts allegedly perpetrated on C and K had not been perpetrated on S, I question whether S's testimony is relevant at all to the crimes charged, even for the currently impermissible purpose of demonstrating [***69] propensity.

In criticizing a court that upheld the admission of evidence of uncharged sexual acts with young girls other than the victim in order to show the defendant's motive to gratify his lustful desire by grabbing or fondling young girls,' "Richard Lempert and Stephen Saltzburg state: "Clearly the evidence is only relevant in that it suggests a propensity to assault young girls. One [*88] wonders whether the . . . court would have condoned the admission of evidence of other thefts in a trial for theft on the grounds that it showed the defendant's 'desire to satisfy his greedy nature by grabbing other people's belongings.' Perhaps they would if theft left them as upset and uncomprehending as a sexual assault on a fifteen year old." R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* (2d Ed. 1982) p. 230. Sexual assault is a terribly brutal and emotionally damaging crime, especially where the victims are minors. This does not, however,

230 Conn. 43, *; 644 A.2d 887, **;
1994 Conn. LEXIS 205, ***

justify the adoption of special rules allowing the state to introduce any evidence of prior sexual misconduct that it can dig up against the defendant.

The judgment of the trial court should be reversed, and this case should be remanded [***70] for a new trial. ²

2 Because the admission of ev-

idence of uncharged sexual misconduct is presumed to be prejudicial to the defendant unless it is admitted for a substantial, legitimate purpose; *State v. Ouellette*, 190 Conn. 84, 95, 459 A.2d 1005 (1983); I need not consider the issue of harmless error.

I respectfully dissent.