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SUPREME COURT NO. 91279-3
COURT OF APPEALS NO. 70291-2-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HITT,

Petitioner.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. IDENTITY OF RESPONDENT

The Respondent, the State of Washington, asks this Court to deny the defendant's petition for review because a full and accurate review of the facts and the law shows that this case does not meet the criteria for review under RAP 13.4(b).

B. THE COURT OF APPEALS DECISION

The unpublished Court of Appeals decision is at State v. Hitt, 2014 WL 7339602 (Wn. App. Div. 1, Dec. 22, 2014) (attached).

C. BRIEF SUMMARY OF FACTS

In determining whether to accept review, it is imperative that this Court's determination be based on an *accurate* and *complete* recitation of the facts. The State believes a more accurate and complete recitation of the facts and law is as set out below.

1. PROCEDURAL BACKGROUND

The defendant broke into a residential home near the University of Washington, corralled at knifepoint six UW women students who lived in the house, took two of their cell phones, and bound with electrical and duct tape five of the women before officers arrived and apprehended the defendant in the act. The defendant was charged with one count of First-Degree Burglary, two counts of

First-Degree Robbery[1] and six counts of First-Degree Kidnapping, each with a deadly weapon enhancement. CP 1-7. The burglary count (count I) and one count of kidnapping (count III) carried with it a "sexual motivation" special allegation pursuant to RCW 9.94A.835. Id. The defendant was convicted as charged.

The offenses of first-degree burglary and first-degree kidnapping, *with a jury finding of sexual motivation*, each constitute a "most serious" offense under the Persistent Offender Accountability Act. RCW 9.94A.030(37)(b). With a prior first-degree rape conviction on his record, the defendant was found to be a persistent offender under the "two strikes" option of the POAA related to sex offenses, and a mandatory life sentence was imposed. CP 378-39; RCW 9.94A.030; RCW 9.94A.570.

The defendant appealed his conviction. As pertinent here, the Court of Appeal accepted the State's concession that the trial court's ER 404(b) ruling allowing into evidence facts pertaining to the defendant's prior rape conviction was in error. The Court found that the admission of the evidence was prejudicial in regards to the jury's sexual motivation findings but not as to the underlying charges because there was overwhelming evidence of the offenses for which

[1] In the Information, the properly listed as being stolen by the defendant consisted of a cell phone from KB and a cell phone from MS. CP 1-7.

the defendant was charged and confessed. Thus, the case was remanded for resentencing as a non-persistent offender. In addition, in a separate claim of error, the Court of Appeals rejected the defendant's claim that there was insufficient evidence to support one of the alternative means of first-degree kidnapping as charged.

2. SUBSTANTIVE FACTS

In March of 2011, eight young women, all University of Washington students, lived in a home just north of the main campus. RP 393-94. The women are referred to by their initials KB, AuB,[2] AlB, MS, LC, EC, SS and EH.

At approximately 3:00 a.m. on March 5, SS was awakened by the sound of someone banging on the front door. RP 605. EH and SS then heard something crash and break downstairs, followed by heavy footsteps walking across the floor. RP 493-94, 605, 608. When EH heard the footsteps reach the top of the stairs, she opened her bedroom door to see what was going on. RP 496. There stood the defendant, who upon seeing EH, ran directly at her. RP 498.

As EH tried to shut her door, she was knocked to the ground. RP 499. When EH demanded to know what the defendant was doing in her house, he said that he was there to rob her. RP 500. He then

[2] Two of the women share the initials AB. To distinguish the two, the second letter of their first name is also used (AuB and AlB).

asked EH how many people were in the house, and after EH responded, "eight," he proceeded to bind EH's wrists behind her back with electrical tape. RP 500-01. He then placed a serrated kitchen knife, with a 3 ½ inch blade, to EH's neck and forced her from room to room, corralling up the other women. RP 508-09; RP 1148.

The defendant first took EH to AuB's bedroom door where he threatened to kill EH if AuB did not come out of her room. RP 510-13, 523, 821-23. Next, he did the same thing at KB's bedroom door. RP 511-14, 922-24. Saying that he would slit EH's throat, the defendant also demanded that KB hand over her cell phone, which she did. RP 514, 522, 924. Next, the defendant took EH at knifepoint to SS's bedroom where he similarly threatened to kill EH unless SS came out of her bedroom. RP 525-26, 611-17.

Once the defendant had corralled all the women from upstairs (AuB, KB, SS and EH), he ordered them into KB's bedroom and told them to stay put. RP 526-27. He then took EH at knifepoint and proceeded to corral the women from downstairs. RP 527-28.

First, the defendant took EH to MS's bedroom. RP 530-31, 691-93. MS was on her bed with her phone trying to call 911. RP 527-28. MS was ordered out of her room and her phone was taken by the defendant. RP 527-28, 693. This was followed by the

defendant taking EH to LC's bedroom, where he again threatened to kill EH if LC did not comply. RP 533-34, 1109-10. The three women were then taken upstairs to KB's bedroom.[3] RP 534.

Once the defendant had herded all the women into KB's bedroom, he ordered them to lay face down on the floor. RP 536. He then began to bind the women's wrists behind their back with electrical tape; including EH's wrists, as she had been able to free her wrists from when the defendant first bound them. RP 501, 528, 537-40. The defendant repeatedly told the women that he was going to rob them. RP 398, 513, 609, 623, 924. He also repeatedly threatened to kill them and said that if someone had called the police it would be a "hostage situation" and that they were all going to die. RP 542-44, 623.

After binding the wrists of four of the young women, the defendant started on KB. RP 557. KB was wearing what was described as a bulky polar fleece onesie. RP 562, 594, 941. As he struggled to bind her wrists, the defendant told her to take her "sweater" off. RP 562-63. KB and the other women protested

[3] The defendant did not discover the two other roommates, EC or AlB. RP 619. Both were awakened by the commotion, EC to the sounds of someone yelling "robbery," "I have a knife" and "I'm going to stab you"; AuB to the sounds of her roommates' screams and a male voice yelling "open the fucking door." RP 397-98, 790-93. Both women called 911 and waited in their bedrooms until the police arrived. RP 398, 404, 793-94, 796.

because KB was not wearing anything underneath the onesie, but the defendant demanded that she take it off. RP 563, 652-53, 941-42. KB then unzipped the onesie and took her arms out. RP 564. Her wrists were then bound like the others. RP 565, 840.[4]

As the defendant turned his attention to the last girl, SS, he heard a noise and moved towards the door – it was the police. RP 566-67, 655. When officers entered the residence, they heard hysterical screams coming from upstairs. RP 427. The officers looked up to see the defendant standing just outside KB's bedroom door. RP 426. The defendant made eye contact with the uniformed officers, retreated back into the bedroom and slammed the door behind him -- despite orders for him to stop. RP 426, 1082-84. Just as the officers were about to breach the bedroom door, the defendant opened the door and proclaimed that he was just there to rob the women. RP 427-28.

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[4] KB testified that she unzipped the onesie halfway, pulled her arms out and then got down on her stomach with the onesie still covering the lower half of her body. RP 942. She testified that the defendant then pulled the onesie down to her ankles before binding her wrists. RP 942, 945. She believed the defendant could have bound her wrists without removing her onesie. RP 961.

SS testified that the defendant first pulled the onesie down to KB's waist but that when he got off of her, he pulled the onesie down to her ankles. RP 653-54, 672. MS testified that she could not see whether the defendant pulled KB's onesie off but that when the police came into the room, she looked over and saw that KB was completely naked. RP 705-06, 711-13. AuB testified that the defendant pulled the onesie down to KB's bottom. RP 840. EH testified that the onesie was pulled down to KB's waist, with the material gathered around her thighs and bottom. RP 565.

The defendant was placed under arrest. RP 429. Officers found the women bound and laying on the floor, with one of them "naked." RP 1085-86. Not mentioned in his petition, KB and MS's cell phones were found in the defendant's pocket, along with the knife he used to threaten the women. RP 430-32, 717-18, 895, 961. Also not mentioned by the defendant is the fact that Officers discovered a broken window downstairs and a rock on the floor that the defendant had thrown through the window. RP 434, 437, 659-60. The defendant had cuts on his forearm from the broken glass, and there were fresh scuff marks on the window molding and the outside wall just below the window. RP 434, 765. And finally, the defendant fails to mention that he told the arresting officers that he took the cell phones from two of the women inside the house and confessed that he was there to rob them. RP 430, 432. The defendant's conversation with the arresting officer was recorded via the officer's lapel microphone and was played for the jury. RP 893. The defendant did not testify at trial.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b)(1), (3) & (4), the provisions invoked here by the defendant, this Court will accept review "only...if the decision

of the Court of Appeals is in conflict with a decision of the Supreme Court; if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or...if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." This case meets none of these criteria.

Issue One: A Harmless Error Analysis

The first issue the defendant claims warrants Supreme Court review involves nothing more than the defendant's unhappiness with the Court of Appeals' application of a harmless error analysis to its 404(b) ruling.

At trial, pursuant to ER 404(b) (the rule allowing for the admission of prior bad acts evidence) the State sought to admit facts of the defendant's prior rape as evidence of a "common scheme or plan" supporting the sexual motivation allegations. On appeal, consistent with this Court's decision in State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the State conceded that the facts of the defendant's prior rape were not sufficiently similar to the facts of the current case to allow for admissibility of the evidence. The Court of Appeals agreed with the State's concession of error. The only question then before the Court was what affect did the admission of

the 404(b) evidence have in regards to the underlying charges and the sexual motivation allegations.

On appeal, the defendant focuses on the prejudicial nature of the 404(b) evidence, but in this regard he misses the point. It is prejudicial evidence. What the defendant fails to do is address the overwhelming evidence that supported the underlying charges and the lack of overwhelming evidence that supported the sexual motivation allegations. The defendant fails to mention that he repeatedly, and on tape, confessed that he was there to rob the women. Along with the plethora of addition evidence stated in the fact section above that supported each of the underlying charges, the defendant also fails to mention that the knife he used to threaten the women, and the stolen cell phones, were found on his person. None of this was disputed at trial.

Entirely consistent with this Court's many 404(b) cases, and other cases involving the improper admission of evidence in violation of the Rules of Evidence, the Court of Appeals' evaluated the prejudicial effect of the improperly admitted evidence. The defendant is simply unhappy with the Court of Appeals' evaluation of the evidence. But the Court of Appeals' ruling does not conflict with any Supreme Court precedence, does not involve a question of law under

the Constitution, and does not involve an issue of substantial public interest. Thus, this issue is not appropriate for Supreme Court review.[5]

Issue Two: Sufficiency of the Evidence for Kidnapping

Next, the defendant contends that there was insufficient evidence of one of the alternative means of first-degree kidnapping as charged, specifically, that he intentionally abducted each victim with intent to hold the victim "as a shield or hostage." This issue also does not meet the criteria for Supreme Court review.

Pursuant to this Court's decision in State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014), "proof of first degree kidnapping under the hostage/shield [alternative] means [of committing first-degree kidnapping] 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." Id. (emphasis added). "Hostage," this Court found, commonly refers to someone "held as security for the performance, or forbearance, or some act by a third party." Garcia, 179 Wn.2d at 273. "Shield," this Court found, commonly refers to "the holding or detaining of a person

[5] In addition, reviewing courts do not make credibility determinations. See State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

by force as defense or potential protection against interception, interference, or retaliation by law enforcement personnel." Id.

Under a sufficiency of the evidence review, evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The defendant's claim is that he did not actually use the victims as a hostage or as a shield (with the exception of EH). The defendant is correct. However, what the defendant fails to recognize is that under the first-degree kidnapping statute, "a person who intentionally adducts another need do so only with the *intent* to" use the person as a shield or a hostage, the abductor does not need to actually complete the act. In re Fletcher, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989) (emphasis added), accord, Garcia, 179 Wn.2d at 273. In conjunction therewith, the defendant also fails to mention that in repeatedly threatening the six young women with death, he repeatedly told them that if the police showed up, it was going to be a

"hostage situation." RP 542-43, 656, 702, 944. Thus, the fact that he may have changed his mind or been caught unaware by the police and therefore he did not carry out his threat, is of no moment. There was sufficient evidence for a rational trier of fact to have found that when he first kidnapped the young women at knife point and bound their wrists, he possessed the intent to use them as a shield or as a hostage just as he proclaimed.

In any event, as with issue number one, the Court of Appeals' ruling does not conflict with any Supreme Court precedence, does not involve a substantial question of law under the Constitution, and does not involve an issue of substantial public interest. Thus, it is not an issue appropriate for Supreme Court review.

E. CONCLUSION

For the reasons cited above, this Court should deny review.

DATED this 20 day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Not Reported in P.3d, 2014 WL 7339602 (Wash.App. Div. 1)
(Cite as: 2014 WL 7339602 (Wash.App. Div. 1))

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Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Robert D. **HITT**, Appellant.

No. 70291–2–I.
Dec. 22, 2014.

Appeal from King County Superior Court; Hon. Jeffrey M. Ramsdell.
Mick Woynarowski, Washington Appellate Project, Seattle, WA, for Appellant.

Robert D. **Hitt**, Monroe, WA, pro se.

Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Dennis John **McCurdy**, King County Prosecutor's Office, Seattle, WA, for Respondent(s).

UNPUBLISHED OPINION

VERELLEN, A.C.J.

***1** 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.[FN1] **Hitt** failed to locate two other women in the house. They called the police.

FN1. **Hitt** did not bind one of the women's wrists because the police interrupted him.

Hitt struggled to bind K.B.'s wrists because she wore bulky "onesie fleece pajamas" that unzipped from the front.[FN2] **Hitt** told K.B. to "take it off." [FN3] K.B. wore nothing 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.[FN4] 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." [FN5] 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.

FN2. Report of Proceedings (RP) (Mar. 4, 2013) at 562.

FN3. *Id.* at 563.

FN4. 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.

FN5. RP(Feb. 28, 2013) at 428.

*2 **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." [FN6] 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.*" [FN7]

FN6. RP(Mar. 11, 2013) at 1180.

FN7. Clerk's Papers (CP) at 199 (emphasis added).

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.[FN8] For each conviction, the jury entered a special verdict that **Hitt** was armed with a deadly weapon at the time of the commission of the crime.[FN9] 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. [FN10]

FN8. **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).

FN9. *See* RCW 9.94A.533(4), .825.

FN10. *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.

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.[FN11] " '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." [FN12] 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." [FN13]

FN11. RCW 9.94 A.535(3)(f).

FN12. RCW 9.94A.030(47).

FN13. *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." [FN14] Evidence of prior misconduct is presumptively inadmissible, and courts must resolve any doubt about admissibility in favor of exclusion.[FN15]

FN14. *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).

FN15. *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).

***3** One proper purpose for admitting evidence of prior misconduct is to show the existence of a common scheme or plan.[FN16] Relevant here, a common scheme or plan includes occasions "where 'an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.' " [FN17] There must be substantial similarity between the prior misconduct and the charged crimes; "more than merely similar results" are required.[FN18]

FN16. *See DeVincentis,* 150 Wn.2d at 17.

FN17. *Gresham,* 173 Wn.2d at 421–22 (quoting *State v. Lough,* 125 Wn.2d 847, 854–55, 889 P.2d 487 (1995)).

FN18. *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.").

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.[FN19] 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.[FN20] In both events, the victims offered **Hitt** money in order to get away from him, but such a response to **Hitt's** criminal behavior does not relate to his common scheme or plan.

FN19. *Lough,* 125 Wn.2d at 852.

FN20. *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.").

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" [FN21] and "[s]ufficient repetition of complex common features." [FN22] 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.

FN21. *State v. Hecht,* 179 Wn.App. 497, 508–09, 319 P.3d 836 (2014).

FN22. *State v. Burkins,* 94 Wn.App. 677, 689, 973 P.2d 15 (1999).

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." [FN23] **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.

FN23. CP at 199.

***4** "Erroneous admission of evidence in violation of ER 404(b) is analyzed under the nonconstitutional harmless error standard." [FN24] We must ask whether there is a reasonable probability that, without the error, " 'the outcome of the trial would have been materially affected.' " [FN25] "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." [FN26]

FN24. *State v. Gower,* 179 Wn.2d 851, 854, 321 P.3d 1178 (2014).

FN25. *Gresham,* 173 Wn.2d at 433 (quoting *State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

FN26. *State v. Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

"Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very preju-

dicial, as it may lead the jury to believe the defendant has a [criminal] propensity." [FN27] We also acknowledge that the potential prejudice from admitting prior misconduct is " 'at its highest' " in sex-offense cases. [FN28] 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:

> FN27. *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 prejudicialthat 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.").
>
> FN28. *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.[[FN29]]
>
> FN29. RP(Mar. 11, 2013) at 1180.

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.[[FN30]]
>
> FN30. CP at 199 (emphasis added).

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.[FN31]

> FN31. *Bourgeois,* 133 Wn.2d at 403.

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

***5** Moreover, in a recorded interview with detectives, **Hitt** admitted that he "was just there to rob

them." [FN32] Police found two of the women's cell phones and a knife on **Hitt's** person. Incontroverted 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.[FN33] 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." [FN34]

FN32. Ex. 6 at 34.

FN33. It is undisputed that the knife constituted a deadly weapon under RCW 9.94A.825.

FN34. Ex. 6 at 50.

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." [FN35] When the prosecutor referred to the prior rape 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

FN35. RP (Mar. 12, 2014) at 1279.

> 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. [FN36]

FN36. *Id.* at 1294.

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." [FN37] **Hitt** contends that the abiding belief language 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.[FN38]

FN37. 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 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.

FN38. *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).

***6 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." [FN39] *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." [FN40]

FN39. 174 Wn.2d 741, 751, 278 P.3d 653 (2012).

FN40. *Id.* at 760 (citation omitted).

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" [FN41] and accurately informs the jury that it must "determine whether the State has proved the charged offenses beyond a reasonable doubt." [FN42] The reasonable doubt instruction accurately states the law. Therefore, **Hitt** fails to show that the burden of proof instruction was improper.

FN41. *Kinzle,* 181 Wn.App. at 784.

FN42. *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 .

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. [FN43] We disagree.

FN43. **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.

First degree kidnapping is an alternative means crime, where a single offense may be committed in more than one way.[FN44] "[T]here must be jury unanimity as to guilt for the single crime charged," [FN45] but unanimity is not required for the means by which the crime was committed if sufficient evidence supports each alternative means.[FN46] We review the evidence in the light most favorable to the State.[FN47] Evidence is sufficient if " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " [FN48]

FN44. *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.").

FN45. *Crane,* 116 Wn.2d at 325.

FN46. *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).

FN47. *Owens,* 180 Wn.2d at 99.

FN48. *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.

In *State v. Garcia,* the court interpreted the meaning of the shield or hostage alternative means in the first degree kidnapping statute.[FN49] *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." [FN50] *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." [FN51]

FN49. 179 Wn.2d 828, 318 P.3d 266 (2014).

FN50. *Id.* at 840.

FN51. *Id.*

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.[FN52] 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." [FN53]

FN52. CP at 207; *see* RCW 9A.40.020(1)(a), (b).

FN53. *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.").

***7** Here, the record supports that **Hitt** intended to use the victims as hostages.[FN54] Several victims testified that, while **Hitt** bound their wrists together, he said he would "make this a hostage situation" if police were called.[FN55] 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].' " [FN56] 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.

FN54. Based on the victims' testimony, it is clear that **Hitt** did not in fact use the victims as hostages when police arrived.

FN55. RP (Mar. 4, 2013) at 542; *see also* RP (Mar. 5, 2013) at 680 ("That we would be hostages if the police came.").

FN56. *Garcia,* 179 Wn.2d at 839 (quoting *State v. Crump,* 82 N . M. 487, 493, 484 P.2d 329 (1971)).

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." [FN57] 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.

FN57. *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.[FN58] 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.

FN58. **Hitt** agrees that we need not address his persistent offender arguments if we accept the State's concession for the sexual motivation special verdicts.

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: LAU, and APPELWICK, JJ.

Wash.App. Div. 1,2014.
State v. Hitt
Not Reported in P.3d, 2014 WL 7339602 (Wash.App. Div. 1)

END OF DOCUMENT

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner, Mick Woynarowski, containing a copy of the Answer to Petition for Review, in STATE V. HITT, Cause No. 91279-3, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

02/20/15
Date

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Dear Supreme Court Clerk:

Attached for filing in the above-referenced case is Answer to Petition for Review.

Please let me know if you should have problems opening the attachment.

Sincerely,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Dennis McCurdy
Senior Deputy Prosecuting Attorney
Attorney for Respondent