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NO. 69950-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

MAURICE THROWER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant who claims ineffective assistance of counsel must show that the defense attorney's performance was deficient and that the deficient performance caused him unfair prejudice. Here, the defense attorney "opened the door" to his client's uncharged misconduct during cross examination of a State witness. Where the prior act of misconduct was not unfairly prejudicial in light of the other evidence admitted via the same witness, and where a limiting instruction prevented the jury from using the evidence for any purpose other than to explain the witness' demeanor on the stand, has Thrower failed to show ineffective assistance of counsel?

2. A defendant is entitled to a limiting instruction that tells the jury for what purpose it may consider evidence of prior misconduct admitted under ER 404(b). An adequate limiting instruction must inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for proving the defendant's propensity to commit the crime. Here, the trial court gave a limiting instruction, crafted by the defense attorney, ordering the jury to consider evidence of the defendant's prior misconduct only insofar as it may have tended to show a

witness' fear. Where that instruction reiterated the limitation on the evidence in four different ways and ordered the jury not to consider the evidence for any other purpose, was it adequate?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS.

Defendant Maurice (Moe) Thrower was charged with two counts of child molestation in the first degree for molesting his girlfriend's daughter, T.W. CP 1-2. Following a jury trial, Thrower was convicted of both counts. Based on his offender score of 13, Thrower was sentenced to a 180-month standard-range indeterminate sentence. CP 64-71.

2. SUBSTANTIVE FACTS.

Jennifer Wells, a single mother with two children, first met Thrower in 2005. RP 76.[1] Eventually, they started dating and Thrower spent much of his time at Wells' home in Northgate; Thrower had his own set of keys and kept some of his clothes at the house. RP 80. When he stayed overnight, Thrower shared Wells' bed; the bedroom was adjacent to her then eight-year-old

[1] The successively paginated transcript of proceedings will be referred to in this brief as "RP."

daughter, T.W.'s, bedroom. RP 75, 81. Initially, Thrower seemed to get along with Wells' children, including T.W. RP 83. At trial, Wells testified that, while at the Northgate house, she could remember waking up in the middle of the night after she and Thrower had gone to sleep, and noticing that he was no longer in her bed. RP 81-82.

T.W., who was 16 years old during the trial, told the jury that while she was living with her mother at the Northgate home, Thrower would enter her room at night and crawl into her bed. RP 75, 214-16. She could remember, on several occasions, waking up to Thrower lying beside her, pressing his erection against her buttocks, and running his hands over her hips and legs. RP 216-19. While T.W. could not recall exact dates, she testified that she was nine or younger during these incidents. RP 214. T.W. testified that she did not report the molestations because she was afraid of Thrower. RP 220.

When T.W. turned nine, Wells moved the family to the Burke Gilman Apartments in north Seattle. RP 223. By this time, T.W.'s relationship with Thrower had noticeably changed; several witnesses at trial testified that T.W. became openly rude and aggressive toward Thrower. RP 86. T.W. testified that she no

longer liked Thrower because "he started touching [her]."
RP 145-46, 232.

Thrower's sexual abuse of his girlfriend's daughter continued in the apartment. RP 223. T.W. testified about one occasion when she was sleeping on the floor of her living room with her younger cousins and awoke to Thrower "sitting beside" her, touching her breast beneath her tank top. RP 93, 235. When she moved away from him, Thrower stopped and "went back upstairs." RP 236. T.W. testified that Thrower continued entering her bedroom at night, lying beside her and placing his hands on her hips, after the move to the apartment. RP 239. On one particular night, T.W. remembered lying in her bed on her stomach when Thrower entered and "tried to get into [her] pants," shoving his hands inside her pajama bottoms. RP 252. T.W. told him to get off of her, and swung her elbow at Thrower, who eventually left the room. RP 253. Every incident at the apartment occurred before her twelfth birthday. RP 240.

T.W. told the jury that at first she thought Thrower's actions were "okay" because he was an "adult." RP 256. As she grew older, T.W. said, she began to realize that "it was not okay."

RP 256. As she testified, T.W. said that Thrower's very presence in the courtroom made her nervous: "I'm still scared of him." RP 254.

T.W. also described about an occasion when she was playing house with her babysitter, C.A., at the Burke Gilman Apartments, and Thrower entered the room with his erect penis protruding from his unzipped fly. RP 258. Thrower asked the two girls (C.A. was three years older than T.W.) if they wanted to "play house" with him. RP 257, 259. T.W. had never seen a penis before, and began to cry. RP 260. Thrower kept asking her if she wanted to play with him, but T.W. refused and went outside. RP 260.

It was not until after Thrower and Wells had broken up and Thrower had left Seattle, that T.W. disclosed to her mother the episodes of sexual abuse. RP 262. When T.W. was twelve years old, Wells discovered that T.W. had sent a naked picture of herself on her telephone to someone else. RP 96-97, 267. Wells testified that she confronted T.W. about the photograph, and T.W. began to cry; when Wells asked her why she was acting out sexually at such a young age, T.W. finally revealed that Thrower had sexually molested her. RP 98, 267. One of T.W.'s friends testified that

when T.W. was twelve, T.W. also disclosed the molestation to her. RP 275-79.

After speaking with the prosecutor's office and being told that child molestation did not carry a statute of limitations, Wells did not pressure T.W. to report the abuse to police until she was ready. RP 106. Finally, when T.W. turned 16, she reported the incidents to Seattle Police. CP 4-5.

Thrower testified at trial and denied sexually molesting T.W. RP 459-65. He told the jury that he was not "the best boyfriend in the world" to Wells, but was always honest with her about his other relationships; Wells, nevertheless, was jealous and wanted a commitment. RP 459-60, 468. During cross examination, Thrower explained, unsolicited, that T.W.'s bed at the Northgate home was a "metal futon bed" (correcting prior testimony from other witnesses that it was a "bunk bed"):

> What it was, was a metal futon bed, and it has the top carriage thing where it fits up and she had all of her – like she said, she had animals there and everything. And the metal bottom, it was like, a roll out. You know, the reason why Jen got rid of it is because it made a lot of noise. If you ever had a metal – one of those metal futons, it's scree, scree, scree.

RP 476.

Thrower also testified that, while he was Wells' boyfriend, he was not responsible for taking care of T.W., and would not help her get ready for bed. RP 476-77. He added, again unsolicited, that on one occasion he cleaned her room. RP 476-77.

The jury convicted Thrower of all counts. CP 64-65.

3. FACTS REGARDING C.A.'S TESTIMONY AND THE PRIOR INCIDENT.

C.A., T.W.'s babysitter at the Burke Gilman Apartments, also testified at trial. RP 353. C.A. testified that she was close friends with the Wells family and that she was treated like another member of the family. RP 355. When C.A. was 11 or 12, she would babysit T.W. at Wells' apartment. RP 357.

C.A. testified about the incident where Thrower entered the room with his penis exposed. RP 361. She said that she remembered playing "house" with T.W. when Thrower came into the room:

> Moe had came into the room and we were playing and his penis was hanging out of his pants when he had came in. And I remember when I seen that, just, I don't know, I was kind of shocked. So he had asked us to sit down on the bed, and I remember me and [T.W.] sat down on the bed. I don't really remember much of what he was saying, just more because I was

> really shocked of what I had just seen. So, he asked us to sit down, he was talking to us. We sat there.
>
> And then when he was finished talking, he said we could keep playing if we wanted. And then we just kind of just sat there, me and [T.W.] sat there.

RP 361. C.A. testified that this was the first penis that she had seen and that she remembered it "coming through the zipper." RP 361. She said that, to her, it appeared "half erect" and believed that it was uncircumcised (Thrower later testified that his penis was circumcised). RP 375, 463. C.A. added that she was "scared" when Thrower exposed himself. RP 363.

During cross examination, Thrower's attorney pointed out several inconsistencies between C.A.'s testimony and her prior investigatory interviews, including her description of the penis, the manner in which Thrower entered the room initially, and how the incident ended. RP 375-78. Then Thrower's attorney pointed out that, even though C.A. was the babysitter in charge of caring for T.W., she did not do "anything about this alleged incident at the time." RP 378.

After C.A. admitted to the defense attorney that she did not report Thrower's indecent exposure, the attorney asked C.A. some

questions regarding her claim that she was "scared," which evolved into the following exchange on the record:

Defense:	You say you were scared, has Mr. Thrower ever threatened you?
C.A.:	No.
Defense:	Has he ever done anything to make you fear him, physical, other than your allegations around this?
State:	I can't hear the witness' response.
Defense:	She hasn't given one.
State:	Well, I thought she was shaking her head.
Defense:	Has he ever threatened you?
C.A.:	No.
Defense:	No.

RP 378. The court then handed C.A., who apparently was crying, a box of tissue. RP 378. Thrower's attorney continued his cross examination of C.A., eliciting that C.A. knew that T.W. really "didn't like Thrower." RP 380-81.

Outside the presence of the jury, the State moved to admit a prior incident based on the attorney's questions regarding C.A.'s fear of Thrower, but first indicated why the incident had not been addressed during pretrial motions: "There is an incident that the

State was not initially seeking to introduce because I thought it was too far afield." RP 382.

The prosecutor described an incident that happened a few weeks after Thrower exposed himself to the two girls, where he approached C.A. while she was doing laundry at the Wells' home. RP 383. Thrower kissed C.A., picked her up, and carried her to Wells' bedroom, where he kissed her body over her clothes and told her that Wells "never has to know" about the kissing and touching. RP 383. Because it was this incident that the State believed precipitated C.A.'s tears and her reluctance to respond to the attorney's question about whether Thrower had "ever done anything" to make her fear him, the State argued that Thrower's attorney had "opened the door" to the kissing incident and moved to admit it via C.A.'s testimony. RP 383. The State indicated that Thrower's attorney was aware of the kissing incident before C.A. took the stand and had questioned her about it during an investigatory interview. RP 389.

Thrower's attorney argued that he merely asked C.A. if Thrower had ever threatened her, and insisted that he had not "opened the door." RP 383. The trial judge and the parties listened to the record of C.A.'s responses to the defense attorney's

questions and the State reiterated its argument. RP 383-84. Thrower's lawyer further clarified his position, arguing that C.A. was "crying before" he asked her about feeling threatened by Thrower, and said that his questions were limited to the incident where Thrower exposed his penis to the two girls. RP 385. After hearing from both parties and reviewing the record of the exchange, the trial judge ruled that the prior incident against C.A. was admissible:

> But the questioning in the Court's view clearly opens the door. The incident had been talked about in cross-examination, the comparison of today's testimony versus the detective's statement had been gone into, the testimony between today's testimony and the defense interview had been gone into; and then the topic changed to the relationship and why [T.W.] didn't like him, didn't want him dating the mom, talked about their relationship, arguments, rocky, what she'd seen.
>
> And the next question – and at this point in a – a effective cross-examination the witness has been – there have been incidents of different testimony followed by motive to make up the testimony followed by he's never done anything physical to make you afraid of him. If that doesn't open the door, Counsel, I don't know what does.
>
> And the Court did notice that your – you indicated that she cried before then, and I can't be a hundred percent sure she didn't. But I didn't notice her crying until that moment, the sniffle. I looked at her; she was shaking. And I don't know what provoked that. The issue that certainly occurred to me is a possibility or the jury could think she's been caught in a lie, that she's been put up to this by her friend who wanted Mr. Thrower out of the household. I think that was the effective point of cross

> examination. And, unfortunately, there is another reason.

RP 388.

Following the trial judge's ruling, the State sought to admit C.A.'s testimony regarding the kissing incident for two reasons: first, because the prior incident helped explain why C.A. did not report the indecent exposure that she witnessed; and second, because it "goes to explain her demeanor on the stand," where C.A. apparently had a "breakdown" that could be interpreted by the jury as C.A. "somehow breaking under the pressure [of cross examination] because she's a liar." RP 389.

Thrower's attorney countered that there "still needs to be a balancing test on whether its probative value outweighs its prejudicial affect." RP 391. In response, the trial judge explained why she believed that the evidence was more probative than prejudicial:

> The witness had a bit of a breakdown. With the Court's view of not having any information about any other motivation or thinking behind her demeanor and crying at that point, that she's very upset about being – these inconsistencies being exposed. And that certainly goes to her credibility, and I think it's highly relevant.
>
> And, again, it's not remote in time, it's not another very different situation. You know, we're not talking a rape or a – it's – it's, in looking at the

> prejudicial value – prejudicial impact, unfair prejudice versus probative value, I come down on the side that it is highly relevant and not unfairly prejudicial.

RP 391.

Following the court's ruling, C.A. again took the stand and testified regarding the incident with Thrower. RP 395-95. The prosecutor began by asking C.A. whether there was "something that Mr. Thrower did that made [her] fearful of him?" RP 392. C.A. said that "a couple of days" after Thrower exposed himself to T.W. and to her, C.A. was doing laundry in the kitchen at the Wells' house when Thrower came into the kitchen and picked her up: "And he just – was talking, and he kissed me on the forehead. Then we walked upstairs and then we went into [Wells'] room..." RP 393-94. C.A. testified that, once inside the bedroom on Wells' bed, Thrower kissed her on the neck, moving his hands around her legs." RP 395. C.A. told the jury that she cried throughout the incident and that Thrower's body was "on top" of hers, and that he kissed her chest and her neck over her clothes. RP 397. The entire incident lasted "a couple minutes" until Thrower said, "We'll just keep this to ourselves," and left the room. C.A. testified that she was 12 years old when this occurred and that she was "scared." RP 398.

Following this incident with Thrower, C.A. stopped going to the Wells' house and stopped babysitting T.W. RP 399. C.A. testified that ever since he brought her into the bedroom, she has been afraid of Thrower, and was still afraid of him. RP 399. During his re-cross examination of C.A., Thrower's attorney continued to point out inconsistencies in C.A.'s testimony compared to her defense interview, including the fact that she had told the defense investigator that Thrower had kissed her cheek, not her chest, that it was she who left the bedroom first, not Thrower, and that she had initially stated that she did not like to think about the incidents, but now told the jury that she thought about them "a lot." RP 404, 410-14.

All parties agreed that a limiting instruction should be submitted to the jury regarding the kissing incident. RP 391. The instruction, proposed by the defense attorney and given to the jury, read as follows:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of [C.A.] with regards to the allegation concerning the Defendant picking her up, carrying her, and kissing her and may be considered by you only for the purpose of determining whether she had reason to fear the Defendant. You may not consider it for any other purpose. Any discussion of the

> evidence during your deliberations must be consistent with this limitation.

CP 54.

C. ARGUMENT

1. THROWER'S ATTORNEY WAS NOT INEFFECTIVE WHEN HE "OPENED THE DOOR" TO THE KISSING INCIDENT BECAUSE THE EVIDENCE WAS NOT UNFAIRLY PREJUDICIAL.

Thrower contends that his attorney was ineffective because he "opened the door" to C.A.'s testimony regarding the kissing incident with Thrower that began in the kitchen. But Thrower was not unfairly prejudiced by the testimony, so the attorney's performance was not ineffective.

A criminal defendant who claims ineffective assistance of counsel must show that the attorney's performance was so deficient that it "fell below an objective standard of reasonableness" and that the attorney's deficient performance unfairly prejudiced the defendant. State v. Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Courts grant a "strong presumption of reasonableness to counsel's performance," and appellants must show that the deficient performance was so serious as to deprive a defendant of

a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under ER 404(b), evidence of other bad acts is generally inadmissible, but may be admissible for purposes other than showing "action in conformity therewith," such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident where the evidence is more probative than prejudicial." ER 404(b); State v. DeVincentis, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). In order to admit evidence of "other bad acts" under ER 404(b), the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the "misconduct" actually occurred. State v. Lough, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. Lough, 125 Wn.2d at 853. The court may then admit the evidence, subject to a limiting instruction telling the jury the proper uses of the evidence. Id. at 864.

The cross examination conducted by Thrower's attorney that opened the door to the kissing incident with C.A. assisted the attorney in defending Thrower. The thrust of Thrower's defense at trial was to attack the credibility of T.W. and C.A., the only eyewitnesses against Thrower. His attorney contrasted the testimony of T.W. and C.A. with their other interviews in order to point out inconsistencies, supporting his stated theory that "children lie" and that both eyewitnesses were "lying" in order to keep Thrower out of T.W.'s life (supposedly, the allegations would prevent Wells from ever reconciling with Thrower). RP 548-54. During his closing argument, Thrower's counsel noted the witnesses' lack of "eye contact" and expressly commented on C.A.'s tears during his cross examination:

> And [C.A.]'s crying up there? Now the State wants you to believe that's because she was scared of Mr. Thrower, even though her own testimony was, hey even with that incident, he never threatened me. He just picked me up. And that's if you even believe that incident happened. No, she was crying not because she was scared of Mr. Thrower. *She was crying because she got caught lying. She got caught with inconsistencies and she got caught with the same inconsistencies that T.W. did.*

RP 545-55 (emphasis added).

While the defense attorney's cross examination of C.A. did open the door to the admission of the kissing and touching incident with C.A., it also provoked the response that the attorney later used to attack C.A.'s credibility so aggressively in his closing argument. Even though Thrower's attorney objected to the admission of the kissing incident, he reaped every reward from C.A.'s hesitation and the emotional reaction his cross examination prompted; even the trial judge mentioned that it could have appeared to the jury that C.A. had been "caught in a lie," and she was sniffling and "shaking." RP 388. To offer an alternative explanation for C.A.'s response on the stand, the court permitted the testimony regarding the kissing incident, but as the defense attorney's statements during his closing argument made clear, the contention that C.A.'s tears and emotional breakdown were simply the result of her being "caught in a lie" remained a real possibility for Thrower to argue to the jury.

This was especially true because it was not until *after* the parties had taken a break that C.A. provided the details of the prior incident from the witness stand as an explanation for her emotive response on the stand. RP 381-92. The jury had already seen her struggle to answer the attorney's questions and, when the State said that it could not hear C.A.'s response to these questions, the

defense attorney stated, "She hasn't given one." RP 378. Had the jury accepted Thrower's defense that "children lie" in the first place, C.A.'s initial breakdown on the stand and her silent response to his questions would have been further proof of her mendacity, regardless of her later explanation.

If Thrower had not "opened the door" to the kissing incident, it is unlikely that C.A. would have provided anything like the sniffling, shaking, and silence she revealed on the stand, and the defense attorney's argument would have been far less compelling. Because the questions that "opened the door" are the same ones that provided fodder for the defense attorney's argument against C.A.'s credibility, it can hardly be convincingly argued that the result of those questions was unfairly prejudicial to Thrower.

Thrower also argues that, but for C.A.'s testimony regarding the kissing incident, "Thrower had an opportunity for acquittal" because "no one had witnessed the alleged touchings involving T.W." Brief of Appellant at 12. But, as the trial judge suggested, C.A.'s description of the incident added hardly any additional prejudice to the testimony already elicited, and it is unlikely that the evidence of the kissing incident had any impact on the jury's verdict. RP 391.

While C.A. and T.W. were the only eyewitnesses to Thrower's crimes, the State also presented substantial circumstantial evidence that included Wells' testimony about Thrower being missing from the bedroom in the middle of the night, and several witnesses' testimony regarding the sudden change in T.W.'s relationship with Thrower after the abuse began. RP 86, 92-93, 98. The jury also heard about T.W.'s acting out sexually at the early age of 12, and her consistent report of the abuse to a friend. RP 141-49, 275-79. But perhaps the most compelling piece of evidence other than the testimony from T.W. and C.A. was Thrower's own testimony, which described in detail and unsolicited testimony T.W.'s bedroom, her actual bed, and how much it "squeaked." RP 476-78. How Thrower, who also testified that he was not T.W.'s caretaker and played no role in her morning and evening routines, would know so much about her bed (or why he was so eager to tell the jury about it), was left for the jury to assess. RP 476-78, 492. Thrower's argument that it was C.A.'s description of the kissing incident that someway swayed a jury considering acquittal against him, fails to consider the strength of the remaining evidence.

Thrower contends that the kissing incident served to portray "Thrower as a serial pedophile, taking advantage of opportunities for sexual contact with minor girls in Wells' home." Brief of Appellant at 12. But Thrower's abuse of C.A. on that occasion was not as shocking as the other uncharged act of misconduct, admitted at trial and unchallenged on appeal, where Thrower exposed his penis to both T.W. and C.A. Following an ER 404(b) hearing, the trial court found that the exposure was "proper evidence to have before the jury," and permitted C.A. and T.W. to describe to the jury how Thrower entered the room, erect penis exposed, and asked the two girls if they wanted to play with him. RP 248. This incident, which scandalized both girls, was already admitted when Thrower cross-examined C.A. RP 248.

After the defense attorney "opened the door," the trial court conducted an ER 404(b) analysis in determining the admissibility of the kissing incident, and found that the incident was not unfairly prejudicial, as it was not a "rape" and was "another very similar incident" that served to clarify C.A.'s response on the stand. RP 391. The jury had previously heard from C.A. that Thrower had exposed his penis to two underage girls, C.A. and T.W.; this already provided an example of Thrower's behavior toward young

girls aside from the charged incidents. RP 258-60, 361. It is unlikely that C.A.'s testimony regarding being kissed and hugged by Thrower on one other occasion created more prejudice than the already-submitted testimony.

Further, the only evidence of the kissing incident was C.A.'s account at trial – Thrower's defense from the start was that C.A. and T.W. were liars. RP 548. If the jury ever accepted this argument, it would have just as easily applied to C.A.'s uncorroborated testimony regarding the kissing incident. One more uncorroborated story from C.A. did nothing to refute Thrower's argument that C.A. and T.W. had made the whole thing up. On the other hand, if the jury believed in Thrower's guilt after hearing the testimony, one more uncorroborated story from C.A. would also have done little to alter or bolster that belief. C.A.'s testimony about Thrower kissing and touching her a couple of days after he exposed his penis was only helpful insofar as it offered an alternative explanation for her tears on the stand, and perhaps provided an insight into why C.A. never reported the incident.

Thrower contends that the evidence of the kissing incident was so prejudicial that no jury instruction could have cured it. But the few cases that address incurable admissions of evidence deal

with extreme circumstances, not at all commensurate with the testimony elicited here. In State v. Escalona, 49 Wn. App. 251, 253, 742 P.2d 190 (1987), the case relied upon by Thrower, the stabbing victim in an assault case testified, sua sponte, that the defendant had a criminal record and had "already stabbed someone" before. Id. at 253. The trial judge merely instructed the jury to "disregard" the victim's statement, and denied a motion for a mistrial; although the evidence against the defendant was minimal, the jury convicted. Id.

On appeal, this Court stated that "there is no question" that the evidence of the prior stabbing incident was "inherently prejudicial," and while "logically relevant" was not "legally relevant." Id. at 255-56. Because it would be "extremely difficult, if not impossible" in a "close case" like that one for the "jury to ignore this seemingly relevant fact," this Court reversed the conviction. Id. at 256-57.

The facts here are not similar to Escalona. First, as Thrower's trial judge noted, the testimony by C.A. regarding the kissing incident was not especially prejudicial – it was not a "rape," and was in fact tamer than the other evidence already elicited from the very same witness. RP 391. Further, the testimony, even

without the "open door" granted by cross examination, was relevant to the case in chief. After all, admission of the evidence would have been appropriate even prior to cross examination, and it was, in all likelihood, only the prosecutor's cautious decision that the kissing incident was too "far afield" to seek its admission that spared the evidence from being admitted in the first place. RP 382. Because the kissing incident provided a reasonable explanation for C.A.'s failure to report the indecent exposure (which was admitted), and served to rebut the material assertion by defense that C.A.'s demeanor on the stand was a symptom of a lying child, it could easily have been admitted at trial from the start.[2]

Unlike the evidence of a prior stabbing in Escalona, which had no bearing on the charged case, C.A.'s testimony was both legally and logically relevant, and therefore not unfairly prejudicial.

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[2] Numerous cases have held that prior misconduct evidence is admissible to rebut a material assertion of a party, regardless of whether the evidence fits within one of the traditional categories such as motive, intent, or identity. See, e.g., State v. Wilson, 60 Wn. App. 887, 808 P.2d 754, rev. denied, 117 Wn.2d 1010 (1991) (in prosecution for statutory rape and indecent liberties, evidence of prior assaults on same victim was admissible to show the reason for the victim's fear and the delay in reporting the offenses); State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990) (in prosecution for kidnapping and child molestation, evidence of defendant's sexual abuse of a *different child*, although inherently prejudicial, was admissible to rebut defendant's contention that sexual dysfunction prevented his arousal); State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987) (in manslaughter prosecution, evidence of defendant's prior assaultive behavior toward third parties was admissible to contradict claim of self-defense); State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) (prior conviction relevant to rebut claim that killing was not premeditated).

Further, the trial court here did not merely tell the jury to "disregard the evidence," which might have indeed required "mental gymnastics," but instead directed jurors on precisely how to use the evidence appropriately. CP 54.

C.A.'s testimony regarding the kissing incident was not unfairly prejudicial and therefore defense counsel's opening of the proverbial door was not ineffective assistance of counsel. This Court should affirm Thrower's convictions.

2. EVEN IF C.A.'S TESTIMONY WAS PREJUDICIAL, THE PREJUDICE WAS CURED BY THE LIMITING INSTRUCTION SUBMITTED BY THROWER'S ATTORNEY.

Thrower also argues that his attorney was ineffective because his limiting instruction to the jury did not explicitly prohibit jurors from using the evidence to show Thrower's "character (child molester) and [that he] acted in conformity with that character." Brief of Appellant at 1. But the instruction told jurors that they were permitted to use the evidence only to determine whether C.A. had any reason to fear Thrower, and that they may not consider it for "*any* other purpose." CP 54 (emphasis added). The instruction, therefore, prohibited jurors from considering the evidence to show

Thrower's character (and any other improper considerations), and properly cured any harm Thrower's attorney created by "opening the door" to the evidence.

When a court admits evidence of prior acts under ER 404(b), the defendant is entitled to a limiting instruction that tells the jury for what purpose it may properly consider the evidence of prior misconduct. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). An adequate limiting instruction must inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for any other reason. State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012).

The limiting instruction here was crafted by defense counsel. RP 440-41. It was not modified by the court, nor objected to by the State. RP 440-41. The instruction barred the jury from using the evidence for any purpose other than the one stated explicitly: to determine whether or not C.A. was afraid of Thrower. The strong language of the instruction prohibited the jury from considering the evidence to show conformity with Thrower's character because it prohibited the jury from using it to show anything other than C.A.'s fear. CP 54. The purpose and limitation of the evidence was expressed in *four* different ways in the instruction, highlighted here:

> Certain evidence has been admitted in this case for **[1] only a limited purpose**. This evidence consists of the testimony of [C.A.] with regards to the allegation concerning the Defendant picking her up, carrying her, and kissing her and may be considered by you **[2] only for the purpose** of determining whether she had reason to fear the Defendant. **[3] You may not consider it for any other purpose**. Any discussion of the evidence during your deliberations **[4] must be consistent with this limitation**.

CP 54 (emphasis added). The limits of this evidence were further highlighted by the State in its closing: "Now that evidence came in *only for a very limited purpose*, about what Mr. Thrower did to [C.A.], and that goes to [C.A.]'s fear of the defendant and explains her demeanor on the stand." RP 539 (emphasis added). Because jurors are presumed to read and follow their instructions, this Court should presume the jurors here followed the clear language of this instruction, and did not require further language explicitly warning them not to consider it for propensity purposes. State v. Willis, 67 Wn.2d 681, 687, 409 P.2d 669 (1966).

Thrower cites State v. Gresham as support for his argument that an ER 404(b) limiting instruction must explicitly state that the prior misconduct cannot be used as propensity evidence: "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." 173 Wn.2d at 423-24; Brief of Appellant at 14. In Gresham, defendant Scherner was charged with sexually molesting his granddaughter and the court admitted evidence that the defendant had molested four other girls, in a similar manner, to show a "common scheme or plan" under ER 404(b). The trial court ruled that the prior sexual offenses "exhibited such markedly similar conduct that it was 'abundantly clear that they show ...an overarching plan.'" Id. at 422. On appeal, the Washington Supreme Court held that the trial court should have given a limiting instruction clarifying that the offenses were not to be used as propensity evidence (but found that the error was harmless). Id. at 424.

Evidence admitted to show a "common scheme or plan," like the prior misconduct in Gresham, reflects directly on the defendant and whether or not he committed the charged crime; the Gresham court's insistence on differentiating the use of the evidence to show a "common plan" but not to show propensity, makes sense in that context. The distinction between a defendant's "plan," to do something similar to what he had done before, and the likelihood

that he committed the current crime because he has committed similar crimes in the past is a subtle one, warranting an explicit instruction distinguishing two ways of interpreting the same evidence. But in Thrower's case, the evidence of the kissing incident was only admitted to show C.A.'s fear, offering a possible explanation for how she performed on the stand and perhaps why she failed to report the indecent exposure; there was no danger that a jury could confuse a jury instruction about using the evidence to weigh her fear with using the evidence as proof of Thrower's propensity to molest children. Unlike in Gresham, the need for an explicit instruction distinguishing two entirely unrelated concepts was not essential here.

Moreover, Gresham addressed acts of sexual abuse that mirrored the charged acts against four different juvenile victims – the temptation to use such evidence as propensity evidence against Scherner with yet a fifth similarly-situated victim was particularly strong, and the necessity of addressing this head-on in the jury instructions is understandable in that context. But here, the instruction deliberately crafted by Thrower's attorney was worded to focus entirely on the witness, C.A., and omitted any mention of Thrower's character altogether. CP 54.

Given the insistence in the submitted instruction that the purpose of the evidence was extraordinarily narrow, it is likely that this was a strategic decision meant to focus exclusively on C.A. and her testimony, like so much of the defense attorney's closing argument. See State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005) (defense counsel's decision not to request a limiting instruction on the use of ER 404(b) evidence of prior bad acts was a trial strategy aimed not at reemphasizing this damaging evidence to the jury). In the context of the facts of Thrower's case and his strategy at trial, the limiting instruction was appropriate.

The limiting instruction was also consistent with other ER 404(b) limiting instructions that have been upheld by Washington courts. In State v. Goebel, a Washington Supreme Court case cited approvingly by the court in Gresham, the court reiterated the purpose of a limiting instruction: "[T]he court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes." 36 Wn.2d 367,

379, 218 P.2d 300 (1950). The limiting instruction here satisfied the requirements of Goebel.

In In re Detention of Coe, 160 Wn. App. 809, 830, 250 P.3d 1056 (2011), Division III also held that a limiting instruction similar to the one here was appropriate. Coe involved the civil commitment trial under the Sexually Violent Predator Act (RCW 71.09) of a serial rapist before his scheduled release date. Id. at 816. At trial, the court permitted the testimony of two experts to testify regarding the defendant's prior crimes, including uncharged rapes that contained a similar "signature"; the court found by a preponderance of the evidence that the defendant had committed the unadjudicated offenses prior to their admission at trial. Id. at 818-19. Just before the expert testimony, the court instructed the jury to consider the factual basis for the expert's opinion only for the limited purpose of "deciding what credibility and weight should be given" to the experts' opinions. Id. at 835-36. The court added that the jury "may not consider it as evidence that the information relied upon by the witness is true or that the evidence described actually occurred." Id.

The court in Coe never specifically admonished the jury not to use the evidence to show conformity with a particular character

trait and, despite Coe's argument that the limiting instructions required "mental gymnastics beyond a jury's power," the reviewing court found that the limiting instruction was "proper." Id. at 837. Similarly, the limiting instruction here specifically instructed the jury on the *only* appropriate use of the evidence, and was similarly proper.

In State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928, review granted, cause remanded on other grounds, 168 Wn.2d 1027 (2010), the trial court drafted an instruction cautioning the jury to consider evidence of the defendant's prior misconduct only as circumstantial proof of the crimes charged, and not as proof of the defendant's general propensity to commit those crimes: "Evidence from other jurisdictions has been admitted that you may consider as establishing an association of the defendant to the crimes charged. You must not consider this evidence for any other purpose." Id. at 937-38. While this Court said that the "instruction perhaps could have been more artfully worded," the limiting instruction nevertheless "maintained the necessary balance between the obligation to give a satisfactory limiting instruction and the

obligation to refrain from commenting on the evidence." Id. at 940-41. Like the limiting instruction in Thrower's case, this proper instruction did not specifically instruct the jury to not use the evidence for propensity purposes, and yet it was still proper.

The limiting instruction here was designed by Thrower's attorney to specifically address its narrow purpose and, in four different ways, explicitly prohibited the jury from deviating from that purpose. That jurors follow their instructions is an "almost invariable assumption of the law," and there is no reason to find that the jurors here deviated from this assumption, particularly when it was repeated in the instruction itself and echoed again in closing arguments. In re Det. of Coe, 160 Wn. App. at 838. Thrower's attorney's performance was not deficient in proposing this carefully-crafted instruction, which Thrower used strategically during trial. This Court should affirm.

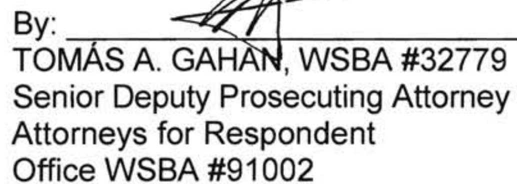
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Thrower's convictions.

DATED this 9 day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: ______________________
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to DAVID B. KOCH, of Nielsen, Broman and Koch, P.L.L.C., at the following address: Central Building, 1908 East Madison Street, Seattle, WA 98122, the attorney of record for the appellant, containing a copy of the Brief of Respondent in STATE V. MAURICE THROWER, Cause No. 69950-4-I in the Court of Appeals of the State of Washington, Division I.

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

08/09/13

Name | Date

Done in Seattle, Washington