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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ANTOINE JOSEPH PERRY,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 17-1-01750-9  
The Honorable Jerry Costello, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred where it admitted testimony describing other criminal acts allegedly committed by Antoine Perry.
2. The trial court erred by finding that the dissimilar allegations of rape committed against C.B. were admissible under ER 404(b) to show a common scheme or plan.
3. The trial court abused its discretion in admitting hearsay statements made by the complainant to a sexual assault nurse examiner.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court commit reversible error when it admitted C.B.'s testimony describing an unproved incident of rape committed against her by Perry as evidence of a common scheme or plan, where her allegations were dissimilar to the charged conduct? (Assignments of Error 1 & 2)
2. Did the trial court abuse its discretion in admitting out-of-court statements made to a sexual assault nurse examiner under ER 803(a)(4), which requires statements to be reasonably pertinent to medical diagnosis or treatment, where the State did not establish that the complainant's motive was to promote her medical treatment and where the

nurse testified that she does not provide medical treatment and she uses the complainant's statements only to guide her in collecting evidence for use in a possible criminal investigation? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Antoine Joseph Perry with one count each of second degree rape, second degree assault, and unlawful imprisonment, in connection with an incident that occurred on November 4, 2016, involving alleged victim T.G.. (CP 5-6) The State alleged that the assault and unlawful imprisonment offenses were sexually motivated. (CP 6)

The jury convicted Perry as charged. (07/25/19 RP 875-76)<sup>1</sup> The trial court found that the crimes were the same criminal conduct. (10/18/19 RP 14-15; CP 220, 224) The court imposed a standard range sentence totaling 161 months to life in prison. (10/18/19 RP 30; CP 221, 224) Perry filed a timely Notice of Appeal. (CP 236)

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<sup>1</sup> The transcripts will be referred to by the date of the proceeding contained therein.

B. SUBSTANTIVE FACTS

In November of 2016, T.G. was a fifteen-year old high school student living at home with her mother and brother. (07/18/19 RP 387-89) Like many individuals in younger generations, she frequently interacted with both friends and strangers through a social media app called Snapchat. (07/18/19 RP 385-86; 07/23/19 RP 677) T.G. was able to post pictures and messages that her followers could see and respond to. (07/18/19 RP 385)

T.G. had one follower with the username "FreeGameAP." (07/18/19 RP 384) That username belonged to Antoine Perry. (07/23/19 RP 678) T.G. did not know Perry, but still gave him access to her posts and followed his posts in return. (07/18/19 RP 386-87) T.G. and Perry would occasionally write comments on each other's posts. (07/18/19 RP 391-92)

On the night of November 3, 2016, T.G. started a fire in her kitchen while she was making dinner. (07/18/19 RP 388, 392, 480) Fire fighters were called and extinguished the blaze. (07/18/19 RP 480) T.G. later posted about the fire on Snapchat, and complained that she did not get to eat her dinner. (07/18/19 RP 392) Perry responded with a message saying, "that sucks," and offering to bring her food. (07/18/19 RP 392-93) T.G. declined the offer,

because she did not know Perry. (07/18/19 RP 393)

But T.G. and Perry continued to converse over text messages, and T.G. thought Perry seemed nice. (07/18/19 RP 393) When he again offered to bring her food, she accepted and gave him her home address. (07/18/19 RP 393) T.G. thought Perry was older than her, and also felt he might be flirting with her, so she told him she was 16 years old. (07/18/19 RP 393-94) Perry asked in response, “[w]hat does that have to do with me bringing you food, silly.” (07/18/19 RP 394)

T.G.’s mother and brother were asleep at the time, so T.G. told Perry to text her when he arrived and she would come out to the car. (07/18/19 RP 398) Perry pulled up in a dark colored car that did not belong to him, and T.G. got into the front seat. (07/18/19 RP409-10) At first T.G. kept one foot out of the open passenger side door, but eventually she felt comfortable with Perry so she put her foot in the car and closed the door. (07/18/19 RP 414-16)

T.G. testified that Perry was flirting with her and tried to touch her, but she told him to stop. (07/18/19 RP 417, 420) According to T.G., Perry kept trying to touch her, then he began looking around the car and reaching under the seat. (07/18/19 RP

420) T.G. thought Perry might have a weapon, so when he told her to get into the back seat she was scared and complied. (07/18/19 RP 420-21)

According to T.G., Perry forced her to perform oral sex on him, then he performed oral sex on her. (07/18/19 RP 421-22) T.G. testified that she told Perry to stop and that she was a virgin. (07/18/19 RP 422-23) She tried to open the car door, but he closed it and told her she was not going anywhere. (07/18/19 RP 422-23)

Perry digitally penetrated T.G., then began taking off her pants. (07/18/19 RP 424) T.G. began to struggle more aggressively but, according to T.G., Perry put his hands around her neck and choked her. (07/18/19 RP 424) Then Perry forced his penis into her vagina, which was painful. (07/18/19 RP 425)

T.G. still had her phone with her, so she tried to contact someone for help. (07/18/19 RP 425-26) At first Perry did not seem to care that she was using her phone, but eventually he got annoyed and grabbed it and threw it into the front seat area. (07/18/19 RP 426, 428, 496) T.G. began crying and asking Perry to stop. (07/18/19 RP 427-28) According to T.G., Perry stopped and told T.G. that she was “killing the mood.” (07/18/19 RP 428)

They got out of the car and T.G. asked for her phone back.

(07/18/19 RP 431) Perry did not give it to her at first, so T.G. grabbed Perry's phone. (07/18/19 RP 431-32) Perry grabbed his phone back and they argued over returning T.G.'s phone. (07/18/19 RP 432) Eventually Perry began driving away and T.G. jumped out of the car without her phone. (07/18/19 RP 432-34)

T.G. went home and called her friend to tell her what had happened. (07/18/19 RP 438) Later that morning she woke up her mother and told her that she had taken their dog out for a walk when a stranger drove up, forced her into his car by threatening her with a gun, and raped her. (07/18/19 RP 442, 482-84, 491) Her mother called the police, and then took T.G. to the hospital for treatment and a forensic examination. (07/18/19 RP 443-45; 485)

After T.G. was treated and medically cleared by emergency room medical staff, and after she had been interviewed by law enforcement officers, a sexual assault nurse examiner (SANE) conducted a forensic examination to collect evidence. (07/22/19AM 513; 07/23/19 RP 642, 644-45, 646, 667-68) The SANE nurse, Shelly Pollock, did not observe any obvious injury to T.G.'s vagina or any evidence of strangulation. (07/23/19 RP 657,666, 669) Pollack completed a rape kit, which included taking swabs from various parts of T.G.'s body that might contain DNA or other

forensic evidence. (07/23/19 RP 658-65)

Over defense objection, the trial court also allowed Pollock to relate statements that T.G. made to her during the examination. (06/10/19 RP 584-615; 07/23/19 RP 649-55) First, Pollock read T.G.'s initial narrative of events:

Okay, so first thing he did was he kissed me. The second thing he did was lick all of my neck and he bit it a little. The third thing was sucked on my right boob, and fourth thing was he gave me oral sex, and, actually, the second thing he did was make me give him oral sex. And then he put his penis in my vagina, and I guess I wasn't wet enough, so he spit inside of it two to three times. Oh, and he choked me and he also fingered me, so that was it.

(07/23/19 RP 649)

Then Pollock asked T.G. a series of additional questions meant to elaborate and fill in the details of the initial narrative. Pollock related T.G.'s responses to the jury, including descriptions of how T.G. and Perry met, where the incident took place, what sexual acts she and Perry engaged in, that T.G. said she was a virgin, and that Perry choked her approximately seven times. (07/23/19 RP 650-55)

Investigators were able to match DNA taken during T.G.'s forensic exam to DNA previously collected from Perry. (07/22/19 RP 527, 530, 532) Investigators created a photomontage that

included Perry's photo, and T.G. identified him as the man she knew as FreeGameAP. (07/18/19AM RP 446-47, 456; 07/23/19 RP 632, 635)

Over defense objection, the trial court allowed the State to call another alleged victim, C.B., to testify that Perry raped her on November 26, 2016. (05/28/19 RP 21-39; 06/10/19 RP 51-55; 07/22/19 RP 547-48; CP 21-33; 178-81) C.B. was also 15 years old at the time, and met Perry through Snapchat. (07/22/19PM RP 551, 554, 574-75) That night, C.B. was helping a friend babysit, and was at the home where the child lived. (07/22/19PM 552) C.B. posted on Snapchat that she was hungry, and asked if someone would bring her food. (07/22/19PM 557) Perry responded and agreed to bring her something to eat. (07/22/19PM 557-58)

When he arrived, C.B. went outside to meet him. (07/22/19PM 558-59) C.B. got into Perry's car and they chatted while C.B. ate the food, then Perry asked where he could get Swisher cigars. (07/22/19PM 558-59) C.B. directed Perry to the store, and when they returned Perry parked the car up the street from the babysitting house. (07/22/19PM 559-60)

According to C.B., Perry asked her to help him look for his phone. (07/22/19PM 560) While she was leaning into the car to

look on the floor, Perry came around the car and pushed her face-down onto the seat. (07/22/19PM 561-62) C.B. testified that she told Perry to stop, but he choked her and then engaged in vaginal intercourse with her. (07/22/19PM 562-63) After Perry ejaculated, C.B. cleaned herself and started looking for her phone. (07/22/19PM 564, 565-66) But Perry drove away before she could find it. (07/22/19PM 565-66)

Perry testified on his own behalf. Perry first began following T.G. on Snapchat because a mutual friend asked people to follow her. (07/23/19 RP 681) He testified that T.G. asked him to bring her McDonalds, and he agreed. (07/23/19 RP 685-86, 687) He testified that T.G. initiated their physical encounter, and he did not threaten or force her to move into the back seat or engage in any sexual activities. (07/23/19 RP 694, 695, 696, 697, 699)

Perry testified that he did not have a condom, so T.G. told him not to put his penis inside her vagina. (07/23/19 RP 701) According to Perry, T.G. kept getting upset whenever his erect penis accidentally poked against her vagina, so he eventually got annoyed and told her she was killing the mood. (07/23/19 RP 701-02) This upset T.G., and she became angry and accused Perry of raping her. (07/23/19 RP 702) She grabbed his phone and got out

of the car, and they began arguing. (07/23/19 RP 703-04) Perry was able to get his phone back, and he threw T.G.'s phone out of the car window as he drove away. (07/23/19 RP 708)

Perry testified that he saw C.B.'s post on Snapchat complaining about babysitting and asking someone to bring her food. (07/23/19 RP 713, 714) Eventually Perry responded and offered to bring her a meal. (07/23/19 RP 715) C.B. also asked Perry to bring marijuana. (07/23/19 RP 716) Perry bought some marijuana and food from Panda Express, and went to the address that C.B. gave him. (07/23/19 RP717, 718)

C.B. came out to the car and they talked while C.B. ate the food. (07/23/19 RP 720) C.B. asked Perry to take her to the store to buy Swishers so that she could use their papers to smoke the marijuana. (07/23/19 RP 720-21) On the way back from the store, Perry realized he could not find his phone. (07/23/19 RP 723-24) He pulled the car over and began looking for it. (07/23/19 RP 726) C.B. also helped him look. (07/23/19 RP 727) While they were both standing outside the car, C.B. grabbed Perry and started kissing him. (07/23/19 RP 727)

C.B. asked Perry if he had a condom, and he said yes even though he could not find one. (07/23/19 RP 730) C.B. took her

clothes off and they had intercourse. (07/23/19 RP 730) After, C.B. became upset when she realized Perry had lied about using a condom. (07/23/19 RP 731) By that time, Perry was late to meet his mother and was anxious to leave, so he drove away even though C.B. was still looking for her phone. (07/23/19 RP7 732-33)

Perry testified that neither T.G. nor C.B. indicated that they did not want to engage in sexual activities with him. (07/23/19 RP 700, 729) He also denied using threats or force or choking either woman. (07/23/19 RP 695, 699, 705, 728)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE TRIAL COURT ERRED IN ADMITTING OTHER BAD ACTS EVIDENCE BECAUSE IT WAS NOT RELEVANT AND AMOUNTED TO INADMISSIBLE PROPENSITY EVIDENCE.

Evidence of the unproved sexual assault against C.B. was improperly admitted under ER 404(b) because it was not substantially similar to the incident described by T.G., and was more prejudicial than probative.

1. Absent a specific exception, propensity evidence is inadmissible.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as

“motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Before evidence of prior crimes, wrongs, or acts can be admitted, two criteria must be met. First, the evidence must be shown to be logically relevant to a material issue before the jury. The test is “whether the evidence ... is relevant and necessary to prove an essential ingredient of the crime charged.” *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982), (quoting *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952) (Goebel II.)) Second, if the evidence is relevant its probative value must be shown to outweigh its potential for prejudice.

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose in order to admit evidence that in fact will be used for the improper purpose of showing action in conformity with the charged crime. Otherwise, “motive” and “intent” could be used as “magic passwords whose mere incantation will open wide the courtroom doors to whatever

evidence may be offered in their names.” *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (quoting *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. *State v. Fisher*, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009) (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must also be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. *Fisher*, 165 Wn.2d at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (Gobel I)).

“Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.”

*Smith*, 106 Wn.2d at 776.

This Court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. *Fisher*, 165 Wn.2d at 745. A trial court's ruling admitting evidence is reviewed for abuse of discretion. *Fisher*, 165 Wn.2d at 745. A trial court abuses its discretion where it fails to abide by the rule's requirements. *Fisher*, 165 Wn.2d at 745.

The trial court in this case admitted the testimony of C.B. under ER 404(b) after finding that it was evidence of a common scheme or plan that was probative of Perry's intent and of T.G.'s lack of consent. (06/10/19 RR 51-55; 07/22/19PM RP 548-49; CP 178-81)

2. The trial court wrongly concluded that C.B.'s testimony was admissible under the common scheme or plan rationale.

Evidence that a "[d]efendant committed markedly similar acts of misconduct against similar victims under similar circumstances" is admissible to show a common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Proof of such a plan is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an

element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. *Lough*, 125 Wn.2d at 852.

The State must establish “[a] high level of similarity... ‘the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.’ . . . [T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” *State v. DeVincentis*, 150 Wn.2d 11, 19-20, 74 P.3d 119 (2003) (quoting *Lough*, 125 Wn.2d at 860).

But propensity evidence is never admissible in criminal cases. ER 404(b). Where the charged crime and the prior acts aren’t substantially similar (beyond mere similarity of outcome), the prior acts serve no purpose other than to show that the accused person is a bad person, and thus likely committed the charged crime. Such evidence is “clearly inadmissible.” *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004).

This Court’s opinion in *State v. Harris* is helpful here. 36 Wn. App. 746, 677 P.2d 202 (1984). In that case, Harris and his co-defendant, Jamie Gibbs, were tried together for the rapes of two

women, during two separate incidents that occurred a few weeks apart. 36 Wn. App. at 747. In the first incident, the female victim accepted a ride in a car with Harris and Gibbs, but they refused to let her out of the car when she asked to leave. Harris instead drove to Gibbs' house, where the men alternated holding the victim down and having sexual intercourse with her. 36 Wn. App. at 747. In the second incident, a different female accepted a ride from Harris and Gibbs, and instead of taking her home as she requested, Harris drove to a dead end street. 36 Wn. App. at 748. The men forced the victim into the back seat and alternated forced sexual intercourse with her. 36 Wn. App. 748. Harris' and Gibbs' pretrial motion to sever the two counts was denied. 36 Wn. App. at 748.

On appeal, the State argued that the court's refusal to sever was justified in part because each rape was part of a common scheme or plan. *Harris*, 36 Wn. App. at 751. This Court disagreed:

In its effort to justify admission the State points out that "both victims voluntarily entered vehicles with the defendants and in both instances the defendants drove the victims against their will to a location where the rapes occurred." In so urging, the State has fallen into the common error of equating acts and circumstances which are merely similar in nature with the more narrow common scheme or plan. ... [I]t is obvious the two rapes here do not qualify as links in a chain forming a common design, scheme or plan. At most they show only a propensity, proclivity,

predisposition or inclination to commit rape. Such evidence is explicitly prohibited by ER 404(b).

36 Wn. App. at 751. Likewise here, the incidents with T.G. and C.B. may be similar in nature or result, but are not so markedly similar that they form a common scheme or plan.

The common characteristics between the crimes relied on by the trial court include evidence that (1) Perry used Snapchat to make contact with T.G. and C.B., thus allowing him to “hide his identity” by using a made-up name, while “trying to gain the confidence of both” young women; (2) both T.G. and C.B. were 15 or 16 years old, an age that is “susceptible to online manipulation and curiosity about the opposite sex;” (3) Perry drove a car that did not belong to him; (4) Perry parked in front of both homes, thus “requiring the girls to come to” his car “to isolate them;” (5) Perry “used food as an excuse to meet the girls or gain their friendship or trust;” (6) the sex acts occurred in the car after Perry “pretends to be their friend or using the ruse of going on an “innocent drive;” (7) choking used as a method of subduing resistance; (8) the need for both girls to flee the car and Perry’s “shift in demeanor” after the act was completed; (9) Perry’s attempt to “prevent communication of both girls by not allowing them access to their cell phones; and,

finally, (7) the closeness in time of both incidents. (CP 179-80; 06/10/19 RP 53-54)

However, the trial court mistakenly found similarities where none existed, and the remaining similarities are not so substantial that they rise to the high level of similarity required to find a common scheme or plan. First, Snapchat is an extremely common mode of communication and social contact for young people. (07/18/19 RP 385) It is standard for individuals to have a unique made-up “username.” Also, Perry did not “hide his identity,” as both T.G. and C.B. testified that they were able to see photos and messages Perry posted on his account. (07/18/19 RP 386-87, 391-92; 07/22/19PM RP 554-55, 574)<sup>2</sup>

Perry did not “require” both girls to come out to his car. T.G. testified she directed Perry to text her when he arrived at her house so that she could come out to the car. (07/18/19 RP 398) Likewise, the use of food is more coincidental than a scheme on Perry’s part—both girls independently posted about being hungry, and C.B. testified that she posted a request specifically asking for someone to bring her food. (07/18/19 RP 392; 07/22/19PM RP

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<sup>2</sup> C.B. testified that she mostly ignored Perry’s messages or posts, but nevertheless she could see them. (07/22/19PM RP 554-55, 574)

557)

There was no evidence that Perry used a “ruse” of an “innocent drive” in both incidents. Only C.B. testified that they went on a drive to a convenience store to get Swisher cigars. (07/22/19PM RP 558-59) And there is no evidence that Perry attempted to prevent communication by not allowing access to their phones during the incident. C.B. could not remember how she got separated from her phone. (07/22/19PM RP 565) And T.G. testified that she was actually using her phone during the act of sexual intercourse and that Perry did not seem to care. (07/18/19 RP 425-26, 496)

The remaining similarities are so minor or innocuous that they cannot naturally be explained as being part of a common plan Perry created and carried out in order to commit sexual assaults.

3. The error in admitting the other acts evidence requires reversal.

The erroneous admission of ER 404(b) evidence, requires reversal if the error, “within reasonable probability, materially affected the outcome.” *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the

prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *Acosta*, 123 Wn. App. at 438.

It is well recognized that evidence of a defendant's prior criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. *State v. Calegar*, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); *State v. Perrett*, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the charged crime. *State v. Newton*, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). "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).

Furthermore, the potential for prejudice is even higher where the other act is for an offense that is nearly identical to a current charge. See *State v. Pam*, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to "the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime

should be admitted sparingly[.]” *Newton*, 109 Wn.2d at 77 (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C.Cir.1967)).

The detailed testimony by C.B. about the subsequent incident, committed in a similar way to the current charge, was at best minimally probative. But it was highly prejudicial. The admission of the prior acts therefore violated not only ER 404(b), but also ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative.

The trial court erred when it allowed the State to present detailed testimony about the incident with C.B.. The prejudice from this error could not be cured by the limiting instruction, and Perry’s convictions must be reversed.

**B. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING T.G.’S OUT-OF-COURT STATEMENTS MADE TO THE SANE NURSE.**

T.G.’s out-of-court statements made to the sexual assault nurse examiner Shelly Pollock were not admissible because they did not fall under an exception to the hearsay rule.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. ER 801. Hearsay evidence is inadmissible unless an exception applies. ER 802. ER 803(a)(4) provides a hearsay exception for “[s]tatements made for purposes of medical

diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” A party demonstrates that a statement is reasonably pertinent to medical diagnosis or treatment when “(1) the declarant’s motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment.” *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

Perry objected to the admission of T.G.’s statements to Pollack because the purpose of the examination, and the statements she made during the exam, was to gather evidence and not to receive medical treatment. (70/22/19PM RP 584-85) The trial court found that there was a dual purpose to T.G.’s statements, forensic and medical, and that because there was a medical component they were admissible under ER 803(a)(4). (07/23/19 RP 610-11, 614, 615) A trial court’s evidentiary rulings are reviewed for abuse of discretion. See *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

In *Williams*, this Court found that statements made to a

forensic nurse during a medical examination were admissible under ER 803(a)(4) because the examination was conducted for “a combination’ of purposes—medical as well as forensic,” and because the evidence indicated that the declarant’s motive was not purely forensic. 137 Wn. App. at 746-47. But here, the State did not demonstrate that T.G.’s motive was to promote treatment or that Pollack relied on the statements for the purpose of providing medical treatment.

T.G. testified that her mother called 911, and eventually an ambulance came and took her to the hospital. (07/18/19 RP 443) T.G. did not really know why she was going to the hospital, and she “didn’t know [she] was going there to get swabbed and stuff.” (07/18/19 RP 443, 444) She does not remember if she talked to Pollock about what happened. (07/18/19 RP 445)

Pollock explained that a forensic “sexual assault nurse examiner is a nurse who collects evidence from patients who come in and have an alleged sexual assault.” (07/23/19 RP 642) The SANE nurse will “do a full exam, but ultimately any injuries that need a full medical attention will be done by the ER doctor and the nurse.” (07/23/19 RP 642) Pollock is not employed by the hospital. (07/23/19 RP 643) She works for a company that is based out of

Oregon, which provides forensic nurses for all of the MultiCare and CHI hospitals in the region. (07/23/19 RP 643) She is dispatched to one of the hospitals if “someone presents to the ER and alleges that they were sexually assaulted[.]” (07/23/19 RP 644)

Before the forensic exam begins, the patient is first seen by medical personnel in the emergency room, and any treatment and diagnosis takes place there. (07/23/19 RP 667) Pollock testified that it is not her job to treat or diagnose the patient. (07/23/19 RP 667-68) Instead, her job is to collect evidence for use in a potential criminal investigation. (07/23/19 RP 668) Any evidence collected is handed over to the investigating officers. (07/23/19 RP 665)

Before beginning the exam, Pollock gets consent from the patient. (07/23/19 RP 642) Then, Pollock starts with a “fairly short interview,” and that interview will guide her to where she will look for and potentially collect evidence. (07/23/19 RP 642-43)

Unlike in *Williams*, there was no evidence presented to show that T.G.’s motive in talking to Pollock was to obtain medical care and treatment. It was not T.G.’s idea to seek medical attention, and by the time she met Pollock she had already been seen by emergency room doctors or nurses and had already given a statement to a police officer. (07/18/19 RP 445; 07/23/19 RP 646,

667) There is nothing in T.G.'s testimony to indicate that her motive when she spoke to Pollock was to receive or promote additional medical treatment or diagnosis.

And Pollock did not rely on T.G.'s statements for the purpose of providing medical treatment. Pollock only asked T.G. to describe what happened so that she would know where to look for evidence. (07/23/19 RP 642-43) Finally, sexual assault forensic examinations are totally voluntary and not medically necessary. (07/23/19 RP 642, 656) The objective purpose of the exam is to collect evidence to assist in a criminal investigation and potential prosecution, not to provide needed medical care.

Other state appellate courts have found that statements made during a sexual assault forensic examination are not for the purpose of medical treatment and diagnosis. See *State v. Hartman*, 64 N.E.3d 519, 543 (Ohio Ct. App. 2016) ("a nurse's testimony concerning statements made by a rape victim, recorded by the nurse for the purpose of assisting a criminal investigation, and not for nursing treatment or diagnosis, is inadmissible hearsay"); *Medina v. State*, 122 Nev. 346, 143 P.3d 471, 473 (Nev. S. Ct. 2006) ("A particular duty of a SANE nurse is to gather evidence for possible criminal prosecution in cases of alleged

sexual assault. SANE nurses do not provide medical treatment.”).

Because T.G.’s statements to Pollock were not reasonably pertinent to medical diagnosis or treatment, the trial court abused its discretion in admitting them. The erroneous admission of the hearsay evidence requires reversal. Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983).

It is reasonably probable that the outcome of the trial would have been different if the jury had not heard the extensive incriminating hearsay evidence from Pollock. The evidence substantially bolstered T.G.’s trial testimony, in a case where the jury’s verdict depended entirely on whether they believed T.G.’s or Perry’s version of events. Perry’s convictions must be reversed.

## **V. CONCLUSION**

The trial court improperly admitted propensity evidence because the other acts evidence did not show marked similarities to the charged crime and did not show that it was part of a common scheme or plan. Additionally, the statements to the SANE nurse were not admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment because

they were not reasonably pertinent to diagnosis or treatment. This Court must reverse Perry's convictions and remand his case for a new trial.

DATED: March 23, 2020



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WSB #26436

Attorney for Appellant Antoine J. Perry

**CERTIFICATE OF MAILING**

I certify that on 03/23/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Antoine Joseph Perry, DOC# 333375, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

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