Supreme Court No. 91279-3
(Court of Appeals No. 70291-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HITT,

Petitioner

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Pursuant to RAP 13.4(b)(1), (3), and (4), Robert Hitt asks this Court to accept review of the December 22, 2014 opinion of the Court of Appeals in *State v. Hitt*, 70291-2-I. decision terminating review designated in Part B of this petition. Copy attached as Appendix A.

B. INTRODUCTION

"We will make sure that he never walks our streets again," proclaimed the elected prosecutor when announcing the instant charges against Mr. Hitt.[1] The State pulled no punches in its effort to fulfill this public promise. Even though there was no direct evidence the current burglary was sexual in nature, the prosecution alleged that two out of the nine crimes charged were sexually motivated. Pretrial, the prosecution fought for judicial approval to use the petitioner's 2002 rape conviction in their case-in-chief, under the theory that there was a common scheme or plan between that crime, and what he was alleged to have done now. "[S]imilarities here are striking," they said. RP 284.

The prosecution maintained that if it did not get its way, the trial court would be forcing the State to proceed "with one hand tied behind its back." RP 282. The prosecution pressured the trial court to disregard

[1] http://www.kirotv.com/news/news/crime-law/convicted-rapist-faces-9-counts-uw-home-invasion/nLNQL/ (Last accessed January 20, 2015)

precedent barring use of prior convictions: "I also find it concerning that defense counsel keeps bringing up appellate issues. I don't think the Court should be intimidated in making a ruling because we are concerned about what is going to happen on appeal." RP 291. The prosecution won its motion and closed out its trial presentation by having the prior victim detail what Mr. Hitt had done to her: "Was the knife actually touching your skin?" RP 1186. "Can you show the jury?" RP 1186.

In closing argument, the prosecution portrayed the accused as a sexual sadist: "[Y]ou know from [JSN's[2]] testimony is that the defendant is sexually motivated by violence towards women." RP 1291. In rebuttal, the prosecution carried on: "And you know from his rape of [JSN] that there is something about what makes him tick, that that's dominating of women, and gratifies him sexually." RP 1323.

The State's strategy of using the prior to argue that Mr. Hitt was a sexually violent predator worked as intended. Drinking from a poisoned well, the jury convicted Mr. Hitt of every allegation pressed against him.

Despite all of this, the Court of Appeals concluded the concededly erroneous admission of the facts of the prior offense did not have a likely effect on the jury's verdict.

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[2] The victim of the past crime is referred to by two different last names, likely a maiden and a married name. Meaning no disrespect, petitioner adopts JSN for consistency.

C. ISSUES PRESENTED FOR REVIEW

1. On appeal, the State acknowledges the obvious: the jurors deciding Mr. Hitt's case should have never learned that the petitioner raped JSN at knifepoint because there is no valid ER 404(b) exception upon which to admit this damning testimony. Character evidence is never admissible to prove action in conformity therewith, but here, the prosecution literally argued that Mr. Hitt must be guilty as charged because the past rape evidence showed that violence towards women makes him "tick." To make matters worse, the jurors were explicitly permitted to use the prior rape evidence to decide if the State proved motive or intent, without limitation as to any specific count.

For decades, this Court has consistently emphasized that nothing turns jurors against an accused like prior sex offense evidence. Should this Court grant review, order a new trial on all counts, and thus bring this matter in line with *Gower*, *Gresham*, and *Saltarelli*?

2. As charged, the State had to prove that in restraining the six housemates Mr. Hitt had the specific intent to use each woman as a shield or hostage, or to further robbery. There was no evidence of use as a hostage or shield for five of the counts and the general verdict does not assure the jury did not return a verdict based on this alternative means. In accord with *Garcia*, should the Court grant review and reverse?

D. STATEMENT OF THE CASE

In 2002, petitioner Robert Hitt pleaded guilty to rape in the first degree. CP 69-75. At knifepoint, he had orally raped a young woman, JSN, who delivered food to his home. He was sentenced to a ten year prison term and released onto DOC supervision in early 2012. CP 96.

Less than three months into his community supervision, Mr. Hitt relapsed into substance use. He spent the evening of March 4, 2012 drinking. Pretrial Exhibit 4 at 4:40-5:05, 5:28-51; Pretrial Exhibit 6, p.7-8. When he left the bar in the early morning, he was offered methamphetamine and he accepted. RP 431-32, 900.[3]

Impaired and in need of cab fare to return home, Mr. Hitt walked around, approaching a darkened home on 20th Ave. NE. RP 898, 900. He knocked on the front door repeatedly but no one answered. RP 604-05, 1102-03. Thinking no one was inside, Mr. Hitt threw a rock through a side window and entered. Exhibit 103 (#6636) at 21:09-15.

As it turned out, eight young women lived in the residence and were sleeping when Mr. Hitt came inside. *E.g.*, RP 393-94. He panicked and a highly disorganized series of events ensued. *E.g.*, Exhibit 103

[3] The consecutively-paginated volumes of the trial verbatim report of proceedings are referred to as "RP." The remaining volumes, including the transcripts of voir dire, are referred to by the first date transcribed, for example "3/13/13 RP."

(#6636) at 25:05-40; RP 579-81, 727, 853 (Hitt acted erratically and did not seem to have planned what he was doing).

Mr. Hitt went upstairs and E.H. opened her bedroom door. RP 493-97. He panicked and ran into her open doorway. RP 497-98. While he paced, E.H. asked him what he was doing. RP 499, 501. Mr. Hitt told E.H. he was going to rob her and asked who else was in the house. RP 500. When E.H. told him there were seven others, Mr. Hitt wrapped her wrists together with electrical tape and they went to E.C.'s room. RP 500-01. Mr. Hitt did not see E.C.; he put a small knife to E.H.'s neck and led her around the house to collect the other roommates. RP 506-15. At the other rooms, E.H. told her roommates they were being robbed and to come out and/or Mr. Hitt told the women to come out of their rooms or he would hurt E.H. RP 508-15.

He gathered the six women in K.B.'s upstairs bedroom and had them lay face down on the ground; he took two of the women's cell phones so they could not call the police. RP 514-15, 522-537. He wrapped their hands behind their back with the remaining electrical tape, including those of E.H. who had undone her initial wrapping. RP 537-42. When Mr. Hitt ran out of electrical tape, he asked the women for more. RP 553-54. K.B. pointed him to a roll of duct tape in her drawer. RP 556.

When he went to tape K.B.'s hands, her bulky, fleece top frustrated him and he told her to remove it, which she did at least to her waist, and Mr. Hitt finished taping her hands while she lay face down on the floor like the others. RP 561-66, 594-96, 652-53, 860-61, 942, 1039-40, 1119-20, 1129-31.[4] Two roommates were overlooked in their rooms and were able to call the police. RP 399-404. The police came in soon after Mr. Hitt completed binding K.B. RP 423-28. He came out of the room and cooperated. RP 423-28.

Mr. Hitt told the police that he had made a mistake, only wanted to get cab and beer money, never intended to hurt anyone, and had no idea that anyone was inside when he entered. RP 432.[5]

The State charged Mr. Hitt with one count of first degree burglary, six counts of first degree kidnapping premised on intent to hold as a hostage or shield and to facilitate robbery (for each woman taken into K.B.'s bedroom), and two counts of first degree robbery (for each of the cell phones). CP 1-7. The State added a special allegation of sexual motivation to the burglary charge and to the kidnapping charge pertaining

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[4] Mr. Hitt apparently thought it was just a sweater, but it turned out to be a one piece pajama outfit and she had no other clothes underneath. RP 561-62, 564-66, 671, 966-67.

[5] The State agrees that "there is no evidence that when the defendant broke into the University area home, he knew that anybody was home, let alone that he knew the sex or age of the person or persons who lived there." State Response at 24.

to K.B. *Id.* The State further charged that each of the counts was committed while armed with a deadly weapon, the knife. *Id.*

Before trial, the State moved to admit evidence of Mr. Hitt's prior rape conviction to support its current claim of sexual motivation. CP 14-30, 49-60, 199, 422-25; RP 236-64, 276-306, 389-91. Referring to Mr. Hitt's statements that he wanted to rob, the prosecution argued they badly needed to use the prior crime in their case-in-chief: "[W]e are here to have a fair trial for both sides. And having the State try this case with one hand tied behind its back because the jury won't hear this very probative evidence to rebut Mr. Hitt's assertion." RP 282.

There was little to no evidence the State could point to as suggestive of sexual motivation. While securing the women's wrists, K.B.'s bulky "onesie," which got in the way of Mr. Hitt's attempt to tape her wrists, was pulled down. RP 594-96, 838-40, 971. K.B. had nothing underneath; she was facing away from Mr. Hitt when this happened and he immediately told her to return face down on the floor. RP 596-97, 860-61. He did not treat K.B. any differently than the other women. RP 975-76. Mr. Hitt touched another housemate, E.H., on her backside after ordering her to move up the stairs. RP 535-36. He did not remove anyone else's clothing, make any sexual advances, say anything sexualized, act interested in the women, or do anything else overtly sexual. RP 578, 581,

591-92, 596-97, 669-76, 675, 729-30. He told the women he was only there to rob them. RP 582-83.

The State won its motion and all nine convictions, including the sexual motivation special allegations. CP 249-66, 409-21, 426. Counts I and III counted as Mr. Hitt's second strike for a sex offense and he was sentenced to life imprisonment. CP 413.

On appeal, the State conceded that there were insufficient similarities between the prior and the instant offenses: "many of the identified facts are innocuous, not acts of the defendant, or while they are facts common to both cases, they are not facts suggestive of an actual plan to commit the crime of rape." State Response at 22-23. The Court of Appeals agreed. Opinion at 4-7. The Court of Appeals also accepted the State's proposal that the only remedy Mr. Hitt is entitled to is a remand for resentencing, where the sexual motivation aggravators would be stricken, but that the other verdicts are to stand. Opinion at 16.

E. ARGUMENT WHY REVIEW SHOULD BE ACCCEPTED

1. **Fundamental due process requires the petitioner be given a trial where jurors are not prejudiced against him by the testimony of a prior victim and where the State does not argue he is "sexually motivated by violence towards women."**

a) The State properly conceded its argument in the trial court was erroneous and the propensity evidence should have not been admitted.

While the State concedes error on appeal, the prosecution went to great lengths to convince the trial judge to depart from the general prohibition against the use of prior bad act evidence and admit the prior rape under the "common scheme or plan" exception. The prosecution emphasized that "similarities here are striking; and it's those similarities that make it so probative." RP 284.

The prosecution called JSN as a witness. RP 1165, 1180-1208. The prosecution had JSN describe, in detail, exactly what Mr. Hitt forced her to do. The prosecution asked: "Was the knife actually touching your skin?" RP 1186. The prosecution had JSN demonstrate: "And where, on your throat, was it? Can you show the jury?" RP 1186. JSN told the jurors that she was crying when Mr. Hitt put his penis in her mouth. RP 1190, 1193. She told the jurors that he kept the knife at her throat during the rape. RP 1193. She told the jurors that he ejaculated. RP 1194. The State rested its case. RP 1229.

Before JSN's testimony, the court had given an oral instruction that limited the jury's use of this evidence to determining whether the State had proven the sexual motivation allegation in counts I and III and not for any other purpose. RP 1180. However, the final written jury instruction regarding JSN's testimony told the jurors they could consider

the prior rape for: "the purpose of deciding whether the defendant's prior conduct is part of a common scheme or plan, or as evidence of the defendant's motive or intent with respect to conduct charged by the State in this case." CP 199. (Emphasis added.)

The prosecution requested this change in response to the trial court ruling that the defense was entitled to a voluntary intoxication instruction. RP 1257. The State wanted to use the prior rape – during which JSN believed Mr. Hitt had been drinking alcohol – as evidence that he formed the requisite intent in all of the crimes they charged against him. RP 1257. The trial court agreed to this expansion on how the prior would be used without conducting any new ER 404(b) analysis. Mr. Hitt objected to the instruction as well as the admission of the evidence on the whole. RP 1256, 1258-59, 1271.

In closing argument, the prosecutor talked about the "nightmare that [Mr. Hitt] created," and said "that this is something that they continue to live with, that continues to affect them." RP 1276-77. (Defense objection overruled.) The prosecution told the jury that Mr. Hitt's acts of violence toward "the young women" (plural form in the original) demonstrated a sexual desire. RP 1290. The prosecution explained that just because there was no "groping... touching... ogling [or] kissing," did not mean that Mr. Hitt's behavior during the incident was not sexually

motivated: "That's not how he necessarily got his sexual gratification." RP 1290. (Defense objection overruled.)

The prosecution emphasized that what Mr. Hitt did to JSN proved that his violent acts committed against the housemates were sexually motivated: "[W]hat you know from [JSN's] testimony is that the defendant is sexually motivated by violence towards women, by using a knife, by dominating them, by stripping them naked, by having that power and control over women." RP 1291. (Emphasis added.)

The prosecution compared JSN's experience with those of all of the housemates: "[J]ust as he had held [JSN] at knife point, he held [EH] at knife point... He used a knife, not just a knife, but a serrated knife in both incidents. He threatened those women in the same exact manner." RP 1292. (plural form in the original)

Defense argument focused on Mr. Hitt's intoxication and lack of conclusive proof regarding intent. RP 1297-98, 1301-1304, 1313. But, on rebuttal, the prosecution returned to the rape of JSN: "[t]he defendant has shown that intoxication does not interfere with his ability to form intent when it comes to satisfying his own sexual purposes." RP 1321. The prosecution again characterized the petitioner as a sadist: "[Y]ou know from his rape of [JSN] that there is something about what makes him tick, that that's dominating of women, and gratifies him sexually." RP 1323.

Propensity evidence has no place in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 7 (2012). It is designed to prevent the State from suggesting once a criminal, always a criminal, or once a rapist, always a rapist. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Evidence of a prior crime carries an extraordinary risk of undue prejudice. *Old Chief v. United States*, 519 U.S. 172, 180-84, 191-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002); *State v. Brown*, 113 Wn.2d 520, 529-30, 782 P.2d 1013 (1989). The admission of a prior conviction cast Mr. Hitt in an even less favorable light than if the evidence had merely related to a prior act. *State v. Halstein*, 122 Wn.2d 109, 126-27, 857 P.2d 270 (1993).

Mr. Hitt objected to the admission of the prior act, a rape against an entirely independent victim from over a decade before the current charges. *E.g.*, CP 14-30 (motion in limine); *see* RP 238-57, 285-90, 1271-72. The State argued it was relevant to the alleged sexual motivation special verdict. *E.g.*, CP 49-60; RP 258-64, 276-82.[6]

[6] To prove the special allegation of sexual motivation, the State must set forth "identifiable conduct by the defendant while committing the offense which proves

The State concedes it was wrong to make its argument to the trial court in the first place. The Court of Appeals correctly accepted the State's concession on appeal and ruling that the prior rape evidence was inadmissible. Indeed, the State never met its "substantial burden" to show admission of a prior offense for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003)Similarly, the trial court should have never expanded – again at the State's request – the use of the prior rape evidence to include motive or intent.[7]

b) The Court of Appeals underestimates the impact of the prior victim's terrifying testimony.

An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). This analysis "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." *Id.*; *State v. Gresham*, 173 Wn.2d 405, 434, 269 P.3d 207 (2012) (Erroneous admission of prior sex conviction prejudicial even though evidence otherwise sufficient to sustain conviction.)

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beyond a reasonable doubt the offense was committed for the purpose of sexual gratification." *State v. Halstien*, 122 Wn.2d 109, 120, 857 P.2d 270 (1993).

[7] *Compare* CP 422-25 (Findings of Fact and Conclusions of Law); RP 236-38 (material before the court), 292-306 (oral ruling), 389-91 (affirming ruling on Hitt's request to reconsider) *with* CP 199 (jury instruction "limits" consideration to common scheme or plan, or motive or intent); RP 1180 (before Sewell's testimony, court informs jury it may only be considered for determining whether State met burden on motive); RP 1238, 1254-60 (argument on limiting instruction).

Review should be granted, in part to correct the Court of Appeals untenable minimization of the prejudicial impact of the prior rape testimony. The State's proof of the special sexual motivation allegations hinged upon admission of Mr. Hitt's prior rape conviction. The trial court explicitly recognized the weakness of the State's other evidence. RP 243-44. Generally speaking, prior acts evidence is highly probative if there is "very little proof" the charged crime occurred. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P3.d 901 (2007). Because the focus of the State's sexual motivation case was on Mr. Hitt's prior conviction for a different crime against a different victim, it is reasonably probable that the evidence was harmful and affected the verdict. *See State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012).

"The potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases. *Gower*, 179 Wn.2d at 857, *citing Gresham*, 173 Wn.2d 405 *and quoting State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Just one year ago, in *Gower*, this Court reversed for a new trial where a trial court erred in admitting, in a bench trial, evidence the accused had committed other sex offenses different from those he was charged with. The *Gower* court was "satisfied" that there was a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.

In its analysis, the *Gower* Court first noted the fact that the trial judge, in a pretrial motion noted that the evidence was "necessary" to the State's case. *Id.* at 857. Next, the *Gower* Court pointed out the State's inconsistent approach to the evidence pretrial – where the prosecution argued "this is necessary evidence" – but tried on appeal to say something different. *Id., citing to State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000) (characterizing as "[r]emarkabl[e]" the State's decision to take "opposite position[s]" on one factual matter in two separate but related appeals.

In Mr. Hitt's case, the prosecution attempts the same disingenuous maneuver. Here, when asking the trial court to admit the evidence, the State said that it could not live without it.[8] On appeal, the State oddly distances itself from the error, referring to it as belonging to the trial court, not the prosecution, and claims now the wrongful admission of the evidence was only "partially prejudicial." State Response at 26.

In *Grower* the admission of the evidence was also harmful as it went to the main issue in the case, the alleged victim's credibility. *Id.* at 858. Intent was at issue in all of the counts charged against the petitioner and Mr. Hitt's purpose in all his actions that evening was the chiefly

[8] "[W]e are here to have a fair trial for both sides. And having the State try this case with one hand tied behind its back because the jury won't hear this very probative evidence to rebut Mr. Hitt's assertion." RP 282.

contested issue. But, the trial court's instructions wrongly gave the jurors permission to use the prior rape as evidence that the State proved intent, which is why prejudice exists as in *Gresham*. *See also Saltarelli* at 366. ("Because the evidence did not satisfy the test of relevance to intent, balancing probativeness against potential for prejudice was an empty gesture.")

The Court of Appeals' attempt to assess the prejudice caused by the State's action does not give adequate consideration to exactly what the jury was exposed to. The evidence about the prior crime was made central to the case in the most vivid terms when the prosecutor called JSN to testify. JSN had nothing admissible and relevant to say about the instant case and should have never set foot in the courtroom. The horrifying facts of her victimization weigh heavily in favor of concluding that the jurors were prejudiced against Mr. Hitt by her testimony. JSN's in-court recitation of what happened a decade earlier revealed, inter alia, that Mr. Hitt may have intentionally lured her into a trap, that he threatened her with a kitchen knife to keep her from fleeing, and that he raped her while a pornographic video played in the background. The prosecution did not just ask JSN to say what Mr. Hitt did; the prosecution had JSN demonstrate how he kept the knife pointed at her neck. RP 1186. The prosecutor had her tell the jury that Mr. Hitt ejaculated. RP 1194.

The punishment Mr. Hitt received for the rape of JSN was well-deserved and would qualify as a predicate offense for a Sexually Violent Predator civil commitment filing under RCW 71.09. The jurors would have naturally felt contempt, hatred, and disgust toward the petitioner.

Prior crime evidence prejudices an accused in many ways. The jury may "believe the defendant deserves to be punished for a series of immoral actions," the jury may "overestimate the probative value of the other prior acts," or shift its "attention to the defendant's general propensity for criminality, stripping away the presumption of innocence." *State v. Bowen*, 48 Wn. App. 187, 195-96, 738 P.2d 316, (1987) *abrogated by State v. Lough*, 125 Wn. 2d 847, 889 P.2d 487 (1995) (Internal citations omitted.) Without a doubt, all of these effects apply to Mr. Hitt's situation, to all of the charges he faced.

Certainly, incurable prejudice has been found on less, including in cases where there was no first-person account of the prior victimization, where sex crimes were not at issue, or even where a curative instruction was attempted. *State v. Babcock*, 145 Wn.App. 157, 185 P.3d 1213 (2008) (Reversing when hearsay evidence alleged a second child sex offense; curative instruction insufficient to remove the prejudicial impression created); *State v. Escalona,* 49 Wn.App. 251, 254-256, 742 P.2d 190 (1987) (Assault conviction reversed due to prejudice from witness stating

that defendant already had a record and had stabbed someone; curative instruction insufficient because jury "undoubtedly" used the information for a propensity purpose.) *See also State v. Suleski*, 67 Wn.2d 45, 406 P.2d 613 (1965) (Defendant facing narcotics charge "irretrievably prejudiced" by admission of his prior burglaries, despite a curative instruction) ("We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.")

Here, not only were the facts of the prior crime egregious, the prosecution actually linked the victim of the prior offense to the complainants in the current charges and explicitly compared their experience with the trauma endured by JSN in 2002: "[JSN], when she was raped by the defendant, was a 19 year old college student at the University of Washington, a sophomore just like [KB], just like [AB], just like [LC]." RP 1292. (Complainants AB and LC not alleged to be victims of any sex crime.) *See also* "He used a knife, not just a knife, but a serrated knife in both incidents. And he threatened those women in the same exact manner." RP 1292-1293. *See also* "And just as he had held [JSN] at knife point, he held [EH] at knife point." RP 1292. (Complainant EH not alleged to be the victim of any sex crime.)

The prosecution did not just compare JSN's trauma with what the housemates endured, the prosecution plainly said that Mr. Hitt would have

raped all of these women if only given the chance: "luckily for the women who live on 20th avenue northeast, he was interrupted. [JSN] was not so lucky... [T]here are differences in the assault of the young women in the house on 20th and [JSN], but that has to do more with the number of victims he found than anything else." RP 1293.

c) The Court of Appeals ignores how the prosecution used the prior rape offense to portray Mr. Hitt as mentally abnormal.

The Opinion says that "the State in its closing argument did not use the prior rape conviction for any purpose other than to argue that it impacted the sexual motivation special allegations," but nothing could be further from the truth. Opinion at 10. Not only did the prosecution use the prior conviction to garner sympathy for the victims of the instant case, the prosecution used the prior crime to depict Mr. Hitt as mentally abnormal: "[Y]ou know from [JSN's] testimony is that the defendant is sexually motivated by violence towards women, by using a knife, by dominating them, by stripping them naked, by having that power and control over women." RP 1291. In rebuttal, the prosecutor continued: "And you know from his rape of [JSN] that there is something about what makes him tick, that that's dominating of women, and gratifies him sexually." RP 1323.

A jury's discrimination against the accused reaches "its loftiest peak" when a sex offense is at issue. *Saltarelli*, 98 Wn.2d at 364. The

prejudice ascribed is so high because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy [for the jury] to arrive at the conclusion that he must be guilty, he could not help but be otherwise." *Id.* at 363; *quoting* Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 334 (1956).

The State's closing argument identified Mr. Hitt as a deviant turned-on by violence, essentially a sexual sadist.[9] Contrary to what the State argues on appeal the prejudice of the description of Mr. Hitt as mentally abnormal cannot be quarantined to a specific allegation. *State v. Dawkins*, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993). What the prosecution argued might have been allowable in a RCW 71.09 civil commitment proceeding under the Sexually Violent Predator Act, but had absolutely no place in this criminal case.

The Court of Appeals is correct that the State caused this error: "The State urged the trial court to accept the similarities between the 2002

[9] ""Sexual sadism" is characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person." DSM-IV-TR at 574." *In re Det. of Marshall*, 156 Wn.2d 150, 155, fn.1, 125 P.3d 111 (2005).

rape conviction and the instant offenses." Opinion at 6.[10] But, on this record, the Court of Appeals assertion that "[m]ore importantly, the State in its closing argument did not use the prior rape conviction for any purpose other than to argue that it impacted the sexual motivation special allegations" is off the mark and so is the conclusion that the prejudice does not reach all the verdicts. Opinion at 10, 11.

d) The Court of Appeal fails to analyze how the error damaged the main defense theory.

The Court of Appeals accepted the State's pretense of a concession and ruled that Mr. Hitt is entitled to a new sentencing. The notion that the prejudice that ensued can be so compartmentalized flies in the face of *Grower, Graham,* and *Saltarelli.* This is particularly so given the fact that the trial court's final written instructions regarding JSN's testimony gave the jurors permission to consider the prior rape for motive or intent, as those concepts applied to every charge. CP 199; RP 1180.

Significantly, the court did not consider whether the prior act showed motive or intent for the current offenses and this was error. "A careful and methodical consideration of relevance . . . is particularly important in sex cases, where the prejudice potential of prior acts is at its

[10] It is worth reiterating that at the trial level, the State pressured the trial court to disregard precedent: "I don't think the Court should be intimidated in making a ruling because we are concerned about what is going to happen on appeal." RP 291.

highest." *Saltarelli*, 98 Wn.2d at 363. (Error to admit evidence of a prior attempted rape for purposes of motive and intent.); *State v. Fuller*, 169 Wn. App. 797, 829, 282 P.3d 126 (2012) ("[T]he State may not show motive by introducing evidence that the defendant committed or attempted to commit an unrelated crime in the past.")

"Intent" is the "mental state with which the criminal act is committed." *State v. Tharp*, 27 Wn. App. 198, 208, 616 P.2d 693 (1980). The kidnapping charges required intent to abduct and specific intent to use the women as a shield or hostage or to commit robbery. CP 207, 213, 217, 221, 225, 229, 233. As to burglary, the relevant intent was "intent to commit a crime against person or property therein." CP 204, 206; RP 1278-79 (intent to commit robbery or kidnap). With regard to robbery, the State charged intent to commit theft. CP 239, 241.

Mr. Hitt's sexual motivation was not relevant to these mens rea elements. CP 424 (conclusion 4). Therefore, the prejudice far exceeded any probative value. The evidence should not have been admitted for the purpose of gauging intent and the prejudice that ensued is heightened by the fact that this was a main point of contention.[11]

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[11] The trial judge noted that the prosecutor "wants to get this extra evidence in because it may persuade the jurors that some of his other activity that might look perhaps a little ambiguous, might have a different purpose. His process was interrupted, whatever that was in current offense. So, what he really intended to do is kind of up in the air right now." RP 243-44. (Emphasis added).

On appeal, without citation, the State argued the prior rape evidence was not prejudicial to the underlying convictions because Mr. Hitt confessed to the charged acts. Resp. Br. at 26, 28. The record does not support the State's argument. Mr. Hitt did not testify at trial, and contrary to the State's representation, he did not confess to kidnapping any of the women or to any of the charged crimes even if he did tell the responding police officers that he was only there to rob the home. RP 428-29, 432, 1046, 1057. But this statement of intent to rob is insufficient evidence of first degree burglary, six separate counts of first degree kidnapping and two counts of first degree robbery. And it is insufficient to find that the wrongly admitted prior rape conviction had no material effect on the verdicts without a sexual motivation allegation.

The admission of the prior rape evidence directly undercut the defense ability to argue that the State had failed to prove the intent element for all of the charges. RP 1297-98, 1301-1304, 1313. The State urged the jurors to consider the rape of JSN and reject the defense request they consider voluntary intoxication and the lesser included offenses of unlawful imprisonment. "The defendant has shown that intoxication does not interfere with his ability to form intent when it comes to satisfying his own sexual purposes." RP 1321.

The Court of Appeals opinion does not discuss how the State used the rape of JSN to counter the defense arguments on intent. But the record is clear that the jurors were invited – and permitted – to conclude that because Mr. Hitt had completed a knifepoint rape of JSN in 2001, he had no problem forming the intent to burglarize, kidnap, rob, a decade later. This is illogical, impermissible, and requires reversal for a new trial.

2. Five convictions should be reversed because the State failed to prove beyond a reasonable doubt the alternative means of kidnapping in the first degree.

"When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence in order to safeguard a defendant's right to a unanimous jury determination." *State v. Garcia*, 179 Wn.2d 828, 318 P.3d 266 (2014). In *Garcia,* the Court noted that kidnapping in the first degree requires intent beyond simple abduction, because kidnapping in the second degree is intentional abducting without more. *Id.* at 272-73. Thus, the specific intent elements of kidnapping in the first degree must be narrowly interpreted to effectuate the Legislature's "graduated scheme." *Id.*; *cf. State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979).

The Court also looked to definitions of "hostage" from other jurisdictions. *Garcia*, 318 P.3d at 273. It found that "hostage" is commonly defined as someone "held as security for the performance, or

forbearance, of some act by a third person." *Id.* (citing authority). "[T]he person held as a hostage cannot be the person from whom performance or an act is requested, meaning the hostage must be held to coerce someone else to act." *Id.*.

With regard to "shield," the essence is the use of another as physical protection against the actions of a third party. The Court looked to an Arizona case, which comported with the Court's interpretation in *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). *Garcia*, 318 P.3d at 273 (citing *State v. Stone*, 122 Ariz. 304, 309, 594 P.2d 558 (Ct. App. 1979)). The term "shield" implies "'the holding or detaining of a person by force as defense or potential protection against interception, interference, or retaliation by law enforcement personnel.'" *Id.* (quoting *Stone*, 122 Ariz. at 309 and noting that in *Glasmann*, the defendant positioned a woman between himself and several police offers). The *Garcia* Court also referred with approval to a New Jersey case where the defendants used the victim as cover while attempting to exit a bank they had robbed. *Id.* (citing *State v. Kress*, 105 N.J. Super. 514, 521-22, 253 A.2d 481 (1969)).

With this background in mind, the *Garcia* Court held that "proof of first degree kidnapping under the hostage/shield means requires proof that the defendant intended to use the victim as security for the performance of

some action by another person or the prevention of some action by another person." *Garcia*, 318 P.3d at 273. Critically, "there must be some intent to use the victim as protection for the perpetrator." *Id.* at 274. "Anything less would collapse the distinction between first and second degree kidnapping." *Id.*

Applying this definition, the *Garcia* Court found the evidence insufficient to support the hostage or shield alternative. *Id.* The Court rejected the lower court's reasoning that Mr. Garcia, who came across Wilkins while actively trying to avoid being arrested or killed by people he perceived to be chasing him, abducted the victim in order to prevent her from notifying the police. *Id.* at 270, 274. The Supreme Court found the reasoning speculative and illogical. *Id.* at 274. Rather, it held the evidence insufficient because no facts showed that "Garcia intended to hold Wilkins as security for the performance, or forbearance, of some act by a *third person*. No demands were made on third persons." *Id.* Moreover, the defendant did not use Ms. Wilkins as a shield: "[h]e did not physically put Wilkins between himself and others trying to pursue him." *Id.*

As in *Garcia*, here there is no evidence Mr. Hitt used any of the women as a shield to protect himself from a third party. When the police arrived at the home and went upstairs, Mr. Hitt alone came out of the room

in which he had gathered the women, leaving them behind. He did nothing to use them as protection against the police.

The definition of hostage fits only with Mr. Hitt's conduct towards E.H., whom he arguably used as a means to coerce the performance of the other women. He took E.H. around to the other women and threatened to harm her if the others did not come out of their rooms. Thus, the State sufficiently proved kidnapping of E.H. under this alternative, but not of any of the other complainants.

The Court of Appeals is correct in finding that Mr. Hitt "did not in fact use the victims as hostages when police arrived." Opinion at 15, fn. 54. Likewise, the Opinion is correct in finding that "no demands were made on third persons." Opinion, at 15. The Court of Appeals is wrong, however, when it concluded that there was sufficient evidence of Mr. Hitt's intent to use the other housemates as a shield or hostage. This is speculation that overlooks the absolute lack of acts directed to any such aim. Review should be granted to bring this matter in line with *Garcia.*

Because the jury delivered only a general verdict, this Court presumes the insufficiency error requires reversal. *State v. Rivas*, 97 Wn. App. 349, 353, 984 P.2d 432 (1999). It is impossible here to rule out the possibility that the jury relied on the hostage/shield alternative. *Id.* at 351-52; *Garcia*, 318 P.3d at 274. As in *Garcia*, because the evidence of the

hostage/shield alternative was insufficient as to counts two, three, four, six and seven, the convictions for those counts must be reversed. 318 P.3d at 274-75. If the State elects to retry Mr. Hitt on those counts, it cannot rely on the hostage/shield alternative means. *Id.* at 275.

F. CONCLUSION

On this record, the State's proposal for a resentencing remand, where the sexual motivation allegations would be stricken but all other convictions would remain unaltered is woefully inadequate. The prosecution took a particularly aggressive approach in its pretrial fight to use the rape of JSN against Mr. Hitt. As to be expected, this tactic moved the jurors who returned wholesale guilty verdicts. There never was a nexus between the past crime and the current charges. Despite the prosecution's efforts on appeal to distance themselves from the error below, the State purposefully harpooned the trial below, barbs and all.

Review ought to be granted because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 898, 828 P.2d 1086 (1992) (Utter, J., dissenting) (*quoting Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)).

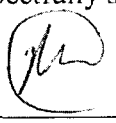
The trial court improperly admitted evidence of a prior sexually violent conviction which the State used to garner sympathy for the complainants, to demonize the accused, and to undercut the main defense theory. Our system of justice demands more; the verdicts cannot stand.

> We dislike to send this case back for a new trial, for if the evidence of the prosecuting witnesses, together with the defendant's own signed statement, is to be believed, to describe him as a beast is to libel the entire animal kingdom. Nevertheless, he was entitled to a fair trial, and that he did not have.

State v. Goebel, 36 Wn. 2d 367, 380, 218 P.2d 300 (1950) (Reversing for erroneous admission of unrelated sex crimes.)

DATED this 21st day of January 2015

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ROBERT D. HITT, Appellant.	)	No. 70291-2-I UNPUBLISHED OPINION FILED: December 22, 2014

VERELLEN, A.C.J. — Robert Hitt was convicted by a jury of one count of first degree burglary with sexual motivation (count I), five counts of first degree kidnapping, one count of first degree kidnapping with sexual motivation (count III), and two counts of first degree robbery. Hitt challenges the admission of a prior rape conviction under ER 404(b) as evidence of a common scheme or plan. Hitt contends that the prejudice stemming from the admission of his prior rape conviction impacted not only the sexual motivation special verdicts but also his remaining convictions and deadly weapon sentence enhancements. We accept the State's concession that there were insufficient similarities to establish a common scheme or plan under ER 404(b). The sexual motivation special verdicts must therefore be reversed. But we affirm his remaining convictions and the deadly weapon sentence enhancements because there is overwhelming evidence of guilt.

Hitt challenges the reasonable doubt instruction containing "abiding belief" language, contending that the instruction diluted the State's burden of proof. But our Supreme Court has expressly affirmed the use of such abiding belief language.

Hitt also challenges the sufficiency of the evidence supporting the "shield or hostage" alternative means of first degree kidnapping. Viewing the evidence and all reasonable inferences in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to conclude that Hitt intended to use the victims as hostages. Hitt's other arguments do not support any relief on appeal.

Accordingly, we reverse the sexual motivation special verdicts, affirm the first degree burglary conviction, first degree kidnapping convictions, first degree robbery convictions, deadly weapon sentence enhancements, and remand for resentencing.

FACTS

Hitt broke a window and entered a house near the University of Washington campus. He encountered a young woman, E.H., and bound her wrists with tape. E.H. told Hitt that seven other women lived in the house. Hitt placed a knife to E.H.'s throat and took her room to room, coercing the other women to exit their rooms by threatening to kill E.H. Hitt took two of the women's cell phones. Hitt gathered six women in a room and ordered them to lie face down on the floor, binding their wrists with tape.[1] Hitt failed to locate two other women in the house. They called the police.

Hitt struggled to bind K.B.'s wrists because she wore bulky "onesie fleece pajamas" that unzipped from the front.[2] Hitt told K.B. to "take it off."[3] K.B. wore nothing

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[1] Hitt did not bind one of the women's wrists because the police interrupted him.

[2] Report of Proceedings (RP) (Mar. 4, 2013) at 562.

[3] Id. at 563.

under the pajamas. Hitt forced K.B. to unzip her pajamas while he bound her wrists with tape, exposing at least the top half of her body.[4] Then the police arrived and found Hitt inside the house on the top floor landing. Hitt told the police that he was "just there to rob them."[5] Police freed the women, who had been bound with tape. They found two of the women's cell phones, a knife, and drugs on Hitt's person.

Hitt was charged with multiple counts of kidnapping and robbery and one count of burglary. Hitt objected to the admission of evidence of his 2002 first degree rape conviction that the State offered as proof of a common scheme or plan under ER 404(b). The trial court permitted the rape victim's testimony. Notably, the court's oral limiting instruction and written limiting instruction differ. The oral limiting instruction restricted the rape victim's testimony to only "determining whether the State . . . met its burden of proof with regard to motive in counts I and III."[6] The written limiting instruction allowed the jury to consider her testimony "only for the purpose of deciding whether the defendant's prior conduct is part of a common scheme or plan, or as evidence of the defendant's motive or intent with respect to *conduct charged by the [S]tate in this case*."[7]

The jury found Hitt guilty of one count of first degree burglary, six counts of first degree kidnapping, and two counts of first degree robbery.[8] For each conviction, the

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[4] There is conflicting testimony whether Hitt unzipped K.B.'s onesie all the way down, fully exposing K.B. Several victims testified that K.B. was fully exposed.

[5] RP (Feb. 28, 2013) at 428.

[6] RP (Mar. 11, 2013) at 1180.

[7] Clerk's Papers (CP) at 199 (emphasis added).

[8] Hitt's convictions for first degree kidnapping were both premised on the alternative means of intent to facilitate robbery or intent to hold the victims as a shield or hostage. RCW 9A.40.020(1)(a), (b).

jury entered a special verdict that Hitt was armed with a deadly weapon at the time of the commission of the crime.[9] The jury also entered special verdicts that Hitt committed both first degree burglary (count I) and first degree kidnapping (count III) with sexual motivation. Hitt was sentenced to life imprisonment as a persistent offender based on the sexual motivation special verdicts and the 2002 rape conviction.[10]

Hitt appeals.

ANALYSIS

Hitt contends, and the State concedes, that his prior rape conviction and the current crimes have insufficient similarities to establish a common scheme or plan under ER 404(b). We accept the State's concession.

A finding of sexual motivation is an aggravating circumstance that can support an exceptional sentence.[11] "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification."[12] The State must prove beyond a reasonable doubt that the defendant committed the crime for sexual motivation, and "[i]t must do so with evidence of identifiable conduct by the defendant while committing the offense."[13]

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[9] See RCW 9.94A.533(4), .825.

[10] See RCW 9.94A.030(37), .570. Without the sexual motivation special verdicts, Hitt would not have the two strikes required for a sentence of life without the possibility of early release.

[11] RCW 9.94A.535(3)(f).

[12] RCW 9.94A.030(47).

[13] State v. Vars, 157 Wn. App. 482, 494, 237 P.3d 378 (2010).

Here, as requested by the State, the trial court admitted evidence of Hitt's 2002 rape conviction under ER 404(b) as evidence of motive, intent, and a common scheme or plan. ER 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character."[14] Evidence of prior misconduct is presumptively inadmissible, and courts must resolve any doubt about admissibility in favor of exclusion.[15]

One proper purpose for admitting evidence of prior misconduct is to show the existence of a common scheme or plan.[16] Relevant here, a common scheme or plan includes occasions "where 'an individual devises a plan and uses it repeatedly to

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[14] State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (rejecting the "once a thief, always a thief" rationale for admitting evidence).

[15] State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008) ("In close cases, the balance must be tipped in favor of the defendant."); accord State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In addition, to admit evidence of prior misconduct under ER 404(b), "the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect of the evidence." State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court must also identify the purpose of the evidence and conduct the balancing on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

[16] See DeVincentis, 150 Wn.2d at 17.

perpetrate separate but very similar crimes.'"[17] There must be substantial similarity between the prior misconduct and the charged crimes; "more than merely similar results" are required.[18]

The State urged the trial court to accept the similarities between the 2002 rape conviction and the instant offenses. The trial court identified facts common to both cases. But the instant offenses and the 2002 rape conviction are not "markedly similar acts" and do not show substantial similarity that manifests a common scheme or plan.[19] The State concedes that because neither of the events was well thought out and both appeared to be impulsive that a common scheme or plan is absent. Although both crimes occurred in residences, Hitt's 2002 rape conviction occurred in his own residence (an apartment), and the current incident occurred in the victims' residence (a house). The State now concedes that this is an insignificant similarity since most sex crimes occur in residences. And while in both incidents the victims were young, college-aged females, this also is of limited significance because no evidence suggests that Hitt knew that eight young, college-aged women occupied the residence.[20] In both events, the victims offered Hitt money in order to get away from him, but such a

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[17] Gresham, 173 Wn.2d at 421-22 (quoting State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995)).

[18] DeVincentis, 150 Wn.2d at 20; Lough, 125 Wn.2d at 860 ("To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.").

[19] Lough, 125 Wn.2d at 852.

[20] See id. at 860 ("the similarity is not merely coincidental, but indicates that the conduct was directed by design"); DeVincentis, 150 Wn.2d at 20 ("Random similarities are not enough.").

response to Hitt's criminal behavior does not relate to his common scheme or plan.

Moreover, in both incidents, Hitt ordered a victim to disrobe themselves, which they did. But the State concedes that ordering a victim to disrobe is a limited similarity. In Hitt's 2002 rape, disrobing was an immediate prelude to rape. And, at least as far as the current incident unfolded, ordering K.B. to disrobe so Hitt could bind her wrists had limited similarity to the 2002 rape. In both cases, Hitt also expressed repeated concern about being caught by police. But in the 2002 rape, this occurred after he completed the rape, and in the current incident, Hitt was preoccupied with the victims calling the police from the outset. The State now concedes that the similarities do not amount to "markedly similar acts of misconduct [committed] under similar circumstances"[21] and "[s]ufficient repetition of complex common features."[22] We accept the State's concession that evidence of Hitt's 2002 rape conviction should not have been admitted. The sexual motivation special verdicts must therefore be reversed and this matter remanded for resentencing.

Hitt contends that we should also reverse his remaining convictions and remand for a new trial because the trial court allowed the jury to consider Hitt's 2002 rape conviction to show "motive or intent with respect to conduct charged by the [S]tate in this case."[23] Hitt contends that the prejudice stemming from the admission of his 2002 rape conviction cannot be confined to the sexual motivation special verdicts. We disagree.

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[21] State v. Hecht, 179 Wn. App. 497, 508-09, 319 P.3d 836 (2014).

[22] State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999).

[23] CP at 199.

"Erroneous admission of evidence in violation of ER 404(b) is analyzed under the nonconstitutional harmless error standard."[24] We must ask whether there is a reasonable probability that, without the error, "'the outcome of the trial would have been materially affected.'"[25] "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."[26]

"Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a [criminal] propensity."[27] We also acknowledge that the potential prejudice from admitting prior misconduct is "'at its highest'" in sex-offense cases.[28] But in assessing whether the error was harmless, we must measure the admissible evidence of Hitt's guilt against the prejudice caused by the inadmissible 2002 rape victim's testimony. Here, immediately prior to admission of the testimony, the trial court gave an oral limiting instruction to the jury:

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[24] State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014).

[25] Gresham, 173 Wn.2d at 433 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

[26] State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

[27] State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); see also 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.10, at 497-98 (5th ed. 2007) ("Rule 404(b) is based upon the belief that such evidence is too prejudicial—that despite its probative value, the evidence is likely to be overvalued by the jury, and the jury is too likely to jump to a conclusion of guilt without considering other evidence presented at trial.").

[28] Gower, 179 Wn.2d at 857 (quoting Gresham, 173 Wn.2d at 433); see also State v. Harris, 36 Wn. App. 746, 752, 677 P.2d 202 (1984) (recognizing the "'great potential for prejudice inherent in evidence of prior sexual offenses'" (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

> This testimony is admitted only for a limited purpose. The testimony may be considered by you only for the purposes of determining whether the State has met its burden of proof with regard to motive as relevant to Counts I and III as charged, and it may not be considered for any other purpose.[29]

Later, the trial court's written limiting instruction provided that

> [c]ertain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of [the 2002 rape victim]. Her testimony may be considered by you only for the purpose of deciding whether the defendant's prior conduct is part of a common scheme or plan, or *as evidence of the defendant's motive or intent with respect to conduct charged by the [S]tate in this case*. You may not consider it for any other purpose.[30]

Although the written limiting instruction permitted the jury to consider the testimony as evidence of Hitt's motive or intent with respect to conduct charged by the State in general, "[t]he improper admission of [ER 404(b)] evidence constitutes harmless error" if there is overwhelming evidence of guilt beyond a reasonable doubt for Hitt's remaining convictions and deadly weapon sentence enhancements.[31]

Here, given the overwhelming evidence of guilt, it is not reasonably probable that admitting the 2002 rape victim's testimony materially affected the trial's outcome apart from the sexual motivation determinations. Hitt unlawfully entered the house by wrapping a rock around his sweater and breaking a side window. A police officer described fresh scuff marks on the broken window's molding, and Hitt also had a bloody cut on his forearm, which supported the inference that Hitt entered the house via the broken side window. Several witnesses also testified that blood was found in the house, including on the wooden stairwell and on a victim's door. Importantly, the police

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[29] RP (Mar. 11, 2013) at 1180.

[30] CP at 199 (emphasis added).

[31] Bourgeois, 133 Wn.2d at 403.

found Hitt inside the house. Upon seeing the police, Hitt retreated from the top floor landing to the room where six victims were secreted.

Moreover, in a recorded interview with detectives, Hitt admitted that he "was just there to rob them."[32] Police found two of the women's cell phones and a knife on Hitt's person. Uncontroverted testimony shows that Hitt intentionally took two victims' cell phones against their will with the threat of deadly force. Several victims testified that Hitt was armed with a knife during the commission of the offenses.[33] Several victims also testified that Hitt restrained five victims' wrists with tape that restricted their movement, threatened to use deadly force if any of the victims called the police, and intended to hold the victims as hostages if police arrived. Consistent with the victims' testimony, police officers arrived at the house to find Hitt engaged in the kidnapping and the five victims' wrists bound with tape. And in a recorded interview with detectives, Hitt admitted that he "absolutely intentionally intended to burglarize [the] house."[34]

More importantly, the State in its closing argument did not use the prior rape conviction for any purpose other than to argue that it impacted the sexual motivation special allegations. When the prosecutor discussed the evidence crime by crime, she discussed intent in general terms for each charged crime. For example, as to kidnapping, the prosecutor argued that "[b]inding the women, holding them as hostages, that again shows what his intent was."[35] When the prosecutor referred to the prior rape

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[32] Ex. 6 at 34.

[33] It is undisputed that the knife constituted a deadly weapon under RCW 9.94A.825.

[34] Ex. 6 at 50.

[35] RP (Mar. 12, 2014) at 1279.

conviction testimony, it was in the limited context of urging the jury to find Hitt guilty on the sexual motivation special allegations. Importantly, the State expressly acknowledged that the jury

> should not convict Mr. Hitt of the sexual motivation special verdict because he raped before. That would be improper. But, you should convict him of the sexual motivation special verdict because . . . this unique testimony of [the 2002 rape victim] gives you some insight into what motivates Mr. Hitt sexually. So, use that evidence appropriately. Look and see that it is a common scheme.[36]

Thus, the State's closing argument was consistent with the court's oral instruction limiting consideration of the prior rape evidence to the sexual motivation special allegations. The broad language of the written limiting instruction proposed by the State does not require us to overlook the overwhelming evidence of guilt for Hitt's remaining convictions and deadly weapon sentence enhancements. We therefore affirm Hitt's convictions for first degree robbery, first degree kidnapping, first degree burglary, and the deadly weapon sentence enhancements.

Hitt challenges the reasonable doubt instruction that "[i]f, from such consideration, you have an *abiding belief in the truth of the charge*, you are satisfied beyond a reasonable doubt."[37] Hitt contends that the abiding belief language

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[36] Id. at 1294.

[37] CP at 195 (emphasis added). The trial court used 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 18 (3d ed. Supp. 2008), which included the abiding belief language. The court's reasonable doubt instruction stated in its entirety: "The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements. A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a

encouraged the jury to undertake an impermissible search for the truth. But our Supreme Court has expressly affirmed the use of the abiding belief language in the reasonable doubt instruction.[38]

Hitt relies upon State v. Emery, where the prosecutor in closing told the jury both that their "verdict should speak the truth" and to "speak the truth by holding these men accountable for what they did."[39] Emery found these remarks improper, explaining that "[t]he jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.' Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt."[40]

Unlike the search for truth argument at issue in Emery, the abiding belief language in the reasonable doubt instruction given here does not direct jurors to find the truth for themselves; it merely elaborates on the meaning of "satisfied beyond a reasonable doubt"[41] and accurately informs the jury that it must "determine whether the

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reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*" CP at 195 (emphasis added). Hitt did not object to this instruction.

[38] State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (directing trial courts to use WPIC 4.01); see also State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Fedorov, 181 Wn. App. 187, 200, 324 P.3d 784 (2014); State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870 (2014); State v. Lane, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 and the use of the abiding belief language dilutes the State's burden of proof); accord State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982).

[39] 174 Wn.2d 741, 751, 278 P.3d 653 (2012).

[40] Id. at 760 (citation omitted).

[41] Kinzle, 181 Wn. App. at 784.

State has proved the charged offenses beyond a reasonable doubt."[42] The reasonable doubt instruction accurately states the law. Therefore, Hitt fails to show that the burden of proof instruction was improper.

Hitt challenges the sufficiency of the evidence supporting his convictions for five counts of first degree kidnapping, contending that insufficient evidence supports the alternative means that he intentionally held five victims as a shield or hostage.[43] We disagree.

First degree kidnapping is an alternative means crime, where a single offense may be committed in more than one way.[44] "[T]here must be jury unanimity as to guilt for the single crime charged,"[45] but unanimity is not required for the means by which the crime was committed if sufficient evidence supports each alternative means.[46] We review the evidence in the light most favorable to the State.[47] Evidence is sufficient if

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[42] Emery, 174 Wn.2d at 760. Multiple cases have upheld the use of this language, finding that it "adequately instructs the jury," Mabry, 51 Wn. App. at 25, and "could not have misled or confused the jury." Price, 33 Wn. App. at 476. And, importantly, Pirtle concluded that the language did not diminish the definition of the burden of proof. Pirtle, 127 Wn.2d at 658.

[43] Hitt concedes that sufficient evidence supports the jury's finding in count V that he intentionally abducted E.H. with the intent to use her as a shield or hostage. Hitt only challenges his first degree kidnapping convictions on counts II, III, IV, VI, and VII. Moreover, Hitt also concedes that sufficient evidence supports the alternative means that he intentionally abducted the victims with the intent to facilitate commission of robbery.

[44] State v. Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); State v. Harrington, 181 Wn. App. 805, 818, 333 P.3d 410 (2014) ("An alternative means crime categorizes distinct acts that amount to the same crime.").

[45] Crane, 116 Wn.2d at 325.

[46] State v. Owens, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014); State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012).

[47] Owens, 180 Wn.2d at 99.

"'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[48]

In State v. Garcia, the court interpreted the meaning of the shield or hostage alternative means in the first degree kidnapping statute.[49] Garcia held that "proof of first degree kidnapping under the hostage/shield means requires proof that the defendant intended to use the victim as security for the performance of some action by another person or the prevention of some action by another person."[50] Garcia also held that first degree kidnapping requires an additional specific intent—an intent not only to intentionally abduct another person but also an "intent to use the victim as protection for the perpetrator."[51]

The trial court here instructed the jury on two alternative means, providing that "[a] person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to hold the person as a shield or hostage or to facilitate the commission of robbery or flight thereafter.[52] We must determine whether there is sufficient evidence for any rational trier of fact to find that Hitt *intended to* use the victims as a shield or hostage."[53]

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[48] Garcia, 179 Wn.2d at 836 (quoting State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)); Owens, 180 Wn.2d at 99.

[49] 179 Wn.2d 828, 318 P.3d 266 (2014).

[50] Id. at 840.

[51] Id.

[52] CP at 207; see RCW 9A.40.020(1)(a), (b).

[53] See In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989) (interpreting first degree kidnapping statute) ("[T]he person who intentionally abducts another need do so only with the *intent* to carry out one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e) inclusive; not that the perpetrator actually bring about or complete one of those qualifying factors listed in the statute.").

Here, the record supports that Hitt intended to use the victims as hostages.[54] Several victims testified that, while Hitt bound their wrists together, he said he would "make this a hostage situation" if police were called.[55] This evidence clearly reveals Hitt's intent to hold the victims "'as security for the performance, or forbearance, of some act by a third person [e.g., the police].'"[56] Although no demands were made on third persons and the incident involved communications only between Hitt and the victims, a rational trier of fact could find, drawing all reasonable inferences favorable to the State, that Hitt intended to hold the victims as hostages if the police arrived. That Hitt did not carry out this intent when police arrived does not diminish the evidence of his intent to do so when he bound the women. Therefore, this alternative means is supported by sufficient evidence, and we affirm his first degree kidnapping convictions.

Hitt contends that the cumulative effect of the trial court's errors prejudiced him and likely materially affected the jury's verdict. "The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial."[57] Here, we accept the State's concession as to a single issue—the evidence of Hitt's 2002 rape conviction. There is no cumulative error.

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[54] Based on the victims' testimony, it is clear that Hitt did not in fact use the victims as hostages when police arrived.

[55] RP (Mar. 4, 2013) at 542; see also RP (Mar. 5, 2013) at 680 ("That we would be hostages if the police came.").

[56] Garcia, 179 Wn.2d at 839 (quoting State v. Crump, 82 N.M. 487, 493, 484 P.2d 329 (1971)).

[57] State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

Because we accept the State's concession that his sexual motivation special verdicts should be reversed, we need not address Hitt's remaining persistent offender arguments.[58] Moreover, because we reverse Hitt's sexual motivation special verdicts, which served as Hitt's second strike, Hitt will not be subject to being classified as a persistent offender at resentencing. This renders his remaining arguments moot.

We reverse the sexual motivation special verdicts as applied to counts I and III, affirm the first degree burglary conviction, first degree kidnapping convictions, first degree robbery convictions, and deadly weapon sentence enhancements and remand for resentencing.

WE CONCUR:

[58] Hitt agrees that we need not address his persistent offender arguments if we accept the State's concession for the sexual motivation special verdicts.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70291-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 21, 2015