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

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

WALLACE W. GILPIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Foscue

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BRIEF OF APPELLANT

---

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A. SUMMARY OF ARGUMENT

Wallace Gilpin's 16 year old daughter, A.S with whom he had had limited contact came to live with him when her mother became ill with cancer and eventually died. His daughter later claimed that Mr. Gilpin and she had engaged in sexual intercourse for several years, most times consensually but sometimes through his threats. Mr. Gilpin was charged with two counts of second degree rape and one count of first degree incest. Following a jury trial, Mr. Gilpin was acquitted of one count of rape and convicted of the remaining counts.

The court admitted evidence of a prior incident under a theory of lustful disposition where Mr. Gilpin was alleged to have threatened A.S. with a knife. The court also admitted the knife, even though in neither of the charged rape counts was it alleged that Mr. Gilpin had used a knife or that a knife was present. The court did not engage in any balancing of the probative value of this evidence against the prejudice Mr. Gilpin suffered. Defense counsel neither moved the court to engage in such a balancing nor sought a limiting instruction.

At the conclusion of defense counsel's closing argument, the court improperly instructed the jury that Mr. Gilpin's trial did not involve the death penalty.

Mr. Gilpin contends the court erred in admitting the evidence of the knife and the evidence concerning its use in the prior incident. Alternatively, Mr. Gilpin submits his attorney was ineffective in failing to require the court to engage in the mandated balancing prior to admitting the prior act evidence, was ineffective in failing to request a limiting instruction, and was ineffective in failing to object to the court's improper instruction. As a result, Mr. Gilpin is entitled to reversal of his convictions and remand for a new trial.

**B. ASSIGNMENTS OF ERROR**

1. The court erred in admitting evidence of a prior uncharged sexual incident involving A.S. by failing to weigh the probative value against the prejudicial impact of such evidence.

2. Defense counsel rendered ineffective assistance thereby denying Mr. Gilpin his Sixth Amendment and art. I, § 22 right to counsel.

3. Defense counsel violated Mr. Gilpin's right to counsel when he failed to move the court to weigh the prejudicial impact of evidence of the prior uncharged incidents with its probative value.

4. Defense counsel was ineffective when he failed to move for a limiting instruction regarding the prior uncharged sexual incidents.

5. The trial court erred in instructing the jury Mr. Gilpin's matter did not involve the death penalty.

6. Defense counsel was ineffective when he failed to object to the trial court's instruction to the jury that this case was not a death penalty case.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court admitted evidence of a prior incident of sexual intercourse between Mr. Gilpin and his daughter where he allegedly threatened her with a knife as probative of lustful disposition under ER 404(b). In the charged acts there was no evidence of Mr. Gilpin's use of a knife. The court failed to balance the probative value of the prior incident against the prejudice that might be suffered by Mr. Gilpin from admission of the evidence despite numerous decisions finding evidence of dangerous weapons unduly prejudicial. Did the trial court violate Mr. Gilpin's

right to due process in admitting prejudicial evidence, thus requiring reversal?

2. Under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution, a criminal defendant has a constitutionally protected right to counsel and a commensurate right to the effective assistance of counsel. Mr. Gilpin's counsel failed to move the court to balance the probative value of the prior incident involving his alleged use of a knife as required by ER 403, and ER 404(b), failed to request a limiting instruction when this evidence of the prior incident was admitted, and failed to object to the court's improper instruction that the trial did not involve the death penalty. Did trial counsel's performance fall below objective standards thus prejudicing Mr. Gilpin and requiring reversal?

D. STATEMENT OF THE CASE

A.S. was the product of a relationship Wallace Gilpin had with Susan Smith in 1987. 2RP 68-69. A.S. lived with her mother in Tacoma until 2001 when she was 13 years old. 2RP 69. During this time Mr. Gilpin had very little contact with A.S. 2RP 69. In 2001, A.S. and her mother moved in with Mr. Gilpin in Aberdeen. 2RP 69. In 2002, the family moved to Hoquiam where they

remained until November 1, 2003, when Ms. Smith passed away. 2RP 70. A.S. lived with an aunt for eight months then returned to live with Mr. Gilpin. 2RP 71.

A.S. was a very angry young woman. 2RP 327. At times, A.S.'s anger would escalate to the point where she became either physically violent or would make threats. 2RP 327. A.S. was also very flirtatious and would dress provocatively. 2RP 330. When Mr. Gilpin became involved in a relationship with Liane Benson, A.S. became angry and would threaten Mr. Gilpin and Ms. Benson. 2RP 378.

A.S. claimed that Mr. Gilpin began to touch her inappropriately when she first arrived at his home in 2001. During the summer of 2001, A.S. claimed Mr. Gilpin began paying her to perform oral sex on him. 2RP 73-74. From there, according to A.S., the relationship progressed to where she and Mr. Gilpin were engaging in sexual intercourse. 2RP 74. A.S. stated she told her mother about this before her mother died. 2RP 74. According to A.S., Ms. Smith spoke to Mr. Gilpin about A.S.'s claim and Mr. Gilpin denied A.S.'s allegations. 2RP 74. Ms. Smith took no further action. 2RP 74.

A.S. claimed the episodes of sexual intercourse continued through February 2005. On February 15, 2005, A.S. discovered she was pregnant. 2RP 75. A.S. later gave birth to a baby which was determined to be fathered by Mr. Gilpin. 2RP 292. Even after A.S. discovered she was pregnant, she continued to live with Mr. Gilpin. 2RP 75.

A.S. disclosed several incidents where she and Mr. Gilpin engaged in sexual intercourse. 2RP 76. Most notably, A.S. described an incident that occurred on Thanksgiving Day 2003 in which Mr. Gilpin was alleged to have come up from behind A.S. and place a knife against her throat. 2RP 78. The two then engaged in sexual intercourse. 2RP 78.

A.S. claimed that on February 25, 2005, Mr. Gilpin told A.S. he was going to gag her with duct tape, bind her hands, and have intercourse with her. 2RP 84. A.S. agreed to have intercourse if Mr. Gilpin would not bind her. 2RP 85.

A.S. also described an event that occurred on February 28, 2005. A.S. claimed she and Mr. Gilpin were arguing that day, and when her counselor came to the house, A.S. convinced the counselor to take her to the Department of Social and Health Services (DSHS) office where she demanded to be removed from

her father's house. 2RP 86-87. Mr. Gilpin was also present at this meeting. *Id.* When DSHS refused to remove A.S., Mr. Gilpin drove her back to his residence where A.S. claimed Mr. Gilpin threatened to duct tape her. 2RP 88. A.S. claimed Mr. Gilpin struck her then began having intercourse with her. 2RP 88. After experiencing sharp pain, A.S. told Mr. Gilpin to stop and he complied. 2RP 89. According to A.S., Mr. Gilpin told her she would have to perform oral sex on him instead. 2RP 89. When she was finished, A.S. fled to a friend's house where she revealed the sexual history between she and Mr. Gilpin.

Mr. Gilpin was charged with one count of first degree incest and two counts of second degree rape, one count for the February 25, 2005, incident, and one count involving the February 28, 2005, incident. CP 1-3. Prior to trial, the State filed a motion noting its intent to introduce evidence of the prior uncharged specific incidents of sexual intercourse between A.S. and Mr. Gilpin, including the one involving A.S.'s claim that Mr. Gilpin held a knife to her throat as evidence of lustful disposition, despite the fact A.S. did not claim any of the charged incidents involved a knife. CP 22-24. The court decided the prior incidents fell within the lustful disposition doctrine, and without any analysis or balancing of the

probative value of the evidence against its prejudicial impact, ruled the evidence was admissible. 2RP 147-50.

At trial, the prosecutor did not merely seek testimony from A.S. concerning the knife, but admitted the knife into evidence.

Q: Would you recognize the knife if you saw it again? Would you describe it?

A: It was probably about five inches, I would say. It had a silver blade and homemade handle on it made out of wood that had Gilpin carved into it. The handle was a little wobbly because it had been homemade, and it had a long tip like this. It was a blade like this.

Q: Do you know what happened to the knife?

A: I gave it to Sergeant Kinney.

Q: [A.S.], I am going to hand you what's been marked for identification as Number 11, do you recognize that?

A: Yes, I do.

Q: What is this?

A: This is the box I gave to sergeant [sic] Kinney with the knife in it.

Q: I am going to have you open the box, and can you tell me if the contents are the same as they were when you gave them to Sergeant Kinney?

A: Yes.

Q: And is that the knife that was used in this incident?

A: Yes, it is.

2RP 79-80. The court admitted the knife into evidence.

The jury acquitted of Mr. Gilpin of count two, the February 25, 2005, incident, but convicted him on the remaining counts. Mr.

Gilpin was subsequently sentenced to an exceptional minimum term of 300 months with a maximum term of life imprisonment.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS AS EVIDENCE OF LUSTFUL DISPOSITION WHERE IT FAILED TO WEIGH THE PROBATIVE VALUE OF SUCH EVIDENCE AGAINST ITS PREJUDICIAL IMPACT

- a. The admission of the prior act involving a knife

violated Mr. Gilpin's constitutionally protected right to due process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant a fair trial.

Erroneous evidentiary rulings which render the defendant's trial fundamentally unfair violate due process. *Estelle v. McGuire*, 502 U.S. 62, 75, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1990); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence does not deprive a defendant of due process "unless the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'").

The erroneous admission of other acts evidence under ER 404(b) where there were *no* permissible inferences the jury could

have drawn from the evidence (in other words, no inference other than conduct in conformity therewith), violates due process because it renders the trial fundamentally unfair. *McKinney v. Rees*, 993 F.2d 1378, 1384-86 (9th Cir. 1993); *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) .

b. When admitting evidence of prior uncharged incidents under ER 404(b), the court must conduct an on the record weighing of the probative value against the prejudicial impact.

Generally, evidence of prior acts of the defendant admitted solely to prove propensity to commit an offense is not admissible. ER 404(a). But, ER 404(b) provides:

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.

To admit evidence of other wrongs, 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 sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d

630, 642, 41 P.3d 1159 (2002); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The purpose of ER 404(b) is to prevent consideration of prior bad acts evidence as proof of a general propensity for criminal conduct. *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Besides being relevant and necessary to purposes other than proving character or propensity, a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; ER 404(b). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). The prejudicial nature of ER 404(b) evidence must be balanced by the court on the record. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Here, the court's analysis regarding the admission of the prior uncharged acts of Mr. Gilpin was scant at best. But, most egregious was the court's complete failure to balance the limited

probative value of such evidence against its substantial prejudice to Mr. Gilpin.

c. The court failed to conduct any analysis of the prior uncharged incidents prior to their admission at trial. Courts have recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended party. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990). In Washington, appellate courts routinely hold that in sex cases it is highly probative to show the defendant's lustful disposition directed toward the victim. *State v. Ferguson*, 100 Wn.2d 131, 133, 667 P.2d 68 (1983).

In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079 (1987).

Testimony about weapons unrelated to the charged crime is irrelevant and unfairly prejudicial. *State v. Freeburg*, 105 Wn.App. 492, 20 P.3d 984 (2001). In *Freeburg*, a gun found on Mr. Freeburg at the time he was arrested was admitted at his trial for an offense which occurred several years prior to his arrest and which did not involve the use of a gun as evidence of flight. In reversing Mr. Freeburg's conviction, finding that evidence of the gun was more prejudicial than probative, the Court of Appeals stated:

Freeburg made no attempt to resist arrest, he did not occupy a traveling arsenal, he readily admitted to the arresting officer that he had a gun in his boot, the gun was not the gun used in the shooting of Rodriguez, the arrest occurred more than two years after the shooting, and the presence of the gun does not by itself indicate a consciousness of the serious offense he faced. Finally, no evidence was recovered at the time of arrest to link Freeburg to Rodriguez's death.

*Freeburg*, 105 Wn.App. at 500. In finding the evidence not harmless and thus reversible, the Court noted:

We cannot agree that the evidence was harmless. Evidence of weapons is highly prejudicial, and courts have "uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged." The prejudicial effect of the evidence of Freeburg's loaded handgun is especially clear in light of the court's refusal to give a limiting instruction.

*Id.*, at 501. See also *State v. Oughton*, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980) (evidence of a knife totally unrelated to the murder knife found to be of highly questionable relevance; reversed and remanded on other grounds).

Following defense counsel's objection to the admission of the prior uncharged sexual acts by Mr. Gilpin, the sum total of the court's analysis of the admission of this evidence consisted of:

There is law supporting evidence of defendant's previous sexual contacts with the defendant under 404(b). And I – although I don't know all of the details other than what's been outlined by the State, I believe that evidence is admissible. There may be something in the evidence that isn't admissible, but I don't know.

...

Well, I think that this possibility has been there from the very beginning, as I understand the allegations here. Um, certainly the issue of his, what they call lustful disposition, I think is relevant to the case. Lustful disposition for her, his daughter. And there was an opportunity to talk with her, and – okay. Anything further then.

...

I am ruling it admissible. As I say, there may be something about it that I don't know that you might want to ask that I preclude, but I don't have any idea what that would be. Generally it's admissible.

1RP 147-50.

The prejudicial impact of this evidence was considerable and its probative value minimal. The State proffered that A.S. would testify to an incident in 2003 where Mr. Gilpin brandished a knife

and forced A.S. to have intercourse. CP 23. At trial, A.S. testified regarding the incident involving the knife:

Q: What do you remember about that incident?

A: I went to spend Thanksgiving with my father. So, I – so my aunt and my father arranged that I got to go spend some time with him. I don't remember exactly what happened, but I remember when I got there that I was unpacking my stuff, went into the back where he stayed and he had his hands behind his back, and I kept on asking him what he had behind his back. He kept on saying nothing. And I remember next I was on the back of the bed with – my back was on the bed and I had a knife against my throat. I don't remember exactly how the rest went, but we began having sexual intercourse and then we went up in the bathroom.

...  
Q: Would you recognize the knife if you saw it again? Would you describe it?

A: It was probably about five inches, I would say. It had a silver blade and homemade handle on it made out of wood that had Gilpin carved into it. The handle was a little wobbly because it had been homemade, and it had a long tip like this. It was a blade like this.

2RP 79-80. Over defense counsel's chain of custody objection, the knife was subsequently admitted.

The prejudice suffered by Mr. Gilpin from the admission of the evidence concerning the knife was that there was no evidence that any of the charged incidents involved the use of a knife. The two charged incidents of second degree rape, one event occurring

on February 25, 2005, for which Mr. Gilpin was acquitted, and one event occurring February 28, 2005, involved threats by Mr. Gilpin to bind A.S. unless she voluntarily acquiesced to intercourse. CP 2-3; 2RP 84-89.

Had the court fulfilled its mandatory on-the-record duty of weighing the prejudicial impact of this evidence regarding Mr. Gilpin's alleged use of the knife to the jury against its minimal probative value it would have excluded this evidence of the Thanksgiving 2003 incident. The evidence of the Thanksgiving 2003 incident was cumulative to the evidence concerning the charged incidents as well as numerous other uncharged prior incidents of oral sex and intercourse by A.S. and Mr. Gilpin. 2RP 72-74, 76. Thus, the court erred in failing to perform the mandatory weighing under ER 403 and exclude evidence of the Thanksgiving 2003 incident.

d. The admission of the prior uncharged incidents was not harmless in light of the issue concerning the credibility of A.S. The court's error in admitting the prior incident involving the knife was not a harmless error given its extreme prejudicial impact.

*i. The State must prove beyond a reasonable doubt the error did not contribute to Mr. Gilpin's conviction.* To prove a constitutional error is harmless, the State must prove beyond a reasonable doubt the error did not “contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The harmless error standard is not met by speculating that a hypothetical reasonable juror relying on the properly admitted evidence *could* have reached the same verdict, but rather requires the State prove this specific jury *would have* reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

The inquiry . . . is not whether, in a trial without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

*Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Thus, unless the State can prove that the admission of the evidence of the knife in the prior episode in no

way contributed to Mr. Gilpin's conviction, the error requires reversal.

The critical issue in this case was the credibility of A.S. as there as no physical evidence regarding the charged rape incidents which were ultimately based solely on her testimony. The jury was clearly concerned about A.S.'s credibility as evidenced by its rejection of her claim that Mr. Gilpin raped her on February 25, 2005, as charged in count two. CP 2, 51-52. Given this concern on the jury's part, it is impossible for the State to prove beyond a reasonable doubt that the evidence of the prior incident involving the knife did not contribute to the jury's verdict regarding count three. *Freeburg*, 105 Wn.App. at 501. This is especially so given the court's failure to give a limiting instruction. *Id.* The error was not harmless and Mr. Gilpin's conviction for rape as charged in count three must be reversed.

*ii. Alternatively, the outcome of Mr. Gilpin's trial was materially affected by the court's error.* An error under ER 404(b) is nonconstitutional in nature, so the question is whether it is reasonably probable the outcome of the trial was materially affected. *State v. White*, 43 Wn.App. 580, 587, 718 P.2d 841 (1986).

For the same reasons as expressed above, the error was not harmless under this standard. Given that the credibility of A.S. was the critical issue, any evidence which bolstered that credibility tipped the scale in favor of conviction. The evidence concerning the prior incident involving the knife portrayed Mr. Gilpin as a dangerous man making A.S. appear more credible. Thus, the error in admitting the prior incident materially affected the outcome of the trial. This Court must reverse Mr. Gilpin's conviction for count three.

2. DEFENSE COUNSEL RENDERED  
INEFFECTIVE ASSISTANCE THEREBY  
DENYING MR. GILPIN OF HIS  
CONSTITUTIONALLY PROTECTED RIGHT  
TO COUNSEL

a. Mr. Gilpin had the constitutionally protected right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v.*

*Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

b. Mr. Gilpin's trial counsel rendered ineffective assistance of counsel. "The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, counsel fell below the objective standards of representation by failing to object to the admission of the prior incident involving a knife and for failing to object to the trial court's erroneous instruction to the jury.

i. Counsel failed to move the court to exclude the evidence of the prior uncharged incidents as more prejudicial than probative and failed to move for a limiting instruction upon the admission of the evidence. Should this Court determine the trial court did not abuse its discretion in admitting the evidence of the prior uncharged acts by Mr. Gilpin because defense counsel failed to move to exclude the evidence of the prior uncharged incident as more prejudicial than probative, failed to move for a limiting instruction, then counsel was ineffective for failing to so move.

As argued above, the evidence concerning the Thanksgiving 2003 incident where Mer. Gilpin was alleged to have used a knife

should have been excluded as more prejudicial than probative. But, once the evidence of the incident was admitted, defense counsel failed to propose a limiting instruction to the court.

In his cross-examination of A.S., defense counsel compounded the prejudice to Mr. Gilpin and reinforced the impact of the knife to the jury by repeatedly referring to it, searing the incident into the memories of the jury.

Q: So he threatened to kill you with this knife, put a knife to your throat, and then at some point he just turned it over to you, left it lying around so you could grab it?

...  
Q: Now, let me ask you this, I want to take you back a little bit. There was a November, 2003 incident we talked about where, with this knife and whatnot, and what I want to ask you about, what happened after that? Now, you left and you went back to live with your aunt for some period of time?

2RP 106, 123.

Instructive on this issue is this Court's decision in *State v. Dawkins*, 71 Wn.App. 902, 863 P.2d 124 (1993). In *Dawkins*, the defendant was accused of fondling two 13-year-old girls as they slept next to one another on his living room floor. Both girls claimed to have been touched on the same date, at the same time, and in the same location. The jury acquitted Dawkins of the charge

involving one of the girls but convicted on the charge involving the second girl. The only difference in the evidence presented was testimony by the second girl that the defendant had fondled her on prior occasions. The prior incidents were admitted by the trial court as evidence of a lustful disposition. Defense counsel did not object to the admission of the evidence of prior incidents. Subsequently the jury acquitted Dawkins on the count involving the first girl but convicted on the second girl involving the prior incidents. *Dawkins*, 71 Wn.App. at 905-06. The trial court granted a new trial after finding defense counsel's failure to challenge the prior incidents was ineffective assistance as it noted that had the evidence been challenged, it would have excluded it as more prejudicial than probative. *Id.* at 906.

This Court agreed and affirmed the trial court's finding. *Id.* at 910-11. This Court noted that the prejudice suffered by the admission of the evidence outweighed its probative value:

The real question at this trial was one of reality, not identity; *i.e.*, not who improperly touched K.N. and R.B., but whether any improper touching ever took place. Because there were no eyewitnesses to the touching, nor any physical evidence, the question of guilt thus necessarily turned on the relative credibility of the accused and the accuser. Here, the accuser's testimony concerning Dawkins cast him as "a person of abnormal bent, driven by biological inclination."

[*State v.*] *Coe*, 101 Wn.2d [772,] 781], 684 P.2d 668 (1984)] (quoting Slough & Knightly, *other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 333-34 (1955-1956)). As such, it was relatively easy for the jury to believe Dawkins must be guilty because he could not help himself, and thus was more likely less credible in his recitation of events that morning than R.B. was.

*Id.* at 909-10. As a result, this Court concluded the trial court would not have abused its discretion in concluding that R.B.'s testimony about prior, uncharged touching incidents was inadmissible, had the objection been made." *Id.* at 910.

Regarding the prejudice to Dawkins as a result of counsel's deficient performance, this Court adopted the trial court's conclusion that there was a strong possibility the jury used the evidence of the prior uncharged incidences to convict Dawkins and that without the evidence the outcome would have been different. *Id.* at 911.

A similar scenario is presented here. Had defense counsel objected to the prior incident involving the knife the court would have been compelled to exclude it. *Freeburg*, 105 Wn.App. at 501. Although the evidence of the prior incident may have been relevant as evidence of lustful disposition, as was the case in *Dawkins*, the evidence of the knife was irrelevant as the charged rape offenses did not involve the use of a knife by Mr. Gilpin. The resulting

prejudice suffered by Mr. Gilpin from the admission of the knife evidence was substantial and outweighed any probative value. The evidence painted Mr. Gilpin as a violent man who could not help himself and therefore was less credible than A.S. The error was compounded when the counsel failed to request a limiting instruction, and the court failed to so instruct the jury. *Freeburg*, 105 Wn.App. at 500-01.

Further, had defense counsel objected, the outcome would have been different. The jury did not believe A.S. regarding one of the allegations of rape as it acquitted Mr. Gilpin of that count. CP 52. Thus, “there is a strong probability that the jury used” the evidence concerning Mr. Gilpin’s use of a knife in a prior uncharged incident to convict him of the offense for which he was ultimately convicted. *Dawkins*, 71 Wn.App. at 911. Defense counsel rendered constitutionally deficient representation in failing to object to the evidence of the uncharged incident involving a knife.

*ii. Counsel failed to object to the trial court’s instruction to the jury this was not a death penalty case.* In Washington, in noncapital cases, courts are barred from informing the jury the case is not a death penalty case, the rationale being that juries have no role in the sentencing of a defendant except in

capital cases. *State v. Townsend*, 142 Wn.2d 838, 845-47, 15 P.3d 145 (2001).

*Townsend* answers the question raised here of whether defense counsel's failure to object to such an instruction is deficient performance. In *Townsend*, defense counsel failed to object to the trial court's instruction to the jury during *voir dire* that the case was not a death penalty case. *Townsend*, 142 Wn.2d at 842-43.

*Townsend* found this to be deficient performance:

Considering the long-standing rule that no mention may be made of sentencing in noncapital cases we conclude that counsel's failure to object to the instruction fell below prevailing professional norms.

. . .

There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instruction, if anything, would only increase the likelihood of a juror convicting the petitioner. Petitioner has carried his burden of establishing deficient performance.

*Id.* at 847.

The court here instructed the jury in a similar manner without objection: "In light of the comment by counsel, just to make sure, that there is no question. This is not a death penalty case. He is not on trial in that sense." 2RP 441.

The court instructed the jury at the request of the prosecutor who noted defense counsel had argued in closing argument that Mr. Gilpin was “fighting for his life.” 2RP 441. Although defense counsel did make such a reference, it in no way justified the court’s instruction. The *Townsend* Court was very clear that the prohibition against such an instruction is a “strict prohibition” that “ensures impartial juries and prevents unfair influence on a jury’s deliberations.” *Townsend*, 142 Wn.2d at 846. The *only* exception the *Townsend* Court created was in death cases, “and even then the jury is to consider the penalty only after a determination of guilt.” *Id.* Thus, the court’s instruction that this is not a death penalty case was erroneous and counsel was ineffective for failing to object to it.

c. Mr. Gilpin suffered prejudice from counsel’s multiple failures. “To satisfy [this] prong, a defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceedings would have been different but for counsel’s deficient performance.” *State v. Contreras*, 92 Wn.App. 307, 318, 966 P.2d 915 (1998), *citing Thomas*, 109 Wn.2d at 225-26. “The defendant, however, ‘need not show that counsel’s deficient conduct more likely than not altered the outcome in the

case.” *Tilton*, 149 Wn.2d at 784, quoting *Strickland*, 466 U.S. at 693.

In failing to object to the court’s improper actions, counsel essentially created a scenario where Mr. Gilpin was left without an advocate. See *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (“if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”). Under such a scenario, prejudice is presumed and the defendant is entitled to a new trial. *Id.*

Here there was the jury’s consideration of the knife that was irrelevant to any of the charged offenses, and which was admitted without any limitation on the jury’s use of such evidence. This seriously prejudiced Mr. Gilpin because it denied him a fair trial. *Freeburg*, 105 Wn.App. at 500-01. The same can be said with regard to the court’s improper instruction which eliminated any assurance that the jury remained impartial and was not unfairly influenced. *Townsend*, 142 Wn.2d at 846.

Mr. Gilpin has established prejudice from counsel's deficient performance and is entitled to reversal of his convictions and a new trial.

d. Cumulatively, trial counsel's error requires reversal of Mr. Gilpin's convictions. The cumulative error doctrine is applied in those cases where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Put another way, the doctrine of cumulative errors requires reversal where multiple nonprejudicial errors, when considered as a whole, so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686; *Greiff*, 141 Wn.2d at 929.

Should this Court determine each instance of deficient performance by defense counsel alone was insufficient to justify reversal, then the cumulative effect of the multiple instances do require reversal. In failing to object to the trial court's clearly erroneous rulings, defense counsel had abandoned his role as advocate for his client. Thus, this Court cannot be assured that the

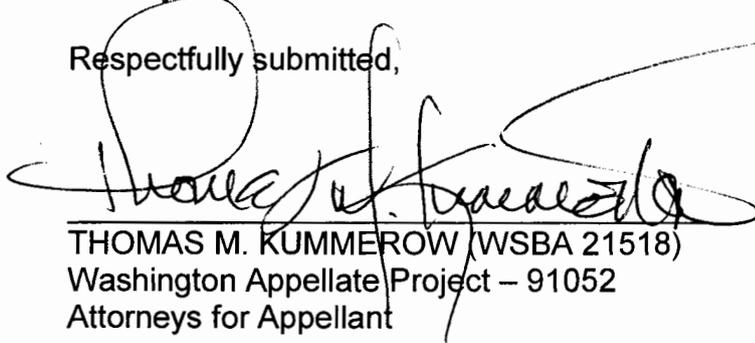
jury's conclusion was a just result. This Court must reverse Mr. Gilpin's convictions and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Gilpin submits this Court must reverse his convictions and remand for a new trial.

DATED this 14th day of November 2007.

Respectfully submitted,



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