

No. 42422-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTIAN LEVI GAGNON,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 11-1-00134-6

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. STATEMENT OF THE ISSUES1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....7

 1. The trial court’s decision to admit Gagnon’s prior sexual conviction under ER 404(b) was not an abuse of discretion. Even if it were, the trial court’s decision to admit Gagnon’s prior sexual conviction was harmless7

 2. Gagnon did not receive ineffective assistance of counsel (1) because his counsel’s performance was not deficient, and (2) because even if it was deficient, it was not prejudicial to his case17

D. CONCLUSION23

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)	4
<u>State v. Finley</u> , 85 Ariz. 327, 338 P.2d 790 (1959)	12
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)	18, 19, 22

Federal Court Decisions

<u>Mannhalt v. Reed</u> , 847 F.2d 576, 579 (9th Cir. 1988).....	17
---	----

Washington Supreme Court Decisions

<u>In re Barr</u> , 102 Wn.2d 265, 684 P.2d 712 (1984).....	4
<u>State v. Badda</u> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	23
<u>State v. Cunningham</u> , 93 Wn.2d 823, 613 P.2d 1139 (1980).....	15, 16
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	9, 10, 20
<u>State v. Dixon</u> , 159 Wn.2d 65, 147 P.3d 991 (2006).....	8, 15
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	7, 11, 19, 20

<u>State v. Gresham,</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	7, 9, 10, 11, 13, 14, 15, 17, 19, 20, 21, 22, 23
<u>State v. Johnson,</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	20, 22
<u>State v. Lough,</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	9, 10, 11, 12, 14, 20
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	18
<u>State v. Robtoy,</u> 98 Wn.2d 30, 653 P.2d 284 (1982).....	16
<u>State v. Rohrich,</u> 149 Wn.2d 647, 71 P.3d 638 (2003).....	8, 15
<u>State v. Russell,</u> 171 Wn.2d 118, 249 P.3d 604 (2011).....	19
<u>State v. Saltarelli,</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	9, 19, 20
<u>State v. Smith,</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	15
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	18, 22
<u>State v. Vy Thang,</u> 145 Wn.2d 630, 41 P.3d 1159 (2002).....	9

Decisions Of The Court Of Appeals

<u>State v. Donald,</u> 68 Wn. App. 543, 844 P.2d 447 (1993).....	20
<u>State v. Fredrick,</u> 45 Wn. App. 916, 729 P.2d 56 (1986)	18-19

State v. Scherner,
153 Wn. App. 621, 225 P.3d 248 (2009).....6, 20, 21

State v. White,
80 Wn. App. 406, 907 P.2d 310 (1995).....17

Statutes and Rules

ER 105.....20

ER 404(b) 1, 5, 7, 8, 9, 13, 14, 15, 17, 19, 22, 23

RCW 10.58.0905, 7

Other Authorities

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND
PRACTICE § 404.9, at 497 (5th ed. 2007).....9

Admissibility, in Rape Case, of Evidence That Accused Raped or
Attempted To Rape Person Other Than Prosecutrix, 2 A.L.R.4th
330 (1980)12

A. STATEMENT OF THE ISSUES.

1. Whether the trial court's decision to admit Gagnon's prior sexual conviction under ER 404(b) was an abuse of discretion. If it did constitute an abuse of discretion, whether the trial court's decision to admit Gagnon's prior sexual conviction was harmless.
2. Whether Gagnon's counsel's performance was deficient. If Gagnon's counsel's performance was deficient, whether it was prejudicial to his case.

B. STATEMENT OF THE CASE.

On November 28, 2010, Christian Levi Gagnon raped T.M. RP 3, 12.¹ T.M. had been hanging out with friends at Amanda's² apartment, RP 3-4; Cyrus, Frizz, Gagnon, and "a couple other guys" were there, too, RP 4. T.M. left Amanda's around 9:00 p.m., walking down the stairwell to her apartment. RP 5. After she got home, T.M. put on her nightgown, brushed her teeth, and got into bed. RP 5-6.

Lying in bed, T.M. heard a knock on her door. RP 9. She got up to answer it, finding a "pretty drunk" and "pretty high" Gagnon. RP 9. Gagnon told T.M. that he wanted to grab his

¹ Unless stated otherwise, all references to the Report of Proceedings are to the transcripts entitled "Jury Trial, Volumes I-V."

² Amanda and T.M. met each other through Community Youth Services (CYS); they were best friends and neighbors at CYS's transitional housing. RP 4, 96.

backpack, which he had left at T.M.'s earlier that day.³ RP 5, 9.

T.M. asked Gagnon to wait outside. RP 9.

I went to go grab his backpack, and he came in and shut the door behind him and locked it,⁴ and he tried to kiss me, and I pushed him away. I said no, and he got this really angry look on his face and grabbed me by the throat and pushed me up against the wall.

RP 9. Gagnon ripped off T.M.'s underwear, put his penis inside her vagina, and ejaculated: "I couldn't really do anything. I kept trying to get him off. I just couldn't get him off. I couldn't scream. I couldn't breathe any more." RP 12-13. Gagnon also put his fingers into T.M.'s anus and bit T.M.'s shoulder. RP 13.

While Gagnon denied raping T.M., *see, e.g.*, RP 265, 356, (Gagnon also suggested that he was too drunk to rape T.M.), Gagnon's trial focused on his alleged alibi—that is, whether Gagnon was in Olympia, Washington, on November 28, 2010, or in Bellingham, Washington. *See, e.g.*, CP 6, 42. Both Amanda and T.M. testified that Gagnon was in Olympia on November 28, 2010. *See, e.g.*, RP 4, 98 (Amanda actually saw Gagnon leave T.M.'s apartment). Gagnon said that he was in Bellingham from

³ Earlier that day, someone put a can of whipped cream into Gagnon's backpack as a practical joke. RP 5. The can exploded, covering Gagnon's backpack in whipped cream. RP 5. Amanda, a self-described "neat freak," refused to allow Gagnon's backpack into her apartment. RP 5, 97. Knowing her best friend's preference for clean floors, T.M. told Gagnon that he could keep his backpack at her apartment. RP 5.

⁴ T.M. also testified that when Gagnon entered her home, she confronted Gagnon—stating "What the hell. I told you to wait there." RP 18.

November 27 through January 27, RP 259-60; his mother said that Gagnon returned to Bellingham on November 27, RP 205; and two of Gagnon's friends said that they thought they saw Gagnon in Bellingham on November 28, RP 219, 235.

Gagnon made conflicting statements to Detective Paul Evers, explaining (1) that he had not been in Olympia since November 4; (2) that he was in Olympia on November 28, mixed up his dates, and left Olympia because he was "falsely accused;" and (3) that he was not in Olympia on November 28. RP 120-23, 292. Christina McVeigh, a case manager at CYS, said that she spoke with Gagnon in Olympia on the Monday or Tuesday after November 28, CP 143-44; Belinda Shirey, a Greyhound employee, said that its records indicated that Gagnon did not take a Greyhound Bus out of Olympia on November 26, RP 278-79; and Sandra McClanahan, a mental health coordinator at CYS, said that she saw Gagnon in Olympia on December 1, RP 302, 305.

Finally, the State played a recorded 911 call from December 1, 2010, RP 319, in which a caller said he was calling to report a runaway, that his name was "Christian Gagnon," and that he was in Olympia, RP 329. When the defense recalled Gagnon to explain the 911 call, he testified that while he did not remember making the 911 call, "It's possible" (1) that he was in Olympia on December 1;

(2) that he had his dates wrong; and (3) that his mother had her dates wrong. RP 331-32.

At trial, the judge read the following stipulation into the record:

The defendant, Christian L. Gagnon, has previously been found guilty in Whatcom County . . . of the crime of unlawful imprisonment.⁵ The factual basis for that charge is as follows: On August 4, 2008, Whatcom County deputies contacted R.L., who reported that the defendant had raped her. The Deputy noted that R.L. was visibly upset and crying. R.L. reported that on August 3, 2008, at approximately 2200 hours, she had been home with the defendant. They had been hanging out and listening to music together. R.L. went to ready herself for bed and had completely disrobed before making one last trip to the bathroom. When R.L. left the bathroom, she stopped at the defendant's closed door to remind him he needed to get up in the morning. The defendant then opened the door and proceeded to give R.L. a hug. The defendant then tried to kiss R.L., at which time she attempted to push him away and said, "no stop." The defendant then forcefully threw R.L. onto his bed, threw her legs up and penetrated her vagina with his penis. R.L. reported that she told him to stop, but was afraid of what he would do if she resisted too much. R.L. reported that this happened twice in the past.

CP 67; RP 114-15. R.L. is Gagnon's mother; Gagnon raped R.L.

when he was just 17-years-old. CP 36.

⁵ While the State originally charged Gagnon with second degree rape and first degree incest, CP 32, Gagnon eventually plead guilty to unlawful imprisonment pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) and In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), 5/31/11 RP 5. The court noted that Gagnon agreed to the lesser charges so that his mother would not have to testify against him (among other things). Id.

This stipulation was read to the jury after the trial court held a 3.6 hearing, 5/23/11 RP 4, finding that “The Defendant’s prior act of rape is admissible at trial in this matter pursuant to RCW 10.58.090 to show any fact in issue and pursuant to Evidence Rule 404(b) to show the Defendant’s common scheme or plan to fulfill sexual compulsions.” CP 81. Both the State and Gagnon agreed that “[t]he stipulation was the least prejudicial way to present that evidence.” RP 139.⁶

Defense counsel mentioned Gagnon’s prior rape twice during closing, emphasizing that he is “not on trial here for anything he did in the past. He’s not on trial for that. Don’t convict him for this based on anything he’s done in the past.” RP 360; *see also*, 363. The State elaborated on Gagnon’s statements, reiterating that Gagnon’s previous rape is not admissible to prove character:

And you heard that that act involved kissing somebody at a doorway, pushing them down and forcibly penetrating a vagina with his penis.

Now, we go through the evidence in this case, and that’s obviously not evidence in this case, but if you

⁶ When the State asked Gagnon’s mother, R.L., if it was true that she was “actually a victim of a case involving Christian [Gagnon] in Whatcom County . . .,” RP 209, the trial court sustained Gagnon’s objection, prevented R.L.’s answer, and instructed the jury to disregard the State’s question. RP 209-13. Out of the jury’s presence, the trial court stated:

I just wanted to note for the record that I’m quite concerned about going beyond the scope of the stipulation as I understood that the content of the stipulation was a result of this court’s ruling by Judge Sutton, not by agreement of counsel, and so going beyond that in any way I think would require an additional ruling of the court because I suspect that Mr. Hack would object.

RP 212-13.

look at it, *does it show a commonality, a common scheme or plan? I submit to you it is. And that's the only reason that's offered so you can take a look at the similarity. . . .*

Id. at 365 (emphasis added). Based on the limiting instruction in State v. Scherner, 153 Wn. App. 621, 658-59, 225 P.3d 248 (2009),⁷ the State requested a limiting instruction. See, e.g., 05/31/11 RP 9-10. The trial court agreed, instructing the jury that

Evidence has been admitted in this case regarding the defendant's commission of a previous sex offense. The defendant is not on trial for any act, conduct, or offense not charged in this case.

Evidence of a prior sex offense on its own is not sufficient to prove the defendant guilty of the crime charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crime charged.

CP 93; RP 342. Gagnon did not propose any jury instructions, and neither party took exception to the trial court's instructions. RP 335.

On June 14, 2011, a jury found Gagnon guilty of second degree rape. CP 123. Gagnon was sentenced to 100 months of total confinement on July 28, 2011, CP 123, 128, filing a timely notice of appeal later that day, CP 137. On appeal, Gagnon argues

⁷ The trial court in Scherner instructed the jury that:

[E]vidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. *I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.*

Id. at 658-59 (emphasis in original).

(1) that evidence of his prior sexual misconduct was improperly admitted under RCW 10.58.090 and ER 404(b); (2) that he was denied his Sixth Amendment right to effective assistance of counsel, and (3) that, alternatively, an accumulation of non-reversible errors denied his right to a fair trial. Appellant's Opening Brief at 1-2.

C. ARGUMENT.

1. The trial court's decision to admit Gagnon's prior sexual conviction under ER 404(b) was not an abuse of discretion. Even if it were, the trial court's decision to admit Gagnon's prior sexual conviction was harmless.

Interpretation of an evidentiary rule is a question of law that appellate court's review de novo. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012) (quoting State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). If a trial court interpreted an evidentiary rule correctly, an appellate court will review the trial court's determination to admit or exclude evidence for an abuse of discretion. See, e.g., Gresham, 173 Wn.2d at 419 (citing Foxhoven, 161 Wn.2d at 174). Appellants who show that a trial court erroneously admitted evidence under ER 404(b) must also show that the trial court's error was not harmless. Gresham, 173 Wn.2d at 433.

- a. The trial court did not abuse its discretion because Gagnon vaginally raped each victim (1) after hanging

out with them; (2) after the victims left to go to bed; (3) after confronting them in a doorway; and (4) after the victims refused to kiss him.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable; or when it is exercised on untenable grounds or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Dixon, 159 Wn.2d at 75-76 (citing Rohrich, 149 Wn.2d at 654). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Dixon, 159 Wn.2d at 75-76 (citing Rohrich, 149 Wn.2d at 654).

ER 404(b) states:

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

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” Gresham, 173 Wn.2d at 420 (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). “Critically, there are no ‘exceptions’ to this rule,” Gresham, 173 Wn.2d at 421 (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.9, at 497 (5th ed. 2007)), just “one improper purpose and an undefined number of proper purposes,” Gresham, 173 Wn.2d at 421.

To admit evidence of a person’s prior misconduct, “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.”

Id. (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995))).

“One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan.” Gresham, 173 Wn.2d at 421 (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)). Evidence may be admitted to prove a common scheme or plan: “(1) “where several crimes constitute constituent parts of a plan in which each crime is but a

piece of the larger plan,” and “(2) where an individual devises a plan and uses it repeatedly to perpetuate separate but very similar crimes.”” Gresham, 173 Wn.2d at 422 (quoting Lough, 125 Wn.2d at 854-55). In order to introduce evidence that an individual repeatedly uses a plan,

the prior misconduct and the charged crime must demonstrate “*such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which*” the two are simply “*individual manifestations.*” Mere “similarity in results” is insufficient. In DeVincentis, we clarified that while the prior act and charged crime must be *markedly and substantially similar*, the commonality need not be “a unique method of committing the crime.”

Gresham, 173 Wn.2d at 422 (internal citations omitted) (emphasis added).

In Gresham, the court held that the trial court did not err in admitting evidence of Scherner’s prior molestations “for the purpose of demonstrating that Scherner had developed a common plan or scheme, which he again put into action when he molested M.S.”⁸ Id. at 423. The evidence produced at trial indicated that Scherner molested his “either seven or eight years old” granddaughter, M.S., at night while they were on vacation. Id. at

⁸ The court in Gresham consolidated two cases on appeal: Scherner and State v. Gresham, No. 84148-9. Gresham, 173 Wn.2d at 417. While Gresham affirmed Roger Scherner’s conviction, it also held that “RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine,” which required its reversal of Michael Gresham’s conviction. Gresham, 173 Wn.2d at 434-35. Unlike Scherner’s trial court’s determination, Gresham’s found that his previous conviction was inadmissible under ER 404(b) to show a common scheme or plan. Gresham, 173 Wn.2d at 418.

414. Attempting to show that Scherner had developed a common plan or scheme, the State sought to admit testimony of Scherner's four previous victims: Scherner's two nieces, a close friend's child, and another granddaughter. Id. at 415.

With respect to evidence of Scherner's abuse of Williamson and Kahn, the implementation of the crime was markedly similar to the charged crime: Scherner took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals. *Though there are some differences, (e.g., the presence of oral sex), these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as "individual manifestations" of the same plan.* Lough, 125 Wn.2d at 860. Though the abuse of Spillane and Oducado took place in Scherner's home, the remaining details share such a common occurrence of fact with the molestation of M.S. that we cannot say that the trial court abused its discretion in determining that these were merely individual manifestations of a common plan.

Gresham, 173 Wn.2d at 422-23 (emphasis added).

"The existence of a common scheme or plan, for ER 404(b) purposes, is relevant only to the extent that it shows the charged crime happened." Foxhoven, 161 Wn.2d at 179 (citing Lough, 125 Wn.2d at 861-62). In Lough, the court stated that

The evidence is admitted to show plan, not propensity. In this case, the Defendant's history of drugging women, with whom he had a personal relationship, in order to rape them while they were unconscious or confused and disoriented evidences a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual

intercourse. A rational trier of fact could find that the Defendant was the mastermind of an overarching plan.

Id. at 861. The Lough court noted that “A large number of cases have held that when there are enough similarities between the charged crime and the prior misconduct, then the prior conduct may be admissible to prove the existence of a plan or scheme or design.” Id. at 857 n.14 (citing State v. Finley, 85 Ariz. 327, 338 P.2d 790 (1959) (design or course of conduct of two rapes was remarkably similar and hence admissible); see Timothy E. Travers, Annotation, Admissibility, in Rape Case, of Evidence That Accused Raped or Attempted To Rape Person Other Than Prosecutrix, 2 A.L.R.4th 330 (1980) (it is generally agreed that in the proper factual situation evidence that the accused has previously committed a similar but separate and independent crime is admissible for the purpose of establishing a common plan or scheme of the accused)).

In this case, the trial court found that

Here [sic] the State seeks admission of the prior acts to show a common scheme or plan utilized by the Defendant. To admit evidence of a common scheme or plan, the court need only find that the prior bad acts showed a pattern or plan with marked similarities to the facts of the case before it. Here, the Defendant noted in the Combined Omnibus Application that the defense is indicating an alibi. Where the alleged victim specifically indicated that the defendant was the person who allegedly raped her, this puts whether

the crime occurred at issue in the case at bar. Therefore, the existence of a design to fulfill sexual compulsions evidenced by the defendant's past acts is highly probative. In this case, the facts of the prior Whatcom case are substantially similar to the current allegations. As discussed above, the probative value of the prior acts substantially outweighs the risk of prejudice.⁹ As such, evidence of the prior Whatcom County acts is admissible pursuant to ER 404(b) to show the Defendant's common scheme or plan to fulfill sexual compulsions.

CP 81. Because the trial court also found that Gagnon raped R.L., CP 78; 05/23/11 RP 3-5, it correctly interpreted ER 404(b) and its decision to admit evidence of Gagnon's prior rape cannot be disturbed absent an abuse of discretion. Gresham, 173 Wn.2d at 419.

The trial court's decision that Gagnon's rape of R.L. was markedly and substantially similar to his rape of T.M.—or that it was an individual manifestation of a general plan—was not manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Both vaginal rapes occurred after Gagnon and the victims were hanging out, compare CP 67 with RP 3-4; after the victims left to go to bed, compare CP 67 with RP 5-6; and after the victims

⁹ On the previous page, the court found that:

The similarities between the prior acts and the current allegations make the prior acts highly probative in showing the defendant's lustful disposition and credibility of the allegations in the present case. The probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury and will not cause undue delay, a waste of time or be a needless presentation of cumulative evidence.

CP 80.

shunned Gagnon's attempted kiss, compare CP 67 with RP 9. Gagnon also confronted both victims in a doorway. Compare CP 67 with RP 9.

While evidence indicated that Gagnon raped R.L. after he opened his bedroom door, CP 67, raped T.M. after she opened her front door, RP 9, and inserted his fingers into T.M.'s but not R.L.'s anus, compare CP 67 with RP 13, Gresham and Lough do not require previous incidents to be identical to the alleged crime. Gresham, 173 Wn.2d at 423 (evidence of Scherner's past molestations, three of which included oral sex, are admissible under ER 404(b) even though the alleged molestation did not involve oral sex); Lough, 125 Wn.2d at 849-51 (unlike the defendant's past victims, the charged rape did not include an allegation that the defendant penetrated the victim's anus.).

Although reasonable minds could conclude that Gagnon's rape of R.L. was not substantially and markedly similar to his rape of T.M.—reasonable minds could also conclude that the two rapes were substantially and markedly similar. After an extensive review,¹⁰ the trial court found that

The allegations in the present case are substantially similar to the factual basis relied upon in the prior

¹⁰ Before making its decision, the trial court noted that it had "read everything," examining Whatcom County's affidavit of probable cause, listening to a 50 minute recording of Gagnon's guilty plea, and examining the statement on plea of guilty (among other things). See, e.g., 5/31/11 RP 3.

Whatcom County case in that in both cases, the Defendant met the alleged victim at a doorway, began attempting to kiss the alleged victim and, when met with resistance, forcibly vaginally penetrated the alleged victim with his penis.

CP 79. Clearly, the trial court did not adopt a view that “no reasonable person would take,” or arrive at a decision “outside the range of acceptable choices.” Dixon, 159 Wn.2d at 75-76 (citing Rohrich, 149 Wn.2d at 654). Because the trial court also based its decision on facts supported by the record and applied the correct legal standard, CP 78, 81, its decision cannot constitute an abuse of discretion, Dixon, 159 Wn.2d at 75-76 (citing Rohrich, 149 Wn.2d at 654).

- b. Even if it were error, the trial court’s decision to admit Gagnon’s prior sexual conviction was harmless because Gagnon impeached himself at trial, causing his alleged alibi to fail.

“An accused cannot avail himself of error as a ground for reversal unless it has been prejudicial.” State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (citing State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). In fact, “It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error.” See, e.g., Gresham, 173 Wn.2d at 433 (citing Smith, 106 Wn.2d at 780). If an error is not of constitutional magnitude, the “error is not prejudicial unless, within reasonable probabilities, had the error not

occurred, the outcome of the trial would have been materially affected.” Id. (citing Cunningham, 93 Wn.2d at 831); accord, State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

The State does not concede that the trial court’s ER 404(b) ruling constituted an abuse of discretion, but even if evidence of Gagnon’s previous crime was excluded, the jury would have found Gagnon guilty. Gagnon’s trial focused on his alleged alibi, as he claimed that he was in Bellingham on the night T.M. was raped (i.e., November 28)—and that he did not leave Bellingham until the end of January. RP 259-60. Amanda’s, T.M.’s, Detective Evers’s, Christina McVeigh’s, Belinda Shirey’s, and Sandra McClanahan’s testimony indicated that Gagnon was in Olympia on or around November 28. Id. at 4, 98 (Amanda saw Gagnon leave T.M.’s apartment), 120-23, 143-44, 278-79, 292, 302, 305.

While Gagnon, his mother, and his two friends initially testified that he was in Bellingham on November 28 and did not leave Bellingham until January, RP 205, 219, 235, 259-60, Gagnon admitted after he heard his 911 call on December 1 from Olympia that “It’s possible” (1) that he was in Olympia on December 1; (2) that he had his dates wrong; and (3) that his mom had her dates wrong. RP 331-32. Regardless of whether Gagnon’s previous

sexual crime was disclosed, Gagnon impeached himself at trial, causing his alleged alibi to fail.

Gagnon attempts to analogize his case to Michael Gresham's, stating that "[w]hen the support of RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b)." Appellant's Brief at 15 (quoting Gresham, 173 Wn.2d at 433). But as stated above (see page 10), Gagnon's and Gresham's cases are distinguishable because Gresham's trial court found that his previous conviction was inadmissible under ER 404(b) to show a common scheme or plan. Gresham, 173 Wn.2d at 418. In this case, the trial court admitted evidence of Gagnon's previous conviction under both RCW 10.58.090 and ER 404(b), CP 81; therefore, when RCW 10.58.090's support is removed, his previous conviction—like Roger Scherner's—is still proper under ER 404(b). See Gresham, 173 Wn.2d at 434-35.

2. Gagnon did not receive ineffective assistance of counsel (1) because his counsel's performance was not deficient, and (2) because even if it was deficient, it was not prejudicial to his case.

While appellate courts review claims of ineffective assistance of counsel *de novo* after considering the entire record, State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)—their review always begins with a strong presumption that counsel's

performance was effective, Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). As with all ineffective assistance of counsel claims, the Strickland rule governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 687).

As to Strickland's first prong, appellants must show that their "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 698). To meet the requirement of the second prong, appellants must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (emphasis removed) (quoting Strickland, 466 U.S. at 694).

Appellant courts are not required to address both prongs of the test if the appellant makes an insufficient showing on either prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56

(1986) (*superseded by statute on other grounds*). Courts may therefore dispose of an appellant's ineffectiveness claim on the ground of lack of sufficient prejudice if they prefer. Strickland, 466 U.S. at 697.

"If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction *upon request*." Gresham, 173 Wn.2d at 423 (emphasis added) (citing Foxhoven, 161 Wn.2d at 175; Saltarelli, 98 Wn.2d at 362). Trial courts have no duty to give an ER 404(b) limiting instruction *sua sponte*. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

Once the defendant requests an ER 404(b) limiting instruction, the instruction "must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity

with that character.” Gresham, 173 Wn.2d at 423-24.¹¹ Juries are presumed to follow a trial court’s instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

In Gresham, Scherner’s requested limiting instruction incorrectly stated the law, and the trial court properly refused to give the proposed, flawed instruction. Id. at 424. Gresham held, however, that “While it was not error for the trial court to refuse to give an incorrect instruction . . . it was error, in this case, for the trial court to fail to give a correct instruction.” Id. At least as it pertains to ER 404(b), “*once a criminal defendant requests a limiting instruction*, the trial court has a duty to correctly instruct the jury. . . .” Id.

The trial court in this case issued essentially the same instruction that the court in Gresham concluded was incorrect. Compare CP 93 with Scherner, 153 Wn. App. at 658-59. At Gagnon’s 3.6 hearing, the State noted that it “wrote out the specific

¹¹ Gagnon attempts to prove that his counsel’s performance was ineffective by claiming that if evidence of other crimes, wrongs, or acts is admitted, a limiting instruction must be provided. Appellant’s Brief at 18 (citing Foxhoven, 161 Wn.2d at 175; State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993)). This appears to be an incorrect statement of the law. While Foxhoven uses the word “must,” it cites as support Lough. Foxhoven, 161 Wn.2d at 175 (citing Lough, 125 Wn.2d at 864). But Lough, id. at 860 n.18, Gresham, id. at 423, Saltarelli, id. at 362, and DeVincentis, id. at 23 n.3, do not use “must”—and only require trial courts to issue a limiting instruction upon request. See also ER 105 (“When evidence which is admissible . . . for one purpose . . . the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.”). Emphasis added.

limiting instruction that was used in State v. Shermer. . . .¹² I've actually requested one from WAPA [Washington Association of Prosecuting Attorneys], but I haven't gotten it yet." 5/23/11 RP 21. Explaining its 3.6 ruling, the trial court noted that the State asked for a limiting instruction, 5/31/11 RP 9-10, citing State v. Scherner, id. at 10.

The State later informed the trial court that its requested limiting instruction was approved by WAPA and "that most of the jurisdictions are using some variation of the reading that was in Scherner." Id. The trial court also stated that "The defendant did not propose any instructions," to which Gagnon's counsel responded: "And I've gone over them, Your Honor. They seem to be appropriate for this case. I have no supplementals to add . . . [and] no objections." RP 335.

In light of the fact that the State's proposed limiting instruction was commonly used at the time of Gagnon's trial, 5/31/11 RP 10, it is hard to imagine how Gagnon's counsel's failure to propose different limiting instructions was deficient. Additionally, Gresham does not require that defense counsel propose their own limiting instruction—it merely requires trial courts to issue a correct

¹² Given the context of the State's statement, it appears as though the court reporter intended to write "State v. Scherner."

ER 404(b) limiting instruction upon the defendant's request. Gresham, 173 Wn.2d at 423-24.

Gagnon cannot show that his counsel's deficient performance was prejudicial to his case, either. See Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). First, both Gagnon's counsel and the State reminded the jury that Gagnon was not on trial for his previous conviction. RP 360, 363, 365 ("... but if you look at it, does it show a commonality, a common scheme or plan? I submit to you it is. And that's the only reason that's offered so you can take a look at the similarity. . . ."). Second, while the jury's instructions did not explain why Gagnon's previous conviction was admitted into evidence, they did inform the jury that:

Gagnon is not on trial for any act, conduct, or offense not charged in this case;

Evidence of a prior sex offense is not, on its own, sufficient to prove that Gagnon raped T.M.; and

The State must prove each element beyond a reasonable doubt.

CP 93; RP 342; see also Johnson, 124 Wn.2d at 77 (juries are presumed to follow a trial court's instructions).

Third, when the State asked Gagnon's mother whether she was a victim in a case involving Gagnon, the trial court sustained Gagnon's objection, prevented his mother's answer, and instructed the jury to disregard the State's question. RP 209-13. Finally, like

Gresham, Gagnon cannot show that he was prejudiced by his counsel's failure to request an ER 404(b) limiting instruction because after claiming that he was not in Olympia on the night T.M. was raped, he testified that he might have gotten his own alibi wrong (see argument briefed on pages 16-17). Gresham, 173 Wn.2d at 425 (Even if a limiting instruction had been issued, "the remaining overwhelming evidence . . . [indicates that] the outcome of . . . trial would not have been materially affected.").¹³

D. CONCLUSION.

The trial court's decision to admit Gagnon's prior rape of R.L. under ER 404(b) was not an abuse of discretion because it was markedly and substantially similar to his rape of T.M. But even if it was an abuse of discretion, the trial court's decision was harmless because Gagnon impeached himself at trial. Moreover, Gagnon's counsel's failure to request an ER 404(b) limiting instruction did not constitute ineffective assistance.

¹³ Almost as an aside, Gagnon also argues that even if one of his arguments, standing alone, does not warrant reversal, "the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed. . . ." Appellant's Brief at 20 (citing State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963)). But while Gresham disapproved of Gagnon's trial court's limiting instruction, id. at 424, the error was harmless. Because the trial court's ruling did not constitute an abuse of discretion (see argument briefed on pages 7-15), Gagnon's argument that an accumulation of non-reversible errors requires reversal of Gagnon's conviction is without merit.

The State respectfully asks this court to affirm Gagnon's conviction.

Respectfully submitted this 16th day of April, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

Electronically filed at Division II

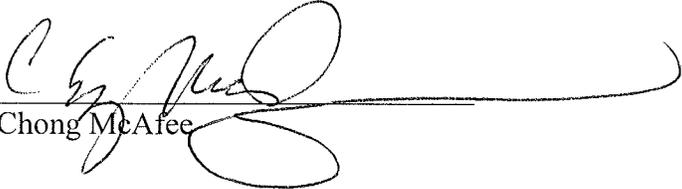
TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

THOMAS DOYLE, ATTORNEY FOR APPELLANT
EMAIL: TED9@ME.COM

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

Dated this 16th day of April, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

April 16, 2012 - 3:11 PM

Transmittal Letter

Document Uploaded: 424223-Respondent's Brief.pdf

Case Name: STATE V. CHRISTIAN LEVI GAGNON

Court of Appeals Case Number: 42422-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Chong H McAfee - Email: mcafeec@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

te9@me.com