70291-2

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NO. 70291-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HITT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF REPLY

Robert Hitt was charged with nine counts and two special allegations of sexual motivation. The State now concedes that evidence of a prior rape conviction was improperly admitted. The admission of prior convictions carries a high risk of unfair prejudice. The likelihood of unfair prejudice is at its zenith when the prior conviction is for a sex offense. Moreover, the instructions did not limit the jury's consideration of the evidence to the special allegations. Rather, the jury was told it could consider the evidence for motive or intent, generally, and intent was a disputed element of each of the charged offenses. Nonetheless, the State argues that the erroneously admitted prior rape conviction and the prior victim's extensive testimony only prejudiced the special allegations. The State is wrong. This Court should reverse and remand for a new trial.

B. ARGUMENT IN REPLY

1. The Court cannot parse the prejudice stemming from the improper admission of a prior conviction for rape so as to limit prejudice to the special allegation.

The State concedes that the trial court improperly admitted Mr. Hitt's prior rape conviction and all of Jessica Sewell's testimony because there was insufficient evidence of a common scheme or plan under ER 404(b). Resp. Br. at 17-25. The Court should accept the State's

concession for the reasons set forth by the State and in Mr. Hitt's opening brief. *Id.*; Op. Br. at 11-26.

The State argues, however, that the error did not prejudice any of the nine convictions. Rather, the State argues only the special allegations of sexual motivation should be reversed. Resp. Br. at 25-28. The State's contention is wrong on several bases, and this Court should remand for a new trial at which evidence related to the prior conviction is excluded.

First, evidence of a prior offense carries an extraordinary risk of undue prejudice. *E.g.*, *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) (holding erroneous admission of ER 404(b) evidence not prejudicial because the admitted prior contacts with victim constituted neither a crime nor a wrong and may not even have been misconduct). In short, prejudice inheres in the admission of a prior conviction.

But beyond even simply a prior offense, the evidence erroneously admitted below was of prior sexual misconduct. The potential for unfair prejudice in a sex case "is at its highest." *State v. Saltarelli*, 98 Wn.2d

358, 363, 655 P.2d 697 (1982); *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A jury's discrimination against the accused reaches "its loftiest peak" when a sex offense is at issue. *Saltarelli*, 98 Wn.2d at 364 (quoting Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 334 (1956)). 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 41 Iowa L. Rev. at 333-34). The improperly admitted evidence characterized Mr. Hitt as a sex offender. *See State v. Garcia*, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013) (discussing particular prejudice that arises from evidence of name or nature of prior offense). The prejudice from this unfavorable branding cannot be quarantined to a specific allegation.

Further, not only did the improperly admitted evidence carry the highest risk of prejudice, but the trial court's instructions did not limit the jury's consideration of the evidence to the special allegations. The jury was not told it could not consider the evidence for intent on the underlying counts. To the contrary, the court's instruction specifically informed the jury to consider the evidence for purpose of intent generally. Intent was

an element of every underlying charge. In relevant part, the court's "limiting" instruction provided,

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of Jessica Sewell. 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 the conduct charged by the state in this case.

CP 199.[1] Thus, the court instructed the jury it could consider Mr. Hitt's prior rape as evidence of Mr. Hitt's motive or intent with respect to the charges generally or for the purpose of deciding whether the conduct is part of a common scheme or plan. Moreover, in referring to "common scheme or plan," the instruction does not restrict how the jury may relate that phrase to the charged acts.

Put otherwise, the jury was not directed to consider the evidence only in deciding the sexual motivation special allegations.[2] It is therefore highly unlikely that the jurors considered Jessica Sewell's testimony and

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[1] Mr. Hitt objected to the instruction as well as the admission of the evidence. RP 1256, 1258-59, 1271. The court understood that an instruction permitting consideration of the evidence for purposes of "intent" would cause the jury to consider the evidence when determining the intent required for each count rather than simply the special allegation. But upon argument by the State that intent generally was a critical issue in the case, the court settled upon the final instruction set forth above. RP 1256-60.

[2] Even the instruction provided before Ms. Sewell's testimony was inadequate. In that oral instruction the court told the jury the testimony could "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." RP 1180. While arguably this instruction limited the evidence to counts I and III, it did not limit it to the sexual motivation allegations. Regardless, the written instruction authorized the jury to consider this evidence even more broadly, including for each count, as discussed above. *See* CP 199.

Mr. Hitt's prior conviction only for the limited, albeit erroneous, purpose for which the court admitted it without applying the impermissible propensity assumption that ER 404(b) precludes. *See State v. Bacotgarcia*, 59 Wn. App. 815, 822-23, 801 P.2d 993 (1990). In light of the high risk of undue prejudice this particular evidence carries, the Court can presume within reasonable probabilities that the admitted evidence materially affected the outcome. *See State v. Gresham*, 173 Wn.2d 405, 433-34, 269 P.3d 207 (2012); *Halstein*, 122 Wn.2d at 127.

The jury was required to follow the court's instructions. On the other hand, summation is a mere persuasive tool. But here the State's summation only further encouraged the jury to consider this evidence beyond the sexual motivation allegations.[3] For example, the State emphasized the importance of determining Mr. Hitt's intent and told the jury to consult its instructions in that regard. RP 1283. As discussed, the instructions did not limit the reach of the evidence as stringently as the State now argues. In fact, when the State discussed this evidence in summation, the prosecutor emphasized it should be used as broadly as the instructional language allowed: "You have an instruction on how you are to receive that evidence [from Jessica Sewell]. And you are to use it to

[3] In light of the court's ruling and instructions, Mr. Hitt does not argue that these lines of argument were improper. He merely points out that the supposed limited purpose for which this prejudicial evidence was admitted was not made clear to the jury in any way.

consider whether or not the defendant acted out in a common scheme or plan. And you can use that evidence as evidence of his motive and intent." RP 1291. It is also plain from the parties' arguments that the intent underlying the nine counts was a key disputed issue. RP 1287, 1303, 1313, 1317-21, 1324. Where the jury instructions allowed the jury to consider the ER 404(b) evidence for purposes of intent, it is impossible to presume that the jury did not look to all the evidence, including Jessica Sewell's extensive testimony and the fact of the prior conviction, to determine these elements.

Without citation, the State argues 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. Contrary to the State's representation, Mr. Hitt did not confess to kidnapping any of the women or to any of the charged crimes. He apparently 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 hardly sufficient to justify the State's argument that the wrongly admitted prior rape conviction had no material effect on the verdicts.

The State further argues Mr. Hitt "was caught in the act." Resp. Br. at 28. Again, Mr. Hitt was found by the police in the home near many of the roommates, but proximity does not satisfy the State's burden. *E.g.*, RP 426-28. Admittedly, identity was not the issue at trial. But what Mr. Hitt was guilty of certainly was an issue. Whether Mr. Hitt was guilty of the nine charged burglary, robbery and kidnapping counts was for the jury to determine beyond a reasonable doubt. In doing so, the State concedes the jury should not have considered any prior conviction evidence.

The fact of the matter is that the jury could not separate the prejudice that stemmed from victim testimony and evidence that Mr. Hitt previously raped Jessica Sewell and consider it only when deliberating upon the State's special allegations. Prior convictions generally, and prior sexual misconduct in particular, are extremely persuasive to the average juror. More significantly, the court's instructions did not tell the jury it could only consider the evidence of a prior rape for the special allegations. Thus this Court should presume the jury took the evidence into account beyond the special allegation. It cannot be said the admission did not materially affect the outcome of the trial; reversal is required.

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.

In addition to reversing and remanding for a new trial, the Court should hold that upon retrial the State cannot rely upon the hostage or shield alternative for five counts of kidnapping in the first degree because the State presented insufficient evidence Mr. Hitt used anyone other than E.H. as a hostage or shield. Op. Br. at 26-30.

The State argues the evidence is sufficient that Mr. Hitt abducted each of the five women with intent to hold that person as a hostage or shield because he "threatened the women with death and told them that if the police showed up, it was going to be a 'hostage situation.'" Resp. Br. at 14 (citing RP 542-43, 656, 702, 944). First, the State fails to explain how threatening the women with death would elevate kidnapping to the first degree under the alternative means of abduction with specific intent to hold a person as a shield or hostage. *See* Resp. Br. at 14 (providing no additional argument). Further, in *State v. Garcia*, our Supreme Court specifically rejected an identical argument made by the State. 179 Wn.2d 828, 841, 318 P.3d 266 (2014). There, the Court of Appeals accepted the State's argument that Mr. Garcia need only intend to use the victim as a shield or hostage and that Mr. Garcia "wanted to avoid arrest; if he released Wilkins [the abducted victim], she would notify the police; so

long as Garcia detained Wilkins, she could not notify police." *Id.* (citing *State v. Garcia*, 168 Wn. App. 1018, 2012 WL 1918961, *7 (2012), *rev'd by Garcia*, 179 Wn.2d 828. The appellate court therefore found sufficient evidence that Mr. Garcia abducted the victim in order to shield himself from the police. *Id.* The Supreme Court reversed, emphasizing that speculation cannot constitute sufficient evidence and that such action is illogical. *Garcia*, 179 Wn.2d at 841. The Court reasoned that sufficient evidence would exist where the defendant positioned and held the victim between himself and several police officers with guns drawn. *Id.* at 840 (citing *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 720-21, 286 P.3d 673 (2012)). But that situation was not present in *Garcia* and the resulting first degree kidnapping conviction had to be reversed. *Id.* at 841-42, 843.

Likewise here, when Mr. Hitt gathered the women, there were no police (or any other third-party threat) present. He gathered them and collected their phones so that the police would not become involved in his robbery. *E.g.*, RP 531, 582-83, 693, 821-25, 828-29, 923-24, 1112. Thus his intent was to avoid law enforcement involvement, not to use the women as a hostage or shield against the police. In fact, once the police arrived, Mr. Hitt specifically did not use any of the women as a hostage or shield; he simply surrendered. RP 426-28. Thus, like in *Garcia*, the

State's evidence on this alternative means of committing kidnapping in the first degree was insufficient.

It also bears noting that the State misstates the record again by stating that Mr. Hitt "literally confessed to the crime as he was committing it." Resp. Br. at 9. Mr. Hitt never said that he kidnapped the women or that he committed first degree kidnapping in particular. His only arguable confession was of an intent to rob. RP 428-29, 432, 1046, 1057. This evidence is not only distinct from what the State claims in arguing a "confession," it also does not supply the sufficient evidence required for first degree kidnapping. *See* RCW 9A.40.020 (first degree kidnapping statute); CP 213 (to-convict instruction for kidnapping in the first degree).[4]

The five convictions for first degree kidnapping at counts two, three, four, six and seven should be reversed.

3. Because even the State agrees Mr. Hitt's persistent offender sentence must be reversed, the Court need not address Mr. Hitt's remaining sentencing arguments unless it rejects the State's concession.

In his opening brief, Mr. Hitt argued his life without parole, persistent offender sentence requires reversal because (a) the constitutional

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[4] Mr. Hitt does not contest the sufficiency of the State's evidence to show intent to commit robbery. But the State charged Mr. Hitt with first degree kidnapping under the alternative means of intent to hold the person as a shield or hostage and to facilitate the commission of the crime of robbery. Because the State did not request a special verdict form, both alternatives must be proved beyond a reasonable doubt for the convictions to stand. *Garcia*, 179 Wn.2d at 835-36; *State v. Rivas*, 97 Wn. App. 349, 351-53, 984 P.2d 432 (1999).

rights to a jury trial, proof beyond a reasonable doubt, and procedural due process require that a jury decide, by the beyond a reasonable doubt standard, whether a defendant is a persistent offender and (b) the constitutional guarantee of equal protection likewise requires that the persistent offender status be found by a jury beyond a reasonable doubt. Op. Br. at 36-50. The State concedes Mr. Hitt's persistent offender sentence must be reversed because the sexual motivation findings, which served as Mr. Hitt's second strike, were garnered improperly. If the Court accepts the State's concession, the Court need not consider the additional arguments Mr. Hitt raises. Consequently, the State did not respond to these arguments and Mr. Hitt rests on the arguments in his opening brief. *See* Resp. Br. at 29; Op. Br. at 36-50.

C. CONCLUSION

Robert Hitt is entitled to a new trial at which the State presents no evidence of Mr. Hitt's prior conviction and intent to commit robbery is the only alternative means of first degree kidnapping offered for counts two, three, four, six and seven. In addition, the reasonable doubt standard should not be defined as an abiding belief in the truth.

DATED this 7th day of July, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. ROBERT HITT, Appellant.	)))))))))	NO. 70291-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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