

No. 29959-7-III

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

FILED
January 24, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RANDY GENE ROBINSON,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable C. James Lust

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

1. The trial court committed reversible error in admitting evidence of two prior rapes under RCW 10.58.090 and ER 404(b).....6

 a. RCW 10.58.090 is unconstitutional.....6

 b. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative.....7

 c. The testimony about the other rapes was improperly used to show action in conformity therewith and was substantially more prejudicial than probative.....10

 i. Admission of evidence of prior rapes “to establish forcible compulsion and rebut a defense of consent” was for an improper propensity purpose.....11

 ii. Admission of evidence of prior rapes “to establish common scheme or plan” was for an improper propensity purpose.....15

 iii. Admission of evidence of prior rapes deprived Mr. Robinson of a fair trial.....22

 d. Reversal is required.....24

2. In a prosecution for rape and burglary with sexual motivation, a limiting instruction which states that evidence of prior convictions and conduct may be considered for the purpose of proving forcible compulsion misstates the law and violates ER 404(b)’s prohibition against impermissible propensity evidence.....25

3. Cumulative error deprived Mr. Robinson of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22.....	30
4. The findings that Mr. Robinson has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.....	31
D. CONCLUSION.....	33

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>United States v. Foskey</u> , 636 F.2d 517 (D.C. Cir. 1980).....	24
<u>United States v. Goodwin</u> , 492 F.2d 1141 (5 th Cir. 1974).....	9
<u>United States v. Meyers</u> , 550 F.2d 1026 (5 th Cir. 1977).....	24
<u>North Carolina v. McKinney</u> , 430 S.E.2d 300 (N.C.App. 1993).....	18
<u>Salas v. Hi-Tech Erectors</u> , 168 Wn. 2d 664, 230 P.3d 583 (2010).....	24, 25
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	30
<u>State v. Badda</u> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	30
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	31, 32
<u>State v. Bertrand</u> , ___ Wn. App. ___, 2011 WL 6097718 (Dec. 18, 2011).....	31, 32, 33

<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987).....	19
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	30
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	15
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	16, 17, 18, 21, 22
<u>State v. Fisher</u> , 165 Wn.2d 727, 745, 202 P.3d 937 (2009).....	9, 10
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 768 (2007).....	26
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	10, 14
<u>State v. Gresham</u> , ___ P.3d ___, 2012 WL 19664 (Jan. 5, 2012).....	7, 8, 16, 17, 18, 26
<u>State v. Harris</u> , 36 Wn. App. 746, 377 P.2d 202 (1984).....	19, 20, 21
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	23
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	9, 16, 17, 21, 22, 26
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	23
<u>State v. Perrett</u> , 86 Wn. App. 312, 322, 936 P.2d 426, <i>rev. denied</i> , 133 Wn.2d 1019 (1997).....	30
<u>State v. Pogue</u> , 104 Wn. App. 981, 17 P.3d 1272 (2001).....	12, 13
<u>State v. Saltarelli</u> , 98 Wn.2d 358 655 P.2d 697 (1982).....	8, 14, 15, 20, 23, 25, 26
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	9, 10
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	10
<u>State v. Thomas</u> , 166 Wn.2d 380, 208 P.3d 1107 (2009).....	24

<u>State v. Thomas</u> , 35 Wn. App. 598, 668 P.2d 1294 (1983).....	24
<u>State v. Vy Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	9
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1998).....	8
<u>State v. Williams</u> , 156 Wn. App. 482, 234 P.3d 1174, <i>rev. denied</i> 170 Wn.2d 1011 (2010).....	13, 14, 18

Statutes

U.S. Const., amend. 14.....	24
Wash. Const. art. I, § 21.....	30
Wash. Const. art. I, § 22.....	30
RCW 9A.44.040.....	14
RCW 9.94A.760.....	32
RCW 10.58.090.....	6, 7
RCW 10.58.090(6)(g).....	22
RCW 70.48.130.....	32

Court Rules

ER 403.....	7, 9, 22, 24
ER 404(b).....	6, 7, 8, 9, 10, 11, 12, 13, 16, 20, 21, 22, 23, 26, 27, 28

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence of two 19-year-old rapes of which Mr. Robinson was convicted.
2. The trial court erred in entering Finding of Fact Nos. 20, 22.¹
3. The trial court erred in entering Conclusion of Law Nos. 7, 8.²
4. The “limiting instruction” given to the jury misstated the law.
5. Mr. Robinson was denied a fair trial.
6. The record does not support the findings that Mr. Robinson has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care.

Issues Pertaining to Assignments of Error

1. Evidence of acts other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts. In this case, Mr. Robinson admitted he had sexual intercourse with C.L.H but denied he committed first-degree rape by forcible compulsion or that he entered her house unlawfully. The trial court allowed the State to call as witnesses the victims of two prior rapes Mr. Robinson committed, to which he pled guilty to first-degree rape by forcible compulsion. Although the trial court admitted the evidence of the other acts to establish forcible

¹ Findings of Fact and Conclusions of Law re: RCW 10.58.090/ER 404(b), CP 172–73.

² Findings of Fact and Conclusions of Law re: RCW 10.58.090/ER 404(b), CP 174.

compulsion, rebut consent defense and to show common scheme or plan, the evidence was relevant only to show propensity to commit rape by forcible compulsion. Did the trial court commit prejudicial error in admitting this evidence?³

2. In a prosecution for rape and burglary with sexual motivation, does a limiting instruction stating that evidence of prior convictions and conduct may be considered for the purpose of proving forcible compulsion misstate the law and violate ER 404(b)'s prohibition against impermissible propensity evidence?⁴

3. Did cumulative error deprive Mr. Robinson of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22?⁵

4. Should the findings that Mr. Robinson has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?⁶

B. STATEMENT OF THE CASE

Randy Gene Robinson was charged with first-degree rape by forcible compulsion and first-degree burglary with sexual motivation for

³ Assignment of Error Nos. 1, 2, 3, 5.

⁴ Assignment of Error Nos. 4, 5.

⁵ Assignment of Error Nos. 1, 2, 3, 4, 5.

acts he committed against C.L.H. CP 54–55. Mr. Robinson’s explanation of events was that he had known C.L.H. for some time and the entry into her home and subsequent sexual activity was consensual. RP 667–84.

C.L.H. testified one evening she took some medication to help her sleep and, after having several glasses of wine, dozed off on her couch with the TV on. RP 276–79, 284, 303–04. She awakened as an unknown man wearing a sort of face covering and holding a knife pulled her up off the couch by her wrist. RP 285–86, 291. He led her into the bedroom and pushed her on the bed, performed oral sex and had her perform oral sex on him, and put his penis into her vagina. The man then took her to a bathroom and made her take a shower. While she did so, the man left the house. RP 286–90, 292–96.

The State sought to introduce evidence of two prior rapes Mr. Robinson committed, against S.S. and T.L. CP 7; RP 480–82, 509–11. Mr. Robinson had pled guilty to one rape and had entered an Alford plea to the other. CP 179, 188. The State sought admission under RCW 10.58.090 and ER 404(b). CP 8–13. The defense objected before trial, during trial and during presentation of the written findings. RP 3–13, 16–17, 20–22, 40–44, 231–33, 235–36, 481, 509, 877–79.

⁶ Assignment of Error No. 6.

By letter opinion filed in October 2009, the trial court decided it was unnecessary to address the constitutionality of RCW 10.58.090 and finding the evidence of the two prior convictions was far more prejudicial than probative, ruled against its admission. CP 33–34. In September 2010 the court granted the State’s motion for reconsideration and reversed itself. The court admitted the evidence under RCW 10.58.090 and ER 404(b) “to establish forcible compulsion and rebut consent defense ... [and] to establish common scheme or plan.” CP 172–74.

S.S. testified about the rape at knife-point committed by a person unknown to her and for which Mr. Robinson pled guilty. The attack occurred at night in her home and after a single act of penetration Mr. Robinson fled. RP 480–90; CP 179. T.L. testified at length about the rape for which Mr. Robinson entered an Alford plea. The in-home attack occurred at night, and the single act of penetration was perpetrated by a masked intruder who threatened several times to harm her children if she didn’t remain quiet. As Mr. Robinson went out the door, she recognized him as her step-sister’s boyfriend—who had babysat her two children just that evening while she and her step-sister went out dancing. RP 509–22; CP 188. Another witness also discussed the S.S. and T.L. rapes, and the

prosecutor referenced both rapes in closing argument. RP 567–71, 814–19, 843.

The jury found Mr. Robinson guilty as charged of first-degree rape and first-degree burglary. RP 869. By special verdict the jury found that the burglary was committed with sexual motivation. RP 869–70. By special verdicts the jury also found that Mr. Robinson was armed with a deadly weapon at the time of committing each crime (RP 869), and that the State had proved the two alleged alternative means of committing each crime. RP 870. The court found that Mr. Robinson is a persistent offender under RCW 9.94A.030(36) and sentenced him to concurrent terms of life without the possibility of release for the two crimes. CP 194, 196.

As conditions of sentence, the court made the following findings:

¶ 2.7 Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP 195.

¶ 4.D.4. Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration

or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2011 is \$79.75 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).

¶ 4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 198.

This appeal followed. CP 206.

C. ARGUMENT

1. The trial court committed reversible error in admitting evidence of two prior rapes under RCW 10.58.090 and ER 404(b).

a. RCW 10.58.090 is unconstitutional. The trial court allowed the State to call the victims from two other rape cases as witnesses in this case, and to use those rapes to prove Mr. Robinson committed rape by forcible compulsion here. The court identified the purpose for admission of the evidence under RCW 10.58.090 and ER 404(b) was to establish forcible compulsion, rebut consent defense and to show common scheme or plan. In a recent decision, the Washington Supreme Court stated

“[b]ecause RCW 10.58.090 irreconcilably conflicts with ER 404(b), we hold that the statute violates the separation of powers doctrine and declare it unconstitutional.” State v. Gresham, ___ P.3d ___, 2012 WL 19664 (Jan. 5, 2012), *12.

Here, the trial court admitted the evidence pursuant to “RCW 10.58.090 and ER 404(b)”, generally, and made no separate analysis under the statute or the court rule. CP 170–74; RP 46–48. Where a trial court provides an alternate basis for admission of evidence under ER 404(b)—as the trial court apparently did in this case—the issue becomes whether evidence of Mr. Robinson’s prior acts of rape was admissible to “establish forcible compulsion, rebut consent defense and to show common scheme or plan.” Gresham, 2012 WL 19664, *1, 13; CP 172 at ¶ 20, 174 at ¶ 8. The court’s ruling of admissibility under ER 404(b) and ER 403 was erroneous. The evidence of the other rapes was used for the forbidden purpose of proving action in conformity therewith. It was extremely prejudicial, and reversal is required.

b. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined."

State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b) provides:

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

The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. Gresham, ___ P.3d ___, 2012 WL

19664 *5, citing State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) and State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. 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." Saltarelli, 98 Wn.2d at 364 (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 be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Id. 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)). "[C]areful 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. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). 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. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

c. The testimony about the other rapes was improperly used to show action in conformity therewith and was substantially more prejudicial than probative. Mr. Robinson's explanation of events, to which he testified, was that the sexual intercourse was consensual and there was no forcible compulsion. RP 666–85, 691–99.

The victim's testimony contradicted Mr. Robinson's version of events. But the trial court allowed the State to call S.S and T.L., who each testified about how Mr. Robinson raped them and threatened them with a knife or with harm to their children. The only relevance of this testimony was to show that because Mr. Robinson raped S.S and T.L with forcible

compulsion in the past, there could not have been consent in the current case and he must have raped C.L.H. with forcible compulsion. This is precisely the propensity purpose forbidden by ER 404(b).

i. Admission of evidence of prior rapes “to establish forcible compulsion and rebut a defense of consent” was for an improper propensity purpose.

In its original ruling excluding the evidence, the trial court properly concluded that “This case must stand on its own merits. The alleged victim, C.L.[H.] is able to make a partial identification of some physical features which a jury could find are similar to the defendant. In addition DNA evidence is available which a jury could find matches defendant’s DNA. On balance, therefore, the court finds that such evidence is more prejudicial than probative and grants defendant’s motion.” CP 33–34.

In reversing the ruling upon consideration, the court partially concluded that because Mr. Robinson now “claim[ed] [] consent to the current rape”, “[evidence of the prior two rapes] is essential to establish forcible compulsion and rebut [the] consent defense.” CP 173 at ¶ 22, CP 174 at ¶ 7. But with or without a defense of consent, the elements of the crime remain the same—the State must prove forcible compulsion beyond

a reasonable doubt. The court did not elaborate as to why such a defense would now prevent the State from presenting the same testimony from the victim, the same DNA evidence and any other relevant testimony to show lack of consent. Although the court appeared to find the evidence of prior rapes was somehow relevant to the state's burden of proof, it did not disclose what the probative value was, or weigh on the record why its probative value would outweigh its substantial prejudicial effect as mere propensity evidence. The court's choice of words in stating that the admission of the prior rapes *was essential to establish* forcible compulsion *and rebut* the consent defense is also significant. This language ironically reveals that the value of the prior misconduct lay solely in its ability to show propensity, a purpose forbidden under ER 404(b).

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) is instructive on the concept of rebuttal of a defense. There, the trial court admitted evidence of prior acts to rebut a defense, but the appellate court reversed because the way the evidence would rebut the defense was by showing a propensity to act in conformity with prior behavior. Id. at 982. Pogue involved a prosecution for possession of cocaine. Id. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. On

review, the court pointed out that "[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." Id. at 985.

Similarly here, the only logical relevance of S.S.' and T.L.'s testimony is based on a propensity argument: because Mr. Robinson committed rape with forcible compulsion against both of them, it is more likely that he committed rape with forcible compulsion against C.L. H. As in Pogue, the admission of the other acts violated ER 404(b).

In its motion to reconsider, the State relied in part on the then-recent decision of this Court, State v. Williams, 156 Wn. App. 482, 234 P.3d 1174, *rev. denied* 170 Wn.2d 1011 (2010). RP 30–31, 37–38, 44. In that case, Williams was convicted of separate counts of first degree rape against two women and a count of second degree assault with sexual motivation against one of the women. Williams, 156 Wn. App. at 489. The trial court had earlier granted the State's motion to admit the testimony of the victim in Williams' 12-year-old prior rape conviction. Id.

This Court agreed with the trial court's conclusion that evidence of the earlier rape "was relevant and appropriate since Mr. Williams claimed that his current victims consented to sexual intercourse." Williams, 156

Wn. App. at 491. This Court held without explanation that “[t]he evidence was relevant to the element of forcible compulsion”, citing to the trial record and RCW 9A.44.040 (the charging statute). Id. As legal authority, this Court also cited Saltarelli, 98 Wn.2d at 368, for the proposition that “evidence of prior attempted rape [was properly] admitted to prove defendant used force and the victim did not consent.” Williams, 156 Wn. App. at 491 (bracketed language added).

This attribution is incorrect. In fact, the court in Saltarelli held just the opposite:

There is no issue of intent in the case before us. Defendant admitted having intercourse with the victim. He does not specifically raise an issue of intent. Because the evidence did not satisfy the test of relevance to intent, balancing probativeness against potential for prejudice was an empty gesture. If evidence of the prior assault is not relevant, it is inadmissible no matter how similar to the offense charged. Therefore, intent was not an “essential point which the state was required to establish” in this case. State v. Goebel, 40 Wn.2d 18, 22, 240 P.2d 251 (1952). Evidence of the prior assault should not have been admitted for the purpose of showing intent.

We hold that evidence of the 1975 assault should not have been admitted to show motive or intent, and remand for a new trial.

Saltarelli, 98 Wn.2d at 366–67.

In Saltarelli, the victim acknowledged limited acquaintance with the defendant, denied any prior sexual encounters and testified on this occasion the defendant forced himself on her. The defendant disputed this

account, testifying they had had prior sexual intercourse on several occasions and the victim consented on this occasion⁷. Saltarelli, 98 Wn.2d at 360. The court held that the evidence of the prior attempted rape was *improperly* admitted to prove defendant used force and the victim did not consent, and the remedy was reversal. Id. at 366–67.

The essential facts in this case are no different—the victim claimed rape by forcible compulsion and Mr. Robinson claimed consent. As in Saltarelli, because Mr. Robinson admitted having intercourse with C.L.H., his defense of consent raised no issue of intent.⁸ The evidence of prior rapes was not relevant under ER 404(b) and should not have been admitted. Saltarelli, 98 Wn.2d at 366—67

ii. Admission of evidence of prior rapes “to establish common scheme or plan” was for an improper propensity purpose.

In reversing the ruling upon consideration, the trial court herein further concluded that because Mr. Robinson now “claim[ed] [] consent to the current rape”, “[evidence of the prior two rapes] is essential to establish ... common scheme or plan.” CP 173 at ¶ 22, CP 174 at ¶ 7.

There are two instances in which evidence is admissible to prove a

⁷ Apparently, thereafter, the victim became upset and jumped out of his van when he told her that he loved someone else. Saltarelli, 98 Wn.2d at 361.

⁸ See also State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003) (Intent is not an element of rape).

common scheme or plan: (1) “where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan” and (2) where “an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” Gresham, ___ P.3d ___, 2012 WL 19664 *6, citing Lough, 125 Wn.2d at 854–55. Mr. Robinson’s case involves the second category.

Evidence of this second type of common scheme or plan is admissible because it is not an effort to prove the *character* of the defendant. Instead, it is offered to show that the defendant has developed a plan and has again put that particular plan into action. Id., citing Lough, 125 Wn.2d at 861. As the DeVincentis Court warned, however, “caution is required in applying the common scheme or plan exception.” State v. DeVincentis, 150 Wn.2d 11, 13, 74 P.3d 119 (2003). Caution is required because this exception to ER 404(b) is not very different than propensity reasoning.

In order to introduce evidence of the second type of common scheme or plan, the prior misconduct and the charged crime must demonstrate “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which” the two are simply “individual manifestations.” Gresham, ___ P.3d ___, 2012 WL 19664 *6, citing Lough, 125 Wn.2d at 860.

Mere “similarity in results” is insufficient. Id. While the method of the crime need not be unique, there must be substantial and marked similarities indicative of a common pattern. DeVincentis, 150 Wn.2d at 19–21.

Here, the similarities identified by the trial court as indicating a “common scheme or plan” in committing the two prior rapes and the current alleged rape of C.L.H. were that Mr. Robinson unlawfully entered residences, where the victims were asleep, the victims were older than him, they were raped in the same manner (forcible compulsion), and he wore some sort of cover over his face in one of the prior rapes as well as in the charged crime. CP 171 at ¶¶ 8, 9; CP 172 at ¶¶ 14, 15, 16; RP 865. Objectively, the court has described only general similarities that could be found in a vast array of rape crimes.

The similarities are neither complex nor “substantial and marked.” *Cf.*, DeVincentis, 150 Wn.2d at 22 (similar instances of elaborate grooming techniques, including “walking around his house in an unusual piece of clothing – bikini or g-string” and having girls “masturbate him until climax” demonstrated common scheme or plan); Lough, 125 Wn.2d at 861 (evidence that defendant “rendered four other women, whom he had relationship with, unconscious with drugs and then raped them”

established necessary pattern under ER 404(b)); Williams, 156 Wn. App. at 491 (common scheme where evidence showed similar victims (women of a similar age, involved with drugs), similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness during the rape), and current rapes occurred within days of each other and only 14 months⁹ after defendant was released from prison for the earlier rape conviction); Gresham, ___ P.3d ___, 2012 WL 19664 *6 (evidence that defendant Scherner (in the companion case) molested two young girls during separate trips, as well as two other girls at defendant's house, admissible to show common scheme or plan in case where complainant alleged defendant abused her on a trip).

The similarities between the S.S./T.L. acts and the charged acts are far less substantial and marked. Rather than demonstrating a common design, the acts instead improperly suggest Mr. Robinson had a propensity for raping women.

⁹ In reversing its ruling upon reconsideration, the trial court remarked, "With consent being brought into this matter and with the intervening cause taking a very large, substantial period of time when nothing could have happened anyway because [Mr. Robinson] was incarcerated, I think that the issue of the testimony of both of these prior witnesses becomes very relevant" RP 48. Unlike in Williams, Mr. Robinson's prior rape convictions were nearly 15 years old at the time of the current incident and the charged rape occurred 48 months after his release from confinement. CP 171 at ¶ 4, 10; 172 at ¶ 17, 18. Although the passage of time between 1991 and 2008 is not in itself a decisive reason for exclusion, DeVincentis, 150 Wn.2d at 13, it "erodes the commonality between acts and makes the probability of an ongoing plan more tenuous." North Carolina v. McKinney, 430 S.E.2d 300, 304 (N.C.App. 1993).

State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) is on point. There, the trial court admitted evidence of two prior sexual assaults which were very similar to the charged crime and occurred within the same year. Id. at 189. Similar to this case, the trial court ruled the evidence was admissible to show motive and common scheme or plan. Id. The appellate court reversed, noting that although the trial court listed proper purposes for the evidence, "the evidence demonstrates little more than a general propensity to commit indecent liberties, precisely the purpose forbidden under ER 404(b)." Id. at 191. The same is true here. Although the trial court admitted the S.S. and T.L. rapes to "establish forcible compulsion and rebut consent as well as to establish common scheme or plan," the evidence demonstrated little more than a propensity to commit rape by forcible compulsion, precisely the purpose forbidden by ER 404(b).

State v. Harris, 36 Wn. App. 746, 377 P.2d 202 (1984), is also instructive. In Harris, two co-defendants were accused of raping a woman after offering her a ride home on May 12, and of doing the same thing to a different woman on June 2. Id. at 747–48. The principal defense was consent. Id. at 748. The trial court denied a motion to sever counts, and the defendants were convicted. The Court reversed, holding the denial of

the motion to sever was improper because evidence of one rape would *not* have been admissible in a separate trial for the other rape. Id. at 749–50.

The State argued that the “common scheme or plan” exception to ER 404(b) applied, because “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.” Id. at 751. The Court disagreed, noting that too often the ER 404(b) exceptions are invoked as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” Id. (quoting Saltarelli, 89 Wn.2d 358, 655 P.2d 697 (1982)). The Court explained the definition of the common scheme or plan exception as:

An antecedent mental condition which evidentially points to the doing of the act planned. Something more than the doing of similar acts is required in evidencing design, as the object is not merely to negate an innocent intent, but to prove the existence of a definite project directed toward completion of the crime in question.

Id. (internal citation omitted). The Court concluded:

Under this definition, it 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).

Id.

The same is true here. Indeed, the three rapes here were less similar and less close in time¹⁰ than the rapes in Harris. As in Harris, the two prior rapes do not satisfy the common scheme exception and at most show only a propensity to commit rape. Such evidence is explicitly prohibited by ER 404(b).

In a case like this one, the evidence of other acts is not appropriate. In order to admit such evidence, the degree of similarity must be “substantial” and only where “the existence of the crime is at issue.” DeVincentis, 150 Wn.2d at 21. Only when “the very doing of the act charged is still to be proved” may scheme or plan evidence be presented. Lough, 125 Wn.2d at 853.

The existence of the crime is not at issue here. Unlike the defendants in Lough and DeVincentis, Mr. Robinson did not deny having sex with the victim. The State argued that the rape was committed by forcible compulsion and Mr. Robinson argued the act of sexual intercourse was consensual. It was precisely as to this element that the S.S./T.L. rapes and the C.L.H. rape were dissimilar. The crimes were not “substantially

¹⁰ The two prior rapes occurred within one month of each other, and nearly 20 years before the charged rape at issue here. CP 172 at ¶¶ 17, 18.

similar” as to the relevant element and the existence of the crime was not at issue. In this aspect, Lough and DeVincintes are inapposite.

In sum, the other bad act evidence in this case was ostensibly admitted for proper purposes, but its only relevance was for the improper purpose of proving action in conformity therewith. The admission of evidence of the S.S. and T.L. rapes therefore violated ER 404(b).

iii. Admission of evidence of prior rapes deprived Mr. Robinson of a fair trial.

Under ER 403, evidence should be excluded if it is substantially more prejudicial than probative. Herein, the trial court initially ruled the evidence of the two prior rapes was inadmissible because although probative, it was “far more prejudicial.” CP 33–34. In reversing its ruling, the court now found the evidence admissible because although prejudicial, the evidence “is essential to establish forcible compulsion and rebut consent defense as well as to establish common scheme or plan.” CP 174. The court made no analysis and weighing on the record—as required by ER 403 and even by the now-unconstitutional RCW 10.58.090(6)(g)—of the probative value versus the prejudicial value of the challenged evidence. As argued above, the evidence of the two prior rapes served only to establish an impermissible propensity to commit rape by unlawful entry

and use of forcible compulsion.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Evidence of a defendant’s prior conviction is devastating to any hope of fair consideration of the evidence in a case such as this one, with significant inconsistencies in the State’s proof, because “such evidence has a great capacity to arouse [unfair] prejudice.” State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). In the context of ER 404(b), propensity prejudice is “unfair” prejudice. And the Supreme Court has recognized that the potential for that sort of unfair prejudice is particularly high in sex abuse cases, such as this one:

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, that he could not help be otherwise.

Saltarelli, 98 Wn.2d at 362 (internal citation omitted). Absent sufficient relevancy and similarity, the jury in Mr. Robinson’s trial was likely to treat the prior convictions in the foregoing manner. The evidence of prior rapes should have therefore been excluded by the trial court.

The admission of propensity evidence prevents a fundamentally fair trial and thus violates due process. “It is fundamental to American

jurisprudence that ‘a defendant must be tried for what he did, not for who he is.’ “ United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) quoting United States v. Meyers, 550 F.2d 1026, 1044 (5th Cir. 1977). And Mr. Robinson was entitled to come to trial with the full presumption of innocence until proven guilty. U.S. Const., amend. 14; State v. Thomas, 166 Wn.2d 380, 390, 208 P.3d 1107 (2009). His trial should have turned on the question whether C.L.H.’s claim of rape was more credible than his defense of consent, and ultimately whether the State had proved the allegations against him beyond a reasonable doubt.

d. Reversal is required. 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). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff’s immigration status in a personal-injury case. *Id.* at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration

status to be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of two prior rape convictions is at least an order of magnitude greater. Indeed, "in sex cases, ... the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury.

It is reasonably probable that Mr. Robinson would not have been convicted of first degree rape and first degree burglary with sexual motivation but for the erroneous admission of S.S. and T.L.'s testimony of the two earlier rapes. Accordingly, this Court should reverse and remand for a new trial at which evidence of the S.S. and T.L. rapes will be excluded.

2. In a prosecution for rape and burglary with sexual motivation, a limiting instruction which states that evidence of prior convictions and conduct may be considered for the purpose of proving forcible compulsion misstates the law and violates ER 404(b)'s prohibition against impermissible propensity evidence.

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 Wn.2d 168, 174, 163 P.3d 768 (2007); Saltarelli, 161 Wn.2d at 175. An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character. Cf. Lough, 125 Wn.2d at 864. In the context of ER 404(b) limiting instructions, once a criminal 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. Gresham, ___ P.3d ___, 2012 WL 19664 *7.

Here, the jury was given the following limiting instruction:

Instruction No. 23. Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior convictions and conduct of the defendant and may be considered by you only *for the purpose of proving* a common scheme, plan, or *forcible compulsion*. You shall not consider it for any other purpose. Specifically, you shall not consider the evidence as proof of character in order to show the defendant acted in conformity therewith. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Instruction No. 23, CP 149 (emphasis added). Counsel proposed a similar instruction, noting that it was proposed because of the trial court’s prior ruling¹¹ as to admissibility of the prior sex offense evidence to prove common scheme, plan and/or forcible compulsion and that counsel believed the inclusion of “forcible compulsion” improperly altered the state’s burden to prove whether or not forcible compulsion was used. CP 59; RP 728–29, 751–52.

As argued above, evidence of the prior convictions and conduct should not have been admitted under ER 404(b) for any reason. Having ruled that it was admissible, the court had a duty to instruct the jury correctly—which it did not do. Given Mr. Robinson’s defense of consent, whether or not forcible compulsion was used was indeed the legal issue to be proven by the State and the factual issue to be determined by the jury. In the “to convict” instruction for first degree rape, the jury was instructed they had to find as an element that the “sexual intercourse was by forcible compulsion”.¹² Forcible compulsion was defined for the jury as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be

¹¹ To which defense counsel had objected.

¹² Instruction No. 5, CP 129.

kidnapped.” Instruction No. 7, CP 131; RCW 9A.44.010(6). By allowing the jury to consider evidence of the two prior rapes as proof of forcible compulsion, the court effectively made evidence of Mr. Robinson’s commission of other sex offenses admissible for the purpose of proving his character (i.e. Mr. Robinson is the “forcible compulsion non-consensual type”) in order to show that he has committed the charged offense in spite of ER 404(b)'s prohibition of admission for that purpose.

The burglary with sexual motivation charge also involved potential residual effects of allowing the jury to consider the two prior sex offenses as proof of forcible compulsion. In the “to convict” instruction for first degree burglary, the jury was told they had to find as elements that “the entering or remaining was with intent to commit a crime against a person or property therein” and that during the entry or unlawful remaining the defendant “was armed with a deadly weapon or assaulted a person.”¹³ The jury was given the three traditional definitions of “assault”.¹⁴ The jury was also instructed that “Sexual motivation means that one of the purposes for which the defendant committed the crime was for the purpose of his sexual gratification.”¹⁵

¹³ Instruction No. 15, CP 140.

¹⁴ Instruction No. 16, CP 141.

¹⁵ Instruction No. 29, CP 157.

Mr. Robinson's defense of consent included lawful entry for a legitimate purpose. The trial court allowed a second-degree rape instruction, acknowledging the jury "may or may not believe he had a knife, they may or may not believe that there was consent." RP 755, 758. The court also allowed a residential burglary instruction in response to argument that the jury could believe there was simply a property crime based on the missing cell phone and purse, but not a deadly weapon, no knife, no assault, as would be required for first-degree burglary. RP 297, 760. There is no way to discern the impact of the court's instruction to consider the propensity evidence of the prior rapes upon the jury's deliberations.

The result of Mr. Robinson's trial should have turned on credibility. The question should have been whether the jury believed Mr. Robinson or C.L.H. No one else saw the incident; no evidence was found other than DNA (and the defense was consensual sex). Instructing the jury that the prior convictions could be considered as proof of forcible compulsion wrongfully eroded Mr. Robinson's credibility as to the current rape and burglary charges, and likely prejudiced the verdicts against him.

3. Cumulative error deprived Mr. Robinson of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22.

Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors “deny a defendant a fair trial.” State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997).

Here, the court’s improper evidentiary rulings combined with an improper limiting instruction denied Mr. Robinson his right to a fair trial. The State’s proof on the forcible compulsion and burglary elements was weak, and it was essentially allowed to retry Mr. Robinson for the S.S. and T.L. rapes in order to secure a conviction for the first-degree rape of C.L.H. Where the rape and burglary with sexual motivation charges arose from the same incident, the prejudice caused by this highly inflammatory evidence cannot be apportioned to specific verdicts, including the findings of guilty of the charged crimes (CP 158, 160) as well as *all* of the special

verdicts (CP 162–66). This Court should reverse and remand so that Mr. Robinson may have a fair trial.

4. The findings that Mr. Robinson has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.

The record does not support the trial court’s judgment and sentence “findings” that Mr. Robinson has (1) the current or future ability to pay LFOs and (2) the means to pay costs of incarceration and (3) the means to pay costs of medical care. CP 195 at ¶ 2.4, 198 at ¶¶ 4.d.4 and 4.D.5. The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” State v. Bertrand, ___ Wn. App. ___, 2011 WL 6097718, *4 (Dec. 18, 2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden’ imposed by LFOs under the clearly erroneous standard

(internal citation omitted).” Bertrand, 2011 WL 6097718, *4, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Mr. Robinson’s financial resources and the nature of the burden of imposing LFOs and costs of incarceration and medical care on him. In fact, the record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Robinson has the present or future ability to pay LFOs, in ¶ 4.D.4 that he has the means to pay costs of incarceration¹⁶, and in ¶ 4.D.5 that he has the means to pay costs of medical care¹⁷. The findings are

¹⁶ As shown on the Judgement and Sentence, Mr. Robinson’s date of birth is April 6, 1970. CP 194. At the time of sentencing on June 2, 2011, he was approximately 41 years old. Assuming a 30-year period of life imprisonment, the costs of incarceration at \$50/day would be roughly total \$547,500. In pertinent part, RCW 9.94A.760, Legal Financial Obligations, provides as follows:

(2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department

¹⁷ In part, RCW 70.48.130, Emergency or necessary medical and health care for confined persons--Reimbursement procedures--Conditions—Limitations, provides as follows:

As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. This information shall be made available to the department, the governing unit, and any provider of health care services.

therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 2011 WL 6097718, *5.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial. In the alternative, the findings as to ability and means to pay legal financial obligations and costs should be stricken.

Respectfully submitted on January 24, 2012.

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The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the department's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 24, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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