

NO. 49482-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PATRICK JAMES EDWARD DOCKERY,

Appellant.

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

The Honorable David Edwards, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a limiting instruction for evidence that should have been subject to ER 404(b) analysis.
2. Trial counsel's failure to move for a mistrial constitutes ineffective assistance of counsel.
3. There was insufficient evidence to support appellant's conviction for second degree rape of a child.
4. There was insufficient evidence to support the aggravating factor of "victim vulnerability."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under ER 404(a), evidence of "other" crimes or bad acts is categorically inadmissible to identify the character of a person and thus show action in conformity therewith. The State bears a substantial burden of demonstrating admissibility for a non-propensity purpose. After it rested, the State changed its theory regarding the commission of child molestation as alleged in Count 2. The testimony by two witnesses originally intended to prove that the appellant molested the complaining witness M.J.N. on a cot located outside a tent became an "uncharged act" controlled by ER 404(b) after the State announced that the alleged act of child molestation took place *inside* the tent and was therefore not the conduct described by the State's witnesses. The defense proposed a limiting instruction regarding the testimony describing

alleged sexual activity outside the tent. Did the court commit reversible error in failing to fulfill its obligation to give a limiting instruction for evidence of prior misconduct---controlled by ER 404(b)---where such instruction was needed to prevent the jury from considering appellant's alleged prior misconduct as evidence of his propensity to offend against M.J.N.? Assignment of Error 1.

2. Did trial counsel's failure to move for a mistrial constitute ineffective assistance of counsel which denied Mr. Dockery a fair trial where the State announced that the alleged child molestation took place inside a tent rather than on a cot outside the tent, thus transforming the testimony of two witnesses originally intended to prove that the alleged molestation of M.J.N. took place on the cot into testimony involving an "uncharged act," and admitted without evaluation under ER 404(b) and ER 403? Assignment of Error 2.

3. Where some evidence showed that appellant and M.J.N. engaged in sexual conduct after she turned 14 years old, was there insufficient evidence to support appellant's conviction for second degree rape of a child? Assignment of Error 3.

4. A finding of "particular vulnerability" requires proof beyond a reasonable doubt that the victim's particular vulnerability was a substantial factor in the commission of the crime. Must the aggravating factor based on victim vulnerability be reversed where there was no showing that Mr. Dockery

was aware of M.J.N.'s intoxicated state? Assignment of Error 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

Patrick Dockery was charged in Grays Harbor County Superior Court by amended information with rape of a child in the second degree (Count 1), and child molestation in the second degree (Count 2), alleging that he engaged in sexual intercourse with M.J.N. on or about July 26, 2014. RCW 9A.44.076(1)(a); 9A.44.086. Clerk's Papers (CP) 53-54. The State alleged as an aggravating factor that Mr. Dockery knew M.J.N. was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b). CP 53-54.

Mr. Dockery's first trial ended in mistrial resulting from a hung jury. In the second trial, a jury convicted Mr. Dockery of both charges. He was sentenced for rape of a child in the second degree only following merger of the offenses. Report of Proceedings¹ (RP 9/30/16) at 18; CP 185-199.

a. Motion to dismiss Count 2, proposed limiting instruction, and change of the State's theory regarding commission of Count 2

The State charged Mr. Dockery in Count 2 of the amended information with child molestation in the second degree. CP 53-54.

¹The record of proceedings consists of the following transcribed hearings: February 22, 2016, August 15, 2016, August 19, 2016, August 29, 2016, and September 30, 2016 (sentencing); May 9, 2016; August 30, 2016 (motions in limine); IRP - February 1, 2016, February 8, 2016, February 29, 2016, August 30, 2016 (jury trial, day 1); 2RP - August 30, 2016, August 31, 2016 (jury trial, day 1 and day 2); 3RP - August 31, 2016, September 1, 2016 (jury trial, day 2 and day 3); and 4RP - September 1, 2016, (jury trial, day 3).

The matter came on for second trial on August 30, August 31, and September 1, 2016, the Honorable David Edwards presiding. 1RP at 19-195; 2RP at 199-392; 3RP 397-578; 4RP 582-65. During the trial, in support of Count 2, the state presented testimony by two of M.J.N.'s friends---M.D. and V.R.--- that while on a family camping trip, M.J.N. took off her shirt and bra and got on top of Mr. Dockery while he was sleeping on a cot under a blanket or sleeping bag outside M.J.N.s tent. During a "halftime" motion to dismiss Count 2, the trial court judge expressed skepticism regarding the charge, inquiring how Mr. Dockery could have committed an offense while he was sleeping after having consumed alcohol when M.J.N. took off her shirt and got on top of him. 3RP at 548. Judge Edwards noted that there was no testimony that Mr. Dockery was conscious or that he moved in any way in response to M.J.N.'s actions. 3RP at 550. Judge Edwards found insufficient evidence to support the charge. 3RP at 550. The court did not dismiss the charge, however. After the court indicated that there was insufficient evidence to support the charge of child molestation, the State abruptly altered its theory and argued that the act of child molestation occurred *inside* the tent, outside the view of M.D. and V.R. 3RP at 548-551. The Court stated that the merger doctrine would apply in the event that Mr. Dockery was convicted of both rape and molestation. 3 RP at 550-51, 4 RP at 583.

The following day defense counsel proposed a limiting instruction

that the testimony by M.D. and V.R. that they witnessed M.J.N. on Mr. Dockery's cot could not be used as "character" evidence to support conviction. 4 RP at 583, CP 143-44. Citing *State v. Michielli*, 132 Wn. 2d. 229, 937 P.2d. 587 (1997), the court found that the State was entitled to have the jury consider both the rape and molestation charges, but that if convicted of both, the merger doctrine would apply to the molestation charge. 4RP at 582-83. The court denied the defense's request for its proposed limiting instruction. 4RP at 583.

b. Verdict, and sentencing:

The jury found Mr. Dockery guilty of second degree rape and second degree child molestation. 4RP at 654; CP 185-199. The jury also found by special verdict that M.J.N. was particularly vulnerable or incapable of resistance. 4RP at 654; CP 160, 162.

Pursuant to the merger doctrine, Mr. Dockery was sentenced for only the conviction for second degree rape. CP 188. Defense counsel argued that Mr. Dockery has an offender score of "0," and requested a sentence at the bottom of the range. RP (9/30/16) at 15. The State requested a sentence of 114 months, but noted in its sentencing memorandum that the Court could go above the standard range. The Court found that Mr. Dockery's offender score was "1" based on a prior conviction, and imposed a sentence within the standard range of 100 months to life. RP (9/30/16) at 18; CP 198. The court imposed legal financial obligations including \$500.00 for victim assessment,

and \$100.00 felony DNA fee. CP 191.

Timely notice of appeal was filed September 30, 2016. CP 200. This appeal follows.

2. Trial testimony:

Patrick Dockery went on a family camping trip on private property the weekend of July 26 and 27, 2014.² 2RP at 355. By the time Mr. Dockery arrived, several people were already at the campsite, including M.J.N. (DOB: July 28, 2000) M.D., who is Patrick Dockery's sister and friend of M.J.N., and M.D.'s girlfriend V.R. were also present. 1RP at 158. M.D. who had known M.J.N. for four to five years, invited M.J.N. to go camping for three days with her family. 1RP at 151. M.J.N. stated that the trip took place between July 25 and July 27 or 28, 2014. 1RP at 156-57.

M.J.N.'s mother, Yuonhee Kim, was initially opposed to allowing M.J.N. to go on the trip, but eventually relented because M.J.N. wanted to go camping with M.D. in part to celebrate her fourteenth birthday on Monday, July 28. 1RP at 160.

M.J.N. met her friends M.D, V.R. and her mother Lora Dockery at a rest area in Elma, Washington, and Ms. Dockery drove the three girls to the campsite in rural Grays Harbor County. 1RP at 161. The camp was located on

²The specific dates of the camping trip are disputed. The State argues that the trip began on Friday, July 25, 2014, and that the offense was on July 26 or July 27, 2014. 1RP at 137. Defense counsel argues that no offense occurred, but even so, the offense alleged would have occurred early on the morning of July 28, 2014, the day that M.J.N. turned 14. 4 RP at

property belonging to friends of Pat Dockery, the father of Patrick Dockery. 1RP at 160-62.

During the first day the only people at the camp were Lora Dockery, M.D., M.J.N., V.R, and another friend, S.H. 1RP at 164. The girls set up the camp and all slept in a large tent the first night. 1RP at 164.

Lora Dockery testified that the campong trip started on Saturday and that her husband and her son Patrick Dockery arrived on Sunday, July 27. 2RP at 355. She stated that she knew it was Sunday because she drove S.H. home so she could attend church services. 2RP at 355. S.H. testified that she was picked up for the campong trip on Saturday and taken home on Sunday so that she could go to church. 3RP at 554.

Later that afternoon several people arrived, including Pat Dockery and Patrick Dockery. 1RP at 165. They set up two more tents and also brought alcohol, including Mikes Hard Lemonade, which was kept in a cooler, and Fireball, a brand of flavored whiskey.³ 1RP at 168, 171. M.J.N. stated that all the adults except Lora Dockery were drinking alcohol. 1RP at 171.

Pat Dockery, Patrick Dockery's father, stated that he and Patrick arrived at the camp on Sunday morning. 3RP at 415. He stated that he had worked the previous day and was tired, so he slept at home on Saturday night and came to the camp on Sunday. 3RP at 416.

628-630.

³The testimony of M.J.N. and V.R. was that either Pat Dockery or Lora Dockery brought

During the day, M.N., M.D., and V.R. also consumed alcohol by taking bottles and cans from the cooler and then going to the woods to drink. They also drank shots of Fireball. 2RP at 216-17. M.J.N. had several bottles of Mikes Hard Lemonade, a can of Mikes' Harder Lemonade, which has a higher alcohol content, and several shots of Fireball. The State introduced photos showing M.J.N. holding a bottle of Mikes Hard Lemonade while in the camp. 1RP at 177-78. State's Exhibit 22.

The girls were subsequently caught drinking by Ms. Dockery and she reprimanded all three of them. 2RP at 333, 357. M.D. and V.R. stopped drinking, but M.J.N. continued to drink even after being confronted by Ms. Dockery. 2RP at 333-34, 336, 3RP at 453. Lora Dockery confronted M.J.N. a second time and she told Ms. Dockery that she was not her mother and that she did not have to listen to her and continued drinking. 2RP at 333-34, 369. Ms. Dockery stated that M.J.N. continued to drink and that when confronted a third time, M.J.N. continued to be disrespectful and yelled at her. 2RP at 373.

M.J.N., M.D. and V.R. were put in a tent to sleep by Pat Dockery. 2RP at 338. Pat Dockery also helped his son get to a cot that was in front of the girls' tent and put a blanket or sleeping bag over him. 1RP at 181. Pat Dockery stayed awake by the fire until Patrick fell asleep. 2RP at 338.

During the night M.J.N. vomited in the tent. 1RP at 180, 2RP at 323, 3RP at 432. After M.J.N. threw up, M.D. and V.R. went to sleep in a vehicle

the alcohol. 1RP at 171, 2RP at 319.

located near the tent. 2RP at 232.

M.J.N. testified that she passed out and then later woke up and went to get water from a table, and then went back into the tent. 1RP at 181. M.J.N. stated that in the tent, Patrick Dockery came into the tent and had sexual intercourse with her. 1RP at 184. She said that she “felt really heavy and kind of numb.” 1RP at 184. She stated that he did not say anything and that her memory was “spotty, but I know it happened.” 1RP at 185. She stated that after he left the tent she “stayed awake for a while” then fell asleep. 1RP at 186.

V.R. stated that during the night she heard M.J.N. crying and then saw that she was “completely naked on top” of Patrick Dockery, who was on a cot near the tent. 2RP at 324. She stated that she watched until he pushed her off of him and she “fell into the tent.” 3RP at 437-38.

M.D.’s testimony was similar. She testified that later she heard the zipper on the tent and then saw M.J.N. take off her shirt and bra and then lie on top of her brother on the cot. 3RP at 434. She stated that her brother was not moving and appeared to be asleep. 3RP at 435. The following day, M.D. was angry and walked with M.J.N. to a nearby fishing shack and told her that she had seen her on top of her brother the previous night. 3 RP at 443. She stated that M.J.N. “and acted as if she was unaware of what she was talking about.” 2RP at 328.

M.D. and V.R. came into the tent in the morning and then they walked

down a trail and then confronted her. 1RP at 187; 2RP at 199. M.D. asked her why she was on top of Patrick on the cot, and she said that she did not respond because she “didn’t know what to say.” 2RP at 200. She stated that for the rest of the day she tried to “just act normal” and then waited to be taken home. 2RP at 201. She said that she did not talk with Patrick about the incident the rest of the day. 2RP at 202. She stated that she rode on a quad runner with Patrick that day. 2RP at 204.

After they returned from the camping trip, she did not tell anyone about the incident. 2RP at 204, 206. She stated that she eventually told her friend R.D. that “something happened on the camping trip,” but she “didn’t tell her fully the story until a little later.” 2RP at 207. She said that eventually she “told her everything.” 2RP at 208.

M.J.N. testified that approximately two and half months later her mother found text messages with R.D. regarding the incident and that her mother took her to a doctor for an examination, but M.J.N. said that she still was not “ready to tell her.” 2RP at 209. She was later given a medical examination and later interviewed by law enforcement and also by Lisa Wahl, a nurse practitioner at St Peters Sexual Assault and Child Mal-Treatment Center in Lacey. 2RP at 211; 3RP at 505.

Several months later, in October, 2014, M.J.N.’s mother Yuonhee Kim, viewed text messages on her daughter’s phone and discovered a text to a friend that she had been assaulted. 2RP at 275, 293. Ms. Kim called Lora Dockery

and asked if a man in his twenties with facial hair been at the camp. 2RP at 277. Ms. Dockery told her that there was no one with that description at the camp that weekend. 2RP at 277. She stated the M.J.N. told her that Patrick Dockery had assaulted her and she contacted law enforcement. 2RP at 281.

M.J.N.'s friend R.D. stated that M.J.N. told her during the summer of 2014 that she was sexually assaulted during a camping trip. 2RP at 255-56.

Grays Harbor County Deputy Sheriff Brad Johansson read portions of Mr. Dockery's previous testimony in which he stated that he woke up and M.J.N. was top of him on the cot. 2RP at 404, 406.

D. ARGUMENT

1. **THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION REGARDING THE TESTIMONY OF M.D. AND V.R., WHICH CONSTITUTED IRREGULARLY ADMITTED ER 404(b) EVIDENCE**

In support of its contention that Mr. Dockery committed second degree child molestation against M.J.N. on the cot, the State introduced the testimony of M.D. and V.R., both of whom testified that after they left the tent to sleep in Lora Dockery's vehicle, they saw M.J.N. take off her shirt and bra and lay on top of Patrick Dockery on the cot outside the tent entrance. After the trial court stated that the evidence presented did not prove the elements of child molestation, the State abruptly changed its theory and argued that the act of child molestation took place in the tent. The trial court did not dismiss Count

2 outright, but instead told the parties that if convicted of both offenses, the two crimes would merge. 3 RP at 551, 4 RP at 583.

The court's ruling and the state's decision to modify its legal theory of the charge resulted in the testimony of M.D. and V.R. becoming irregularly admitted, "untested" ER 404(b) evidence. Appendix A.

Defense counsel proposed the following limiting instruction regarding the testimony.

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony that the alleged victim got on top of the defendant outside of the tent while he was laying on the cot. This evidence may be considered by you only for the purpose of determining credibility of the witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.
WPIC 5.30 Evidence Limited as to Purpose

CP 143-44.

The court declined to give the instruction, stating that "I think that's a comment on the evidence by the Court." 4 RP at 583.

In no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." *State v. Bacotgarcia*, 59

Wn.App. 815, 822, 801 P.2d 993 (1990). “Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.” *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).

The purpose of a limiting instruction is to prevent the jury from basing its verdict on the “once a criminal, always a criminal” reasoning that ER 404(b) is designed to guard against. *State v. Burkins*, 94 Wn.App. 677, 690, 973 P.2d 15 (1999). Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. *Saltarelli*, 98 Wn.2d at 362. A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993).

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. *State v. Foxhoven*, 161 Wash.2d 168, 175, 163 P.3d 786 (2007).

Here, Mr. Dockery's attorney requested a limiting instruction. CP 143-44. In the context of ER 404(b) limiting instructions, once a defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction. *State v. Gresham*, 173 Wash.2d 405, 269 P.3d 207 (2012), (citing *State v. Goebel*, 36 Wash.2d 367, 379, 218 P.2d 300 (1950)).

In *State v. Russell*, 154 Wn.App. 775, 225 P.3d 478 (2010) this Court reversed a conviction under similar circumstances, albeit the evidence was tested under ER 404(b) before admission. 154 Wn. App. at 777. Russell was convicted of first-degree rape of a child. *Id.* Evidence of prior sexual abuse against the same child was admitted under ER 404(b) to show Russell's "lustful disposition" toward the child. *Russell*, 154 Wn. App. at 781-82. This Court explained that when ER 404(b) evidence is admitted, a limiting instruction must be given. This Court concluded the failure to give the instruction had particular impact because the prosecutor drew attention to the prior crimes in closing argument and because the jury was instructed it must consider all the evidence. *Id.* at 786.

The trial court in *Russell* abused its discretion in failing to give a limiting instruction, resulting in reversal of Russell's conviction. *Id.* As in

Russell, evidence of prior sexual misconduct⁴ against the same minor was admitted to in an effort to show a crime in Mr. Dockery's case. This Court should reach the same conclusion it did in *Russell*: admission of the untested ER 404(b) evidence without a limiting instruction requires reversal.

The trial court erred in failing to fulfill its obligation to give a limiting instruction. The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of the alleged incident on the cot as evidence of propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. *Bacotgarcia*, 59 Wn. App. at 822. The hazard of the girls' testimony without a corresponding limiting instruction is illustrated during closing argument, when the prosecutor argued the significance of M.D.'s and V.R.'s testimony regarding the alleged sexual contact on the cot:

[V.R.] also told you that she was woken up by [M.J.N.] crying, that [M.J.N.] couldn't even talk she was so upset, that she looked up and saw [M.J.N.] talking to the defendant, laying on top of him face-to-face.

4RP at 619.

⁴Mr. Dockery does not concede that there was sexual contact with M.J.N. while on the cot, but submits that the State presented the testimony to the jury solely in an effort to prove molestation occurred on the cot, regardless of the ultimate weight of the testimony

Failure to give an ER 404(b) limiting instruction is subject to harmless error analysis. *State v. Mason*, 160 Wash.2d 910, 935, 162 P.3d 396 (2007). The error is harmless ““unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” *State v. Smith*, 106 Wash.2d 772, 780, 725 P.2d 951 (1986) (quoting *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980)). Had a limiting instruction been given, and the jury had accordingly been prohibited from considering the evidence of the incident on the cot for the purpose of showing his character and action in conformity with that character, there is a reasonable probability the outcome of the trial would have been materially different. The absence of a limiting instruction allowed the jury to consider evidence of prior misconduct as evidence of Mr. Dockery’s propensity to commit an offense against M.J.N.

The error cannot be considered harmless. The court’s erroneous ruling is significant enough that there is a reasonable probability that it affected the outcome. The evidence against Mr. Dockery was far from overwhelming; the case was entirely a credibility contest between M.J.N. and Mr. Dockery. There were no witnesses to the sexual intercourse alleged by M.J.N inside the tent, and there was no forensic evidence. Under

following the State’s election to argue the molestation actually occurred inside the tent.

the circumstances, there is a reasonable probability that the failure to give a limiting instruction affected the outcome, requiring reversal of the conviction.

2. COUNSEL'S FAILURE TO MOVE FOR MISTRIAL CONSTITUTES INEFFECTIVE ASSISTANCE

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of

such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

As noted supra, the State's initial theory was that that the molestation alleged in Count 2 occurred when M.J.N. took off her shirt and bra and was on top of Mr. Dockery on the cot. 3 RP at 546-47. After the defense moved to dismiss the count, the State theory underwent an immediate metamorphosis and the State suddenly alleged that the molestation occurred in the tent. The court made clear that if convicted of molestation and rape, the two counts would merge. 4 RP at 583.

The State's sudden election that the alleged molestation occurred in the tent immediately changed the testimony previously elicited from M.D. and V.R. regarding what they witnessed on the cot as prior bad acts evidence which went unchallenged under ER 404(b). The error was compounded by the trial court's failure to give a limiting instruction. Defense counsel did not move for a mistrial.

As a result, the jury was permitted to consider this highly irrelevant and prejudicial testimony when deliberating the charges in this case. The failure to move for a mistrial constituted ineffective assistance of

counsel.

There was no legitimate reason for counsel not to seek a mistrial after the testimony regarding M.J.N. on the cot suddenly became unchallenged ER 404(b) evidence. No defense purpose could be served by allowing the jury to consider V.R.'s and M.D.'s testimony regarding the incident. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

Mr. Dockery was prejudiced by counsel's failure, because had counsel moved for mistrial the court would have been obligated to grant the motion. Trial courts must grant a mistrial where the irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, a mistrial was

required. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

First, the irregularity here was very serious because it injected evidence regarding unchallenged propensity evidence into the deliberation. “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.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule against propensity to commit crime evidence has no exceptions. *Id.* at 421. In other words, the State can never suggest once a rapist, always a rapist. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). To give effect to the rule against using other bad acts to show criminal propensity, the State bears a “substantial burden” of justifying admission with a valid non-propensity purpose. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Ordinarily, before a trial court admits evidence of prior misconduct, it must: (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the non-propensity purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. Here, of course, due to the highly unusual

manner in which the evidence became ER 404(b) evidence after admission, none of those protections occurred in this case.

The trial irregularity in this case is also particularly significant because it involves a sex offense. “The potential for prejudice from admitting prior acts is “at its highest” in sex offense cases. *State v. Gower*, 179 Wn. 2d 851, 857, 321 P.3d 1178 (2014), citing *State v. Gresham*, and quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Here, the testimony regarding Patrick Dockery on the cot with M.J.N was admitted in an irregular manner without benefit of analysis under ER 404(b) and ER 403 , and was not mitigated with a jury instruction. The trial court would have been required to grant a defense motion for mistrial. Counsel was ineffective in failing to make such a motion.

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT M.J.N. WAS LESS THAN 14 YEARS OLD WHEN THE OFFENSE ALLEGEDLY OCCURRED WHICH IS AN ESSENTIAL ELEMENT OF SECOND DEGREE RAPE

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the

proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State charged Mr. Dockery with second degree rape of a child in the amended information, which alleged:

That the said defendant, Patrick James Edward Dockery, in Grays Harbor County, Washington, on or about July 26, 2014, did have sexual intercourse with M.J.N., who is at least 12 years old but less than 14 years old and not married to the Defendant and the Defendant was at least 36 months older than M.J.N.

CP 53.

A person is guilty of rape of a child in the second degree:

When the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1).

To be guilty of this crime, the victim must be less than 14 years old at the time of the act. RCW 9A.44.076(1), if the victim is 14 or 15 years old, then a defendant is guilty of third degree rape of a child. RCW 9A.44.079.

Here, there was testimony by M. J. N. stating that he put his penis in her vagina, but her testimony was extremely vague not only on what specifically occurred, but also regarding the date that the offense allegedly occurred. 2RP at 230. Several witnesses stated that the camping trip started on Saturday, and that Mr. Dockery arrived at the camp with his father on Sunday, July 27, 2014. Lisa Wahl, who examined M.J.N., testified that when she asked her when the rape occurred, “she indicated that it was—it was July,” and it “was close to her birthday.” 3RP at 529.

The evidence is clear that the events described by M.J.N., M.D., and V.R. occurred in the early morning hours. Given the foregoing, the State failed to establish that the alleged act of sexual intercourse occurred before midnight on Sunday, July 27, 2014, when M.J.N. would have been “less than 14 years old.” If the act occurred after midnight, then M.J.N. would have been 14 years old. The evidence simply does not establish beyond a reasonable doubt that any act of “sexual intercourse” occurred before M.J.N.’s 14th birthday.

Because M.J.N.’s age is an essential element of second degree rape of a child, RCW 9A.44.076(1), the State failed to prove every element of the charge. Accordingly, this court should reverse and dismiss with prejudice Mr. Dockery’s second degree rape of a child conviction. See *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficiency of evidence is reversal with no possibility of retrial).

4. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE AGGRAVATING FACTOR OF “PARTICULAR VULNERABILITY”

RCW 9.94A.535(3)(b) provides an “aggravating factor” if the trier of fact finds beyond a reasonable doubt “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” It is not enough that the victim was vulnerable. The Legislature enacted the phrase “particularly vulnerable,” not “vulnerable” only. Statutes are interpreted to give effect to all verbiage with no language rendered meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Accordingly, in the context of an exceptional sentence based on “particularly vulnerable,” court have ruled the State must prove “(1) that the defendant knew or should have known (2) of the victim’s particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.” *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (emphasis in original); accord *State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001) (“In order for the victim’s vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability and the vulnerability must be a substantial factor in the commission of the crime.”).

A challenge to the reasons supplied by the sentencing court to justify an exceptional sentence is reviewed under the “clearly erroneous” standard. RCW 9.94A.575(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); *State v. Ha’mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

With regard to this aggravating factor, the focus is on the victim with the trier of fact determining whether the victim was more vulnerable than other victims and if the defendant knew of the particular vulnerability. *State v. Ogden*, 102 Wn. App. 537, 7 P.3d 366 (2000).

The trier of fact erred in finding that there was sufficient evidence to support the aggravating factor of victim vulnerability. Here, there was no nexus between the alleged offense and her intoxication. The victim's vulnerability in this case was based upon M.J.N.'s intoxication. The testimony presented in this case was that all the parties involved on the evening in question had consumed alcohol. Pat Dockery testified that his son was drinking and that he needed help to get to his cot to go to sleep.

There was no evidence to support that Mr. Dockery knew or should have known that M.J.N. was particularly vulnerable based upon her alcohol intake. The testimony is that during the day all three girls were careful to hide their drinking by sneaking shots of Fireball and sneaking cans and bottles of Mikes Hard Lemonade out of the cooler and drinking them in the woods. Due to the attempt to hide their drinking, Mr. Dockery had no way of knowing how impaired M.J.N. may have been, partially since it is clear that Mr. Dockery himself was impaired by drinking, presumably with a corresponding decline in his ability to assess her vulnerability.

M.J.N.'s use of alcohol was not a substantial factor in the commission of the crime and did not make her any more vulnerable than any other victim of this

type of crime. There was no evidence presented that due to M.J.N.'s alcohol use she was more susceptible to becoming a victim. Both M.J.N. and Mr. Dockery were intoxicated on the evening in question, but not to a level which would have made her vulnerable to any alleged actions on the part of an equally intoxicated Mr. Dockery.

Based upon the insufficient evidence presented the trier of fact erred in finding the aggravating factor of victim vulnerability.

5. **THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.**

If Mr. Dockery does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment and \$100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. There has been no order finding Mr. Dockery's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991

P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Dockery’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Dockery respectfully requests this Court reverse his conviction and remand for a new trial.

DATED: June 20, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

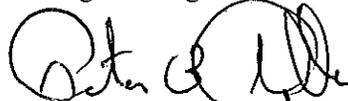
The undersigned certifies that on June 20, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Erin Christine Jany, Grays Harbor Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 20, 2017.



PETER B. TILLER

APPENDIX A

RULE ER 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;
EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

THE TILLER LAW FIRM

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