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Court of Appeals
Division III
State of Washington

No. 283275

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

RODOLFO R. TINAJERO,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL E. SCHWAB, JUDGE

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erroneously admitted accusations of a prior sexual misconduct under ER 404(b)?
2. Whether the trial court erroneously admitted accusations of prior sexual misconduct under RCW 10.58.090?
3. Whether the Appellant Rodolfo Tinajero received ineffective assistance of counsel in that counsel failed to object to certain out-of-court statements?
4. Whether evidence was sufficient to support a deadly weapon finding?
5. Whether the trial court erroneously found that the Appellant was a persistent offender based upon a prior conviction in which he entered an *Alford* plea?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not abuse its discretion in admitting evidence of a prior sexual assault under ER 404(b), in order to prove a common scheme or plan.
2. The Supreme Court has found, and the State concedes, that RCW 10.58.090 is unconstitutional, and the evidence of the

prior sexual assault was not admissible on that basis. The evidence was, however, independently admissible under ER 404(b).

3. Tinajero's counsel was not ineffective, as the complained-of testimony was admissible under exceptions to the hearsay rule, and counsel made a strategic decision to attack the credibility of the State's witnesses.
4. There was sufficient evidence to support the jury's finding that a deadly weapon was used in the commission of the crime.
5. A conviction obtained as a result of an *Alford* plea is a prior conviction for purposes of the Persistent Offender Accountability Act.

II. STATEMENT OF FACTS

The State does not dispute Tinajero's Statement of the Case, but will supplement that narrative herein. RAP 10.3(b).

III. ARGUMENT

1. **The trial court did not abuse its discretion in admitting prior sexual misconduct evidence under the exceptions of ER 404(b), independent of RCW 10.58.090.**

The Washington Supreme Court has declared that RCW 10.58.090 is unconstitutional. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). “In sum, RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.” Id.

Only in rare cases “where a legislative enactment irreconcilably conflicts with a court rule and the rule is procedural in nature will we invalidate the enactment. This is one such circumstance.” Id., at 434.

So, too, this case must be reviewed in light of the holding in Gresham. As the statute is unconstitutional, this court will need to set aside that portion of the trial court’s analysis pertaining to that statute.

The State would submit, however, that evidence at issue in this case, that of a prior sexual assault involving another victim, was properly analyzed and admitted by the trial court under the common scheme or plan exception to the court rule, as well as to refute the defense of consent. As in the case of State v. Scherner, consolidated with Gresham on review, the admissibility of evidence of prior sex offenses under the rule is dispositive. Indeed, this court may affirm the trial court on any correct ground. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

A trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. State v. Sexsmith, 138 Wn. App. 497,

504, 157 P.3d 901 (2007); State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

It is well settled that the erroneous admission of evidence under ER 404(b) is analyzed under the lesser standard for nonconstitutional error, i.e., whether, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Gresham, 173 Wn.2d at 433, (citations omitted).

ER 404(b) provides in pertinent part that “[e]vidence 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 Court of Appeals has held that, in the context of child molestation, a defendant’s past acts may be admissible to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. Sexsmith, 138 Wn. App. at 504. The prior acts must be “(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.” State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features to show a unique method of committing the crime. State v. DeVincentis, 150 Wn.2d 11, 20-21, 74 P.3d 119 (2003). “[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” Id., at 13. *See, also*, State v. Kennealy, 125 Wn.2d 847, 862, 889 P.2d 487 (1995); Lough, 125 Wn.2d at 856, *quoting* People v. Ewoldt, 7 Cal.4th 380, 399, 867 P.2d 747, 27 Cal.Rptr.2d 646 (1994).

This court has affirmed the use of a prior rape to show common scheme or plan in State v. Williams, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010):

The trial court concluded that the evidence was relevant and appropriate since Mr. Williams claimed that his current victims consented to sexual intercourse. Report of Proceedings (RP) at 57. We agree. The evidence was relevant to the element of forcible compulsion. Id.; RCW 9A.44.040; see State v. Saltarelli, 98 Wash.2d 358, 368, 655 P.2d 697 (1982), (evidence of prior attempted rape admitted to prove defendant used force and the victim did not consent.). The court concluded that the 1995 rape conviction showed a common scheme involving similar victims (women of a similar age, involved with drugs) and a similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness

during the rape). The trial court also noted that the current rapes occurred within days of each other and only 14 months after Mr. Williams was released from prison for the 1995 rape conviction.

Id., at 491-92

As noted in Gresham, evidence of a criminal defendant's commission of other sex offenses was already admissible for proper purposes prior to the legislative enactment of RCW 10.58.090. ER 404(b) prohibits the admission of such evidence only for the purposes of demonstrating the criminal defendant's character in order to show activity in conformity with that character. Accordingly, in Schnerer, the Supreme Court held that the trial court did not err in additionally allowing misconduct evidence under ER 404(b) to show a common plan or scheme. Gresham, 173 Wn.2d at 419-20.

Here, there were marked similarities between the accounts of the victim of the April 2007 rape, and that of the victim in this case. In both circumstances, Mr. Tinajero lured the victim into an orchard where no other workers were present, promising work to the victim. He threatened each with a pen knife, instructing her to remove her clothing, then attempted intercourse by forcible compulsion. He did not dispute the act of sexual intercourse with the victim in the instant case, M.V., but claimed that the intercourse was consensual. **RP 1071, 1074**

The court, on the record, and its findings, complied with the four-step analysis identified in Lough, finding by a preponderance of the evidence that the prior assault occurred, identifying the relevance of the proffered evidence, and determining that the probative value of the evidence was not outweighed by the danger of unfair prejudice:

3. The evidence of the prior act is relevant to establishing common scheme or plan, intent (in refutation of a stated consent defense), and identity, and as such is relevant and probative of elements of the crime charged and in rebuttal of the defense.

...

9. The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by any potential for undue delay, waste of time or needless presentation of the evidence.

(CP 30-31)

The current and prior incidents were sufficiently similar that the evidence was highly relevant to refuting the defense of consent. Lough, 125 Wn.2d at 857; Williams, 156 Wn. App. at 491-92.

A case cited by the Appellant, State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984) is easily distinguished from the facts here. In that case, the Court of Appeals reversed the convictions of two defendants whose cases had been joined for trial, finding that evidence of two separate rapes did not constitute a common scheme or plan, and instead

only showed a propensity or proclivity to commit rape which is prohibited by ER 404(b). Id., at 751. Indeed, the only similarity between the two assaults was that they were committed in a motor vehicle after the victim was picked up by the defendants. Id., at 747-48.

There being no abuse of discretion, the court's quite thorough findings on the ER 404(b) evidence should be affirmed.

2. The telephone information was not testimonial.

Tinajero claims that the testimony as to Deputy Mike Russell, relating that the number provided by Ms. S. belonged to Mr. Tinajero, constituted testimonial hearsay, and thus violated his rights under the confrontation clauses of the art. I, s. 22 and the Sixth Amendment, since the supposed declarant, a dispatcher, was unavailable for cross examination. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Since the declarant would not reasonably expect that that such a statement would be used prosecutorially, it does not constitute testimonial hearsay. It would be no more testimonial than looking up a number in a telephone directory and passing along the name of the individual associated with that account. The subscriber information would not have been prepared in preparation for litigation by the dispatcher, but instead would have been kept by the communications provider and communicated

to the dispatcher. The information did not constitute a certification for use in court; it was a piece of information used by Sergeant Russell in the course of his investigation. *See, State v. Jasper*, 174 Wn.2d 96, 109-110, 271 P.3d 876 (2012). Even if admitted in error, it is clear that when the evidence as a whole is examined, such error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

3. Defense counsel was not ineffective.

In order to establish a claim of ineffective assistance of counsel, Tinajero must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced by his counsel's deficient representation, such that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Furthermore, the basis for the claim of ineffective assistance of counsel must be apparent from the record. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The courts also engage in a strong presumption that counsel's representation was effective. *Id.*, 127 Wn.2d at 335.

Additionally, deficient performance “is not shown by matters that go to trial strategy or tactics.” State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

A reviewing court looks to the facts of the individual case to see if the Strickland test has been met, resisting *per se* application of the holding in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001), *citing* State v. Robinson, 138 Wn.2d 753, 767-68, 982 P.2d 590 (1999).

Tinajero asserts that his counsel was ineffective first by failing to object to hearsay testimony given by Felipe Bravo, boyfriend of the victim, M.V. at the time. However, the record reflects that counsel cross-examined the witness at length, challenging his veracity and identifying inconsistencies between his testimony and prior statements. **(RP 730-45)**

Additionally, the out-of-court statements of M.V. which Mr. Bravo described would be admissible under the excited utterance exception to the hearsay rule. ER 803(a)(2). Mr. Bravo testified the M.V. was crying at the time she told him what had happened, and her eyes were swollen. **(RP 724)** That being the case, Tinajero does not meet his burden of showing unprofessional error, but even if there were, he has not shown that the result of the trial would have been different.

Similarly, statements introduced through the testimony of Dr. Seymour and his nurse would have been admissible under the medical diagnosis exception under ER 803(a)(4). Tinajero asserts that since the medical visit was delayed some 30 hours, it was unnecessary for any medical diagnosis or treatment, but cites no authority to support his position. Again, Tinajero has not met his burden of showing deficient performance or prejudice.

Finally, Sergeant Russell testified as to the statement made to him by Ms. S. in April of 2007. He had responded to an orchard immediately upon being dispatched, and observed that she was crying, upset and visibly terrified. The incident she described to Russell appeared to him to be recent and difficult. **(RP 963-64)** Again, this statement would not be excluded by the hearsay rule pursuant to ER 803(a)(2) as an excited utterance. Counsel was on record as objecting to the introduction of the ER 404(b) evidence in its entirety, but he was not deficient by not further objecting to Russell's testimony at the time.

4. Sufficient evidence supported the deadly weapon finding.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, Tinajero displayed the knife to M.V.; it terrified her, and he threatened her, claiming that if she didn't do what he told her to, she would not see her daughters again. **(RP 654-55)**

The jury was instructed both that a knife with blade longer than three inches is a deadly weapon, and that a deadly weapon is an implement or instrument that has the capacity to inflict death. **(CP 63)** Both

definitions are correct under RCW 9.94A.825. Given the testimony of M.V. and Deputy Mottice, the jurors had sufficient evidence upon which to base a finding that Tinajero was armed with a deadly weapon at the time of the rape.

5. The court properly determined that Tinajero was a Persistent Offender.

Tinajero maintains that his 1994 conviction for first degree burglary with sexual motivation does not constitute a predicate offense for purposes of determining that he was a persistent offender as defined in former RCW 9.94A.030(33), since the conviction was entered after entry of an *Alford* plea. The cases he cites do not support his position, and are easily distinguished.

First, in In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), the Supreme Court held that in order to determine whether a foreign crime was comparable to a Washington crime for purposes of the Persistent Offender Accountability Act, the foreign offense must be both legally and factually comparable. Accordingly, “facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign

conviction cannot be truly be said to be comparable.” Lavery, 154 Wn.2d at 258.

Likewise, in State v. Releford, 148 Wn. App. 478, 489, 200 P.3d 729 (2009), the issue addressed by the Court of Appeals was factual comparability of a foreign conviction for purposes of sentencing in Washington.

In In re Personal Restraint of Spencer, 152 Wn. App. 698, 708, 218 P.3d 924 (2009), the court dealt with recantations in the face of entry of an *Alford* plea, and held that the Petitioner should be allowed to withdraw his plea in light of deficiencies in the testimony of witnesses whose statements provided the factual basis for the plea.

None of these cases are on point, and Tinajero has not cited no authority for the proposition that a conviction entered after a court accepts an *Alford* plea, is any less a predicate offense than entered after a verdict or straight plea. There is simply distinction in the SRA, and first degree burglary, as a Class A felony is a “Most serious offense” by definition under former RCW 9.94A.030(a). In other words, the State did not have to prove the facts underlying that conviction were admitted, but the fact of the conviction itself.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction and sentence.

Respectfully submitted this 6th day of July, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant and the Appellant by depositing copies in the U.S. Mail.

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Dated at Yakima, WA this 6th day of July, 2012

/s/ Kevin G. Eilmes