70291-2

70291-2

NO. 70291-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HITT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of first-degree burglary, two counts of first-degree robbery and six counts of first-degree kidnapping, all with deadly weapon enhancements.

1. The defendant has failed to show that there was insufficient evidence supporting each alternative means charged for first-degree kidnapping convictions.

2. The court instructed the jury using WPIC 4.01, the standard Washington Pattern Jury Instruction defining the Burden of Proof, Presumption of Innocence, and Reasonable Doubt. The defendant has failed to show that this instruction misstates the law and that every case where this instruction has been used must be reversed.

3. The State concedes that the trial court erred in ruling that the State could introduce evidence of a prior rape committed by the defendant under the common scheme or plan exception to ER 404(b). This error affected only the sexual motivation special allegation attached to count I (First-Degree Burglary) and count III (First-Degree Kidnapping involving victim KB). It had no effect on the underlying charges or the other seven counts

4. The defendant has failed to show that multiple trial court errors occurred and that he suffered such substantial prejudice that he can avail himself of the "cumulative error" doctrine?

5. The defendant's challenge to the Persistent Offender Accountability Act is moot because the sexual motivation special allegations that made counts I and III "strike" offenses, must be reversed.

B. STATEMENT OF THE CASE[1]

1. PROCEDURAL FACTS

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. For these acts, the defendant was charged with one count of First-Degree Burglary, two counts of First-Degree Robbery and six counts of First-Degree Kidnapping. CP 1-7. Each count carried with it a deadly weapon enhancement. Id. The burglary count (count I) and one count of kidnapping (count III) carried with it a

[1] The verbatim report of proceedings is contained in several consecutively paginated volumes, which are referenced herein as "RP," followed by the referenced page number.

"sexual motivation" special allegation pursuant to RCW 9.94A.835. Id. The defendant was convicted as charged.[2] CP 249-51, 252, 254, 257, 259, 261, 263, 265-66.

The offenses of first-degree burglary and first-degree kidnapping, *with a jury finding of sexual motivation*, each constitute a "most serious" or "strike" offense under the Persistent Offender Accountability Act (hereinafter POAA). RCW 9.94A.030(37)(b). The defendant also has a prior conviction for first-degree rape, a "most serious offense" under the POAA. Id. Thus, at sentencing, 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.

2. SUBSTANTIVE FACTS

In March of 2011, eight young women, all University of Washington students, lived at 5046 20th Ave NW, near Greek Row just north of the main campus. RP 393-94. The women will be referred to by their initials KB, AuB,[3] AlB, MS, LC, EC, SS and EH.

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[2] The charges also carried a rapid recidivist aggravating factor. CP 1-7. After the defendant was convicted of the underlying charges, the State declined to pursue the rapid recidivist aggravator. RP 1369.

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

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 asked EH how many people were in the house, and after EH responded, "eight," he proceeded to bind her wrists behind her back with electrical tape. RP 500-01.

The defendant then placed a serrated kitchen knife to EH's neck and forced her from room to room, corralling up the other women. RP 508-09. He 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.[4] 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

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[4] 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 footsteps, EH's voice, and 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.

her wrists from when the defendant first bound them. RP 501, 528, 537-40.

The defendant began with MS and then moved to LC. RP 539-41, 698-99, 701, 1114. Each time he would sit on the women's lower back, pull their arms behind them and then bind their wrists. RP 539-40, 625. 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.

The defendant then went on to bind EH's wrists and AuB's wrists. RP 544-47. However, just before binding AuB's wrists, the defendant ran out of electrical tape, became enraged and ripped an electrical cord out of the wall, sending sparks flying. RP 553-56, 626-27, 645. He then obtained a role of duct tape from KB's desk and used that to bind AuB's wrists. RP 553-56, 626-27, 645, 836. After binding AuB's wrists, 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. He yelled that it was too bulky. RP 726. KB and the other women protested

because KB was not wearing anything underneath the onesie, but the defendant demanded that she take it off. RP 563, 652-53, 941-42. The defendant responded to the women's protestations by saying that he wasn't going to rape her. RP 653, 839. KB then unzipped the onesie and took her arms out of the outfit. RP 564. Her wrists were then bound like the other women. RP 565, 840.[5]

As the defendant turned his attention to 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 closed 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

[5] 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.

defendant opened the door and proclaimed that he was just there to rob the women. RP 427-28.

The defendant was placed under arrest. RP 429. One of the officers stepped into the bedroom and observed the women bound on the floor and noted that one of the women was appeared to be "naked." RP 1085-86.

KB and MS's cell phones were found in the defendant's pocket, along with a knife and a baggie of methamphetamine. RP 430-32, 717-18, 895, 961. The defendant admitted that the cell phones were taken from two of the women. RP 430, 432. When asked what he was doing in the home, the defendant confessed that he was going to rob the women. RP 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 also had a cut on his forearm. RP 434. 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. There were fresh scuff marks on the window molding and the outside wall just below the window. RP 765. The knife the defendant used was a serrated kitchen knife with a measured blade of 3 ½ inches. RP 1148.

The defendant did not testify at trial. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF THE FIVE CHALLENGED COUNTS OF FIRST-DEGREE KIDNAPPING

First-degree kidnapping is an "alternative means" crime; with two alternatives charged here. The defendant argues that the evidence presented at trial was insufficient for *any* rational trier of fact to have found one of the alternatives charged, that he intentionally abducted each victim with intent to hold the victim "as a shield or hostage." This argument is without merit. While the defendant accurately states the law, he misapplies it. The defendant literally confessed to the crime as he was committing it.

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). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). Circumstantial evidence is equally as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

First-degree kidnapping is an "alternative means" crime. State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014). Alternative means statutes identify a single crime and provide more than one means of committing that crime. In re Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). Under the statute, a person can commit first-degree kidnapping in one of five ways. Specifically, a person can commit kidnapping in the first degree if he or she:

> Intentionally abducts another person with intent:
>
> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
>
> (b) To facilitate commission of any felony or flight thereafter; or
>
> (c) To inflict bodily injury on him or her; or

(d) To inflict extreme mental distress on him, her, or a third person; or

(e) To interfere with the performance of any governmental function.

RCW 9A.40.020(1)(a-e).

Here, the defendant was charged under alternative means (1)(a) and (1)(b). CP 2-6. Thus, as charged and presented, the jury had to find:

(1) That on or about 5th day of March, 2012, the defendant intentionally abducted [name of victim]

(2) That the defendant abducted that person with intent

(a) to hold the person as a shield or hostage,

or

(b) to facilitate the commission of the crime of robbery

(3) That any of these acts occurred in the State of Washington.

See CP 213-14, 217-18, 221-22, 225-26, 229-30, 233-34 (the "to convict" jury instructions for counts 2, 3, 4, 5, 6 and 7).

Where a single offense may be committed in more than one way--an alternative means case, the jury must be unanimous as to the guilt for the single crime charged. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The jury need not be unanimous,

however, as to the means by which the crime was committed if substantial evidence supports each alternative means. Id. Here, the defendant does not contest that there was sufficient evidence for a jury to have found one alternative means, that he intentionally abducted each victim with the intent to facilitate the commission of the crime of robbery. Rather, as to counts 2, 3, 4, 6 and 7, the defendant argues that there was insufficient evidence that he intended to hold each person as a shield or hostage.[6]

Not defined by statute, the phrase "held as a shield or hostage" has recently been defined by the Supreme Court. The Court found that the term "hostage" 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," the Court found, commonly refers to "the holding or detaining of a person by force as defense or potential protection against interception, interference, or retaliation by law enforcement personnel." Id. Thus, the Court held that "proof of first degree kidnapping under the hostage/shield means requires proof that the defendant *intended* to

[6] The defendant concedes that as to count 5, there was sufficient evidence for the jury to find that the defendant abducted EH with the intent to use her as a shield or hostage. Def. br. at 29-30. EH was the victim who was taken room to room at knifepoint and threatened with death in order for the defendant to corral and abduct the other five women.

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).

Up until this point, the State and the defense are in agreement regarding the law. However, in its application, the defendant states that "there is no evidence Mr. Hitt used any of the women as a shield to protect himself from a third party." Def. br. at 29. While this is a correct statement of the facts, the conclusion that this means there was insufficient evidence of the crime fails. This is because kidnapping does not require that the defendant follow through with the intended act, just that he had the intent to do so. As the Supreme Court has stated:

> A reading of the [kidnapping] statute makes it clear that the person who intentionally abducts another need do so only with the ***intent*** to carryout 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.

In re Fletcher, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989) (emphasis in original); accord Garcia, 179 Wn.2d at 273. Thus, while the defendant did not actually use the women as a shield or

hostage, there was sufficient evidence for the jury to find he did intend to the use the women as a shield or as a hostage.

The evidence of the defendant's intent came from the defendant himself. Repeatedly the defendant threatened the women with death and told them that if the police showed up, it was going to be a "hostage situation." RP 542-43, 656, 702, 944. The fact that the defendant may have changed his mind or been caught unaware by the police and therefore he did not carry out the threat is of no moment. There was sufficient evidence for a rational trier of fact to have found the defendant guilty of first-degree kidnapping under both alternative means charged.

2. WASHINGTON PATTERN JURY INSTRUCTION 4.01 PROVIDES AN ACCURATE STATEMENT OF THE LAW

The defendant argues that the court improperly instructed the jury on the burden of proof where the court used the traditional "abiding belief" language in Washington Pattern Jury Instruction 4.01. This argument should be rejected. The use of the challenged language has consistently been upheld as a proper statement of the law.

Jury instructions must inform the jury that the State bears the burden of proving the essential elements of the crime beyond a

reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct the jury in a manner that would relieve the State of its burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). Challenged jury instructions are reviewed de novo and are evaluated in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, in pertinent part, without objection,[7] the court instructed the jury as follows:

> 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, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

CP 195 (Instruction 3) (emphasis added).

Courts have repeatedly held that the abiding belief language of WPIC 4.01 is a correct statement of the law. See. e.g. State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988); State v. Peterson, 35 Wn. App. 481, 667 P.2d

[7] The court specifically asked defense counsel, "Do you have any quarrel with 4.01?" Defense counsel responded, "No." RP 1237.

645, rev. denied, 100 Wn.2d 1028 (1983); State v. Price, 33 Wn. App. 472, 655 P.2d 1191 (1982), rev. denied, 99 Wn.2d 1010 (1983); State v. Walker, 19 Wn. App. 881, 578 P.2d 83, rev. denied, 90 Wn.2d 1023 (1978); State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959); State v. Fedorov, __ Wn. App. __, 324 P.3d 784, 790 (2014).

Still, the defendant cites to State v. Emery to support his claim that the challenged language encourages the jury to view its role as a search for the truth. 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The defendant's reliance on Emery is misguided. In Emery, the court did not address the use of abiding belief language in jury instructions or otherwise. Rather, the court addressed burden shifting in the context of the prosecutor's closing argument that: "this entire trial has been a search for the truth. And it is not a search for doubt." Id. at 758.[8] The prosecutor's argument mischaracterized the jury's role and the State's burden of proof. Id. But here, the challenged instruction does not direct the jury to find the truth. Rather, the language merely elaborates on what it means to be satisfied beyond a reasonable doubt. As the Court in Pirtle

[8] The Court found the prosecutor's "truth" statement improper, but found that any error had been cured by an instruction and had been waived by the defendant's failure to object. Emery, 174 Wn.2d at 760, 765.

stated, "[t]he addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences ... [t]he addition of the last sentence was unnecessary but was not an error." Pirtle, 127 Wn.2d at 658. Per the Court in Pirtle, the jury was properly instructed and the defendant's argument fails.

3. EVIDENCE OF THE DEFENDANT'S PRIOR RAPE WAS IMPROPERLY ADMITTED

Prior to trial, the State asked the court to rule on the admissibility of evidence of a prior rape the defendant committed in October of 2001. The court ruled that pursuant to ER 404(b), evidence of the defendant's prior rape was admissible as a "common scheme or plan" relevant to show the defendant's motive and intent in regards to the two sexual motivation special allegations charged with count I (First-Degree Burglary) and count III (First-Degree Kidnapping involving victim KB). The State concedes the trial court's ruling was in error, an error that was prejudicial only to the sexual motivation special allegations attached to count I and count III.

a. ER 404(b) And The Admission Of Prior Bad Acts

The admission of prior bad act evidence for the purpose of proving a person's character and showing that the person acted in

conformity with that character is categorically prohibited by ER 404(b). State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). However, prior bad act evidence may 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).

Another basis for admission of prior bad act evidence is where the prior acts evidence a "common scheme or plan," i.e., where the evidence of prior acts follows a single plan to commit separate but very similar crimes. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). To establish a common design or plan, "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." State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (citing Lough, at 860). The degree of similarity for the admission of evidence of a common scheme or plan must be substantial. DeVincentis, 150 Wn.2d at 20.

In ruling on the admission of prior bad act evidence, the trial court must (1) find by a preponderance of the evidence that the

misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine if the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. Lough, 125 Wn.2d at 853.

b. The Prior Bad Act And The Trial Court's Ruling

On October 29, 2001, the defendant committed an act of rape against JSN, a 19-year-old University of Washington student.[9] On that date, the defendant called a local sandwich shop and ordered a sandwich to be delivered to his apartment located at 3500 NW 65th Street in the University District. JSN was the delivery person.

When JSN knocked on the door, the defendant, who had been drinking, answered the door. He told JSN he forgot his wallet and asked her to step inside. As JSN stepped inside, the defendant stepped over to a closet, with JSN thinking that he was going to get some money. The defendant then stepped behind

[9] The following facts are found in the sources of information that were before the trial court. The sources consist of the certification for determination of probable cause, guilty plea form and judgment & sentence under King County cause number 01-1-09775-6 SEA (the prior rape charge), the transcript of the defense interview of JSN, the briefing of the parties, the certification for determination of probable cause under King County cause number 12-1-01438-4 SEA (the current charge), pretrial exhibit 13 (statement of Officer Ness), and pretrial exhibit 14 (Emergency Room Report). CP 422; RP 236-37.

JSN, closed the door, put a large serrated knife to JSN's throat and told her to be quiet or he would cut her throat.

The defendant then forced JSN over to the couch in his living room where there was a glass of wine and a marijuana pipe sitting on the table. Pornography was playing on the TV. The defendant ordered JSN to take her jacket off, after which he took her shirt and bra off and tried to take her pants off, until JSN told him that she was on her period. While holding the knife, the defendant said to JSN, "[d]o me a favor, go down on me." He then raped JSN orally and ejaculated inside her mouth.

After raping JSN, the defendant proceeded to talk with her for approximately 20 minutes. He talked about his mother, how he had been trying to turn his life around and asking JSN not to call the police. Finally, JSN broke for the door but she was beaten there by the defendant. JSN asked the defendant if he was going to kill her. The defendant laughed and handed the knife to JSN. He told JSN that he probably ruined her life and then he let her go. At some point during the incident, JSN offered the defendant the money she had on her to let her go.

Based on these facts, the court found that the two incidents shared such a significant degree of similarity as to evidence a

common scheme or plan, the common scheme or plan being relevant because it served as evidence of the defendant's motive and intent in regards to the sexual motivation special allegation as charged in counts I and III. CP 424 (the court's written Findings of Fact and Conclusions of Law).

In making its ruling, the court relied on the following alleged similarities:

> (1) Neither event was well thought out; rather, the events appeared to be impulsive acts by the defendant.
>
> (2) Both crimes occurred in a residence.
>
> (3) In both cases the defendant used a knife and threatened to slit the victims' throat to gain compliance.
>
> (4) Both cases involved college age females.
>
> (5) Both cases involved the defendant ingesting alcohol and mind-altering drugs.
>
> (6) In both cases the victim offered the defendant money to get away.
>
> (7) In both cases the victim was ordered to disrobe.
>
> (8) In both cases the victim was naked at least from the waist up.
>
> (9) In both cases the defendant expressed concern about being caught by the police.

> (10) In both cases the defendant expressed repeated self-loathing because of his acts.
>
> (11) In the first case, the defendant had been watching pornography. In the second case, he had been drinking with a woman at a bar but was rejected after her boyfriend showed up. The court found from this that the defendant "is lonely and despondent and then decides that his needs, wants, desires are going to be met in another fashion."

CP 23-24.

The trial court then ruled, as a conclusion of law, that the degree of similarity between the defendant's rape of JSN and the current allegations demonstrated a "common scheme or plan" that was "relevant because it serves as evidence of the defendant's motive and intent as alleged in the aggravating factor, specifically whether the defendant was acting with sexual motivation as alleged by the State in counts 1 and 3." CP 424.

c. The Problem With The Trial Court's Ruling

The problem with the trial court's ruling is that it appears that the court merely looked to identify facts common to both cases and when the court identified a certain number of facts common to both cases, the court concluded this alone evidenced a "common scheme or plan." However, 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. Taken together with the substantial differences that exist between the two cases, the common facts do not evidence a "single plan to commit separate but very similar crimes" as required by DeVincentis, supra, and Lough, supra.

To begin, the trial court's first finding -- that the crimes were "impulsive" acts and were not well thought-out, is in direct contrast to a finding that the defendant possessed a common scheme or plan to commit rape. To act impulsively is to act on impulse, to act with "a sudden spontaneous inclination or incitement to some unusual unpremeditated action." Merriam-Webster's Collegiate Dictionary at 626-27 (11th ed. 2003). In other words, the court's finding actually indicates that the defendant acted without a plan. Additionally, the fact that the defendant ingested alcohol and drugs in both cases likely increased the probability that he acted impulsively, not with a singular common plan.

Similarly, the common fact that both crimes occurred in a "residence" does not evidence a plan to commit rape, especially when one considers the substantial differences between the two locations and manner in which the crimes were committed. In the

first case, the crime occurred in the defendant's own apartment, with the victim being an invitee lured to the location on a ruse. In the second case, the crime occurred in a residential home of persons unknown to the defendant. Before entering, the defendant pounded on the door in an apparent attempt to make sure that nobody was home, and then he broke into the home by throwing a large rock through the window and climbing inside. In other words, while both crimes did occur in a residence (a common fact to many crimes), access to the residences, access to the victims, and the proprietorship of each residence, was completely different. This also highlights another common fact relied upon by the court, the fact that in both cases the victims were college age females.

The fact that a person may target victims of a certain age or sex can be evidence of a common plan, e.g., a pedophile targeting young boys of a certain age. See e.g., DeVincentis, supra. Here, however, 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. Thus, the fact that the victims in the second incident were of similar age and the same sex as the victim in the first

incident does not show a common scheme or plan to commit the crime of rape where the similarity was by happenstance.

Likewise, the fact that each victim offered the defendant money is not a factor showing a common scheme or plan because this is an act of the victim, not the defendant. The common fact of being concerned about getting caught by the police and expressing self-loathing, while similar in both cases, are fears or emotions of the defendant but they do not evidence a plan to commit the crime itself.

In short, while the trial court identified facts common to both cases, the court did not explain how the common facts evidenced a common plan. Per the Supreme Court's interpretation of ER 404(b), the rule requires that the evidence of the prior conduct must demonstrate not merely similarity in results, but common features that "are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." DeVincentis, 150 Wn.2d at 19. And the degree of the similarity of the evidence of a common scheme or plan "must be substantial." DeVincentis, at 20. The State concedes that the evidence here was insufficient to prove the defendant possessed a common scheme or plan to commit rape.

d. The Result Of The State's Concession

The erroneous admission of prior bad act evidence is grounds for reversal only if it is prejudicial. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Thus, the erroneous admission of ER 404(b) evidence requires reversal "only if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). Here, the error was partially prejudicial and partially harmless.

The defendant was caught in the act and literally confessed to the crimes charged – with one exception, the sexual motivation special allegation charged along with counts I and III. In admitting the 404(b) evidence, the trial court specifically held that the evidence of the defendant's prior rape was admitted for a singular purpose, "whether the defendant was acting with sexual motivation as alleged by the State in counts 1 and 3." CP 424. To this end, prior to JSN testifying, the court instructed the jury that:

> Ladies and gentlemen, you are about to hear testimony from [JSN]. 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, and it may not be considered for any other purposes.

RP 1180.[10]

An allegation of sexual motivation requires the State to prove beyond a reasonable doubt that sexual gratification was among the defendant's purposes in committing the charged offense. State v. Thompson, 169 Wn. App. 436, 476, 290 P.3d 996 (2012), rev. denied, 176 Wn.2d 1023 (2013); RCW 9.94A.030(47). The State must present "evidence of identifiable conduct by the defendant while committing the offense which proves 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).

Here, the State cannot argue that the admission of the prior rape evidence did not influence the jury in returning verdicts that the defendant committed the burglary and kidnapping of KB at least in part for purposes of his sexual gratification. Unlike the underlying charges and the other seven charges, the evidence that the defendant acted with the purpose of his sexual gratification was not overwhelming and the defendant did not confess that this was

[10] A similar limiting instruction was read to the jury along with the other jury instructions at the conclusion of the case. CP 199 (Instruction 7).

his purpose. However, in regards to the underlying charges, the other seven charges and all the other enhancements, the evidence was overwhelming, the defendant confessed and was caught in the act, and thus the charges and enhancements were unaffected by the trial court's error. Resentencing is required.

4. THE DEFENDANT'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED

The defendant contends that the cumulative effect of the errors alleged warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances.[11] Here, as explained in the sections above, only one error occurred and it does not warrant a new trial.

[11] See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial), rev.

5. THE DEFENDANT'S CHALLENGES TO THE PERSISTENT OFFENDER ACCOUNTABILITY ACT ARE MOOT

The defendant makes multiple legal challenges to the Persistent Offender Accountability Act. In light of the State's concession that the sexual motivation special allegations must be reversed and the defendant resentenced as a non-persistent offender, the defendant's challenges are moot. See State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (A case is moot "if a court can no longer provide effective relief").

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denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

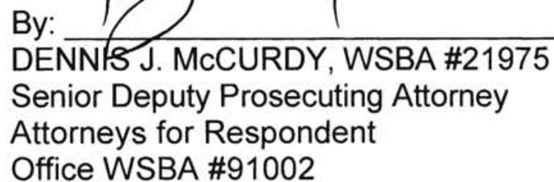
D. CONCLUSION

For the reasons cited above, (1) this Court should remand for resentencing in light of the State's concession regarding the sexual motivation special allegations, and (2) this Court should affirm the defendant's convictions in all other regards.

DATED this 6 day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: ______________________
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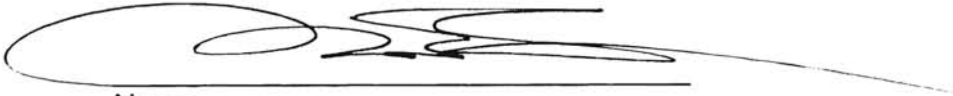
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HITT, Cause No. 70291-2 -I, in the Court of Appeals, Division I, 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.

Dated this 6 day of June, 2014



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