

FILED
4-10-15
Court of Appeals
Division I
State of Washington

NO. 71027-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RAMON CARRILLO-ALEJO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE D. KNIGHTLINGER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
3. THE ER 404(b) EVIDENCE.....	5
C. <u>ARGUMENT</u>	7
1. CARRILLO-ALEJO CANNOT SHOW THAT HIS COUNSEL WAS INEFFECTIVE BY FORGOING A LIMITING INSTRUCTION.....	7
a. The Decision Not To Request A Limiting Instruction Was Strategic	9
b. Carrillo-Alejo Cannot Show Prejudice	14
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
108 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 8

Washington State:

State v. Barragan, 102 Wn. App. 754,
9 P.3d 942 (2000)..... 10

State v. Cham, 165 Wn. App. 438,
267 P.3d 528 (2011)..... 8

State v. Donald, 68 Wn. App. 543,
844 P.2d 447 (1993)..... 10

State v. Embry, 171 Wn. App. 714,
287 P.3d 648 (2012)..... 9

State v. Gresham, 173 Wn.2d 405,
269 P.3d 207 (2012)..... 7, 9

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011)..... 8, 9

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 8

State v. Price, 126 Wn. App. 617,
109 P.3d 27 (2005)..... 10

State v. Russell, 171 Wn.2d 118,
249 P.3d 604 (2011)..... 9

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987)..... 8

State v. Yarbrough, 151 Wn. App. 66,
210 P.3d 1029 (2009)..... 10

Rules and Regulations

Washington State:

ER 404 1, 5-7, 9-15

Other Authorities

5 Karl Teglund, Washington Practice, Evidence Law and
Practice § 404.35 (5th ed. Pocket Part 2014)..... 11, 12

A. ISSUE

1. Counsel is not ineffective in forgoing an ER 404(b) limiting instruction for strategic reasons. Carrillo-Alejo was charged with sexually abusing a child for approximately five years. The trial court admitted as ER 404(b) evidence Carrillo-Alejo's threats, gifts of candy and money, and his other sexual contact with the under-12-year-old victim. Counsel exploited some of the ER 404(b) evidence to Carrillo-Alejo's advantage to discredit the victim. The jury's verdicts, convicting on three counts, but acquitting on one count, show that it did not consider the ER 404(b) evidence to conclude that the defendant had a propensity to commit crimes. Did Carrillo-Alejo receive effective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Ramon Carrillo-Alejo by amended information with two counts of first-degree rape of a child and two counts of first-degree child molestation for abusing F.H. between April 9, 2005 and July 31, 2012. CP 8-9. The Honorable Lori K. Smith presided over the jury trial at which Carrillo-Alejo was found guilty of first-degree rape of a child (count I) and both counts of

first-degree child molestation (counts III and IV). 1RP¹ 5; 9RP 8-11; CP 49, 51-52. The jury acquitted Carrillo-Alejo of the second count of rape of a child (count II). CP 50. The trial court imposed concurrent standard range indeterminate sentences of 165 months to life for first-degree rape of a child and 100 months to life on each count of child molestation. 10RP 13-19; CP 53-58.

2. SUBSTANTIVE FACTS.

From the time that F.H. was four or five until she was almost nine years old, Ramon Carrillo-Alejo lived with her and her parents. 6RP 34-35, 82; 7RP 15. Carrillo-Alejo was a friend of her mother's and moved into their apartment when he needed a place to live. 6RP 34-35, 82-83. F.H.'s parents usually worked two jobs and left for work in the very early morning hours. 6RP 39-41, 43, 47, 80-82; 7RP 18, 21. Carrillo-Alejo often cared for F.H. while her parents worked. 6RP 41, 44, 47-48; 7RP 18-19, 21-22. She called him "uncle" and he was treated like a member of their family. 6RP 44; 7RP 22-23.

Beginning when F.H. was about seven years old, Carrillo-Alejo raped her by performing oral sex on her. 7RP 26-27, 31. She described the first incident as occurring after she had run out of

¹ The State adopts the Appellant's numbering system to refer to the verbatim report of proceedings. Br. of App. at 2.

toilet paper in the bathroom. 7RP 24-25. Carrillo-Alejo had brought her from the bathroom to his room, laid her on his bed, and "licked" her "private part." 7RP 26-27. Carrillo-Alejo performed oral sex on F.H. two additional times: once when caring for her and her friend Anna when she was about 9 years old, and again the day after Christmas after he moved out of the trailer when she was about 11 years old. 7RP 40-43, 78-81.

Carrillo-Alejo also molested F.H. On one occasion when his wife, Odelia, was also living with the family, he made F.H. touch his penis while Odelia went to make breakfast. 7RP 61-62. She described that when she touched his "private part" she felt "little pointy things, like hairs." 7RP 61-62, 71. In another incident, Carrillo-Alejo laid F.H. on his bed and rubbed his "private part" against hers until "white things came out." 7RP 85-90.

F.H. did not tell anyone about the abuse until at eleven years old she told her sixth grade counselor in the fall of 2012. 7RP 73-76. Shortly after this disclosure, she also told her mother. 7RP 73-76. Her parents noticed changes in F.H.'s behavior about the summer before she started sixth grade in 2012 when F.H. had been having nightmares about Carrillo-Alejo and refused to sleep alone in her room. 6RP 52-54, 91-92, 107; 7RP 80, 83. Her parents also

noticed that she had started acting rudely and disrespectful toward Carrillo-Alejo. 6RP 53, 90-91.

The school counselor reported F.H.'s disclosures to Child Protective Services and Detective Angela Galetti followed up with the victim's family. 6RP 21, 113-14. F.H. was interviewed by a child interview specialist. 6RP 113-15. Galetti enlisted Officer Diego Moreno to contact Carrillo-Alejo because Moreno was fluent in Spanish and Carrillo-Alejo primarily spoke Spanish. 6RP 116; 7RP 129. Carrillo-Alejo agreed to an interview with Galetti. 7RP 130-31. Carrillo-Alejo acknowledged that he had lived with F.H.'s family from 2007-2009 and had taken care of F.H. while her parents worked, but denied abusing her. 7RP 131-33.

By the time of trial, F.H. was twelve years old and not able to recall her exact age for each incident of abuse. 7RP 12, 123-24. She explained that the majority had occurred when Carrillo-Alejo lived with them in trailer #16. 7RP 123-24. Because Carrillo-Alejo had moved out around the time her brother was born in 2009 and F.H.'s family had to move out of trailer #16 for a time in 2010 due to fire damage, most of the abuse occurred when F.H. was six to nearly nine years old. 6RP 46, 50-51. The abuse after Carrillo-

Alejo moved out occurred when she was nine to eleven years old.

7RP 30, 48, 69-70, 78.

3. THE ER 404(b) EVIDENCE.²

Throughout the years that Carrillo-Alejo abused the victim, he threatened her not to tell anyone about the abuse, or warned that there would be consequences. 7RP 31, 54-55, 58-59. He also told her that he had killed people where he had lived before. 7RP 54-55, 58-59. She believed his threats. 7RP 55. One of these threats occurred after F.H. visited Carrillo-Alejo at his new home and he gave her an open-mouthed tongue kiss. 7RP 64-65. He followed this up by giving her \$20, telling her to take it or something would happen, and telling her not to tell her parents. 6RP 65-66.

He also routinely gave gifts to F.H. of \$10 or \$20 cash, candy, or donated clothes from the place he worked. 6RP 45, 63-64; 7RP 37. He would tell her to use the money to buy "goodies." 7RP 37-38. After F.H.'s brother was born, he also gave her brother small amounts of money, such as \$1 or \$2, or candy. 7RP 64-75.

On another visit to Carrillo-Alejo's home after he moved out, he offered F.H. an iPhone 4 if she "did it" with him, which she interpreted as an offer to buy her silence if she went to bed with

² The facts recited here are from the ER 404(b) testimony at trial.

him. 7RP 49-50. Around the same time, he also told her that he had paid a woman \$500 to perform oral sex on the woman, but he could have just paid F.H. to do that to her. 7RP 52-53.

Aside from kissing F.H., Carrillo-Alejo also had other collateral sexual contact with her. One time while caring for the victim he made her massage his shoulder. 7RP 33-36. Another time, he showered with her. 7RP 84-85. On another occasion when he visited for dinner after moving out, he rubbed her upper thigh under the dinner table. 7RP 81-82.

The State offered all of the above evidence under ER 404(b).³ The evidence of threats and gifts was offered to explain the victim's delay in reporting the abuse. 2RP 108-10; CP 90, 93-95. The other sexual contact was offered to show the defendant's lustful disposition for the victim. 2RP 109-10; CP 95-96. All of the evidence was also offered as *res gestae*. CP 96.

Defense counsel objected to the threats and gifts evidence, but agreed that the collateral sexual contact was admissible.

³ ER 404(b) states:

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.

2RP 112-13. After conducting the ER 404(b) analysis, the trial court admitted the evidence of threats, other sexual contact, and the gifts of candy and money directly connected with incidents of abuse.⁴ 2RP 115-18. Carrillo-Alejo's counsel did not request a limiting instruction, so the trial court did not give one. 8RP 18-33; CP 25-48 (jury instructions).

C. ARGUMENT

1. CARRILLO-ALEJO CANNOT SHOW THAT HIS COUNSEL WAS INEFFECTIVE BY FORGOING A LIMITING INSTRUCTION.

Carrillo-Alejo asserts that his trial counsel's performance was deficient because she did not request a limiting instruction for the ER 404(b) evidence. Because Carrillo-Alejo's counsel had strategic reasons for not requesting an instruction and Carrillo-Alejo cannot demonstrate that he was prejudiced by the failure to request one, his claim fails.

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced him.

⁴ Prior to admitting ER 404(b) evidence, the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687, 108 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The first prong of the test “requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all of the circumstances.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

Judicial scrutiny of counsel’s performance must be highly deferential and begins with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Trial counsel’s legitimate strategy or tactics cannot be the basis for a claim of ineffective assistance. McFarland, 127 Wn.2d at 336.

The prejudice prong of the test requires a showing that there is a reasonable probability that, but for counsel’s error, the result of the trial would have been different. Thomas, 109 Wn.2d at 226. In this context, Carrillo-Alejo must show a reasonable probability that he would have been found not guilty if the jury was provided a limiting instruction. See State v. Cham, 165 Wn. App. 438, 446, 267 P.3d 528 (2011) (no prejudice shown from counsel’s failure to offer a limiting instruction because an instruction unlikely to have

changed the trial's result). Carrillo-Alejo must meet both prongs of the test to prevail. Grier, 171 Wn.2d at 32-32.

a. The Decision Not To Request A Limiting Instruction Was Strategic.

Once a trial court admits evidence of prior acts under ER 404(b), it must offer an instruction to the jury on the limited purpose of the evidence, but only if such an instruction is requested by counsel. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011). An ER 404(b) limiting instruction informs the jury of the purpose for which the evidence is admitted and that the evidence may not be used to conclude that the defendant has a particular character trait or acted in conformity with that character trait. Gresham, 173 Wn.2d at 423-24.

Because counsel is presumed effective, the defendant must demonstrate that counsel's decision not to request a limiting instruction was unreasonable in the circumstances. State v. Embry, 171 Wn. App. 714, 762, 287 P.3d 648 (2012) (citing Grier, 171 Wn.2d at 34). The decision not to seek an ER 404(b) limiting instruction has been recognized as a legitimate strategy to avoid

emphasizing damaging evidence. State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993); State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009). For example, in State v. Barragan, the defendant was convicted of first-degree assault for stabbing a fellow inmate. 102 Wn. App. 754, 756-57, 9 P.3d 942 (2000). Evidence that the defendant bragged about prior assaults against inmates was admitted under ER 404(b). Id. at 758-59. The court held that counsel's decision not to seek a limiting instruction was strategic as it would only have reemphasized this damaging evidence. Id.

Here, as to the evidence of gifts, a limiting instruction was really not necessary because such evidences was of a fundamentally different character than the typical evidence of prior uncharged crimes or of other victims. A jury would not use evidence of gift-giving to conclude that the defendant had a propensity to commit sex crimes. So, instead of seeking a limiting instruction, counsel strategically exploited the gift-giving evidence to show the close and supportive relationship Carrillo-Alejo had with F.H.'s family. She argued in closing:

Maria also told you, "Yeah, Ramon helped us out. He gave [F.H.] money, bought her some toys and some clothes." She was grateful for the help. They were struggling. She thought they had fun together.

8RP 62.

Moreover, this was not a case where unrelated victims testified that the defendant committed similar prior crimes as part of a common scheme or plan. In such a case, the concern that the jury could use the evidence to conclude that the defendant had a propensity to commit crimes is much greater and a limiting instruction is more critical. But, in Carrillo-Alejo's case, all of the ER 404(b) evidence, aside from the gift evidence, was part of the victim's testimony. Either the jury would believe her or not; there was not the usual propensity concern.

Commentators have also noted that a limiting instruction may be unnecessary when, as here, the evidence is admitted as *res gestae*. Such evidence does not present the same propensity concerns. Karl Teglund explained:

. . . in this sort of situation the State is not attempting to portray the defendant as a person having a propensity to commit crimes. The State is simply offering tangible, albeit circumstantial, evidence of the crime charged.

5 Karl Teglund, Washington Practice, Evidence Law and Practice
§ 404.35, at 92 n.10 (5th ed. Pocket Part 2014).

In any event, counsel used this ER 404(b) evidence in a strategic fashion too. Counsel mined this evidence for inconsistencies that might undercut F.H.'s entire story. The focus of counsel's closing argument was that the State had not proved the charges beyond a reasonable doubt because F.H. lacked credibility:

Consistency is so important when you're deciding whether someone's telling the truth and whether someone's being credible. [F.H.] was not consistent. . . .She was inconsistent about really big details, and the fact that she was inconsistent about some really big details really calls into question whether any of this happened.

8RP 54. Counsel closely examined F.H.'s description of the incidents of abuse and one of the incidents of collateral sexual contact, the open-mouthed tongue kissing, to point out inconsistent statements. 8RP 55-59, 66. Counsel noted that F.H. had originally said that the last instance of abuse was when Carrillo-Alejo kissed her, but she testified at trial that the incident at Christmas was the last incident. Counsel termed this the "which-one-is-the-last incident." 8RP 66. Counsel used these inconsistencies as reasons that the jury should acquit:

[S]tart down here with the presumption of innocence. . . all the way up here that you're convinced beyond a reasonable doubt, in-between these all these reasonable doubts that you might have... There's the different stories between the bathroom incident. There's the Odelia incident. There's the which-one-is-the-last incident. . .

8RP 66. Other than the kissing and the gifts, counsel did not mention the ER 404(b).

Further, a limiting instruction would have listed and imposed some order on the ER 404(b) evidence. F.H. had difficulty testifying, did not testify to the incidents in chronological order, and testified to charged events intertwined with ER 404(b) events. An instruction would have emphasized those incidents which had not been the focus of F.H.'s testimony.

Carrillo-Alejo claims that counsel was not thinking strategically because the ER 404(b) evidence was not of a fleeting nature. This is simply incorrect. The victim's testimony covered abuse over a period of five years. She testified in far greater detail to the incidents that formed the basis of the charged crimes than the incidents that were the ER 404(b) evidence. Her testimony about the showering incident occupies about a page and a half of the transcript, while F.H.'s testimony about the first incident of rape occupies over five pages. 7RP 25-30, 84-85. A limiting instruction

would have emphasized all of the ER 404(b) evidence, even that which F.H. had barely touched upon.

By not requesting a limiting instruction, counsel chose some of the ER 404(b) evidence to exploit and did not emphasize the rest. That strategy was sound. Thus, Carrillo-Alejo cannot show that counsel was deficient, and his claim fails.

b. Carrillo-Alejo Cannot Show Prejudice.

Carrillo-Alejo also fails to show that the result of the trial likely would have been different if a limiting instruction had been provided to the jury.

Here, the jury did not simply use the ER 404(b) evidence to conclude that Carrillo-Alejo was the criminal-type and convict him of all charges. The jury acquitted Carrillo-Alejo of count II, showing it carefully considered the evidence and convicted only on the counts it found proven beyond a reasonable doubt. The jury had heard F.H. testify to five acts that could have constituted the basis for the four charges and also heard her testify about the ER 404(b) evidence. If the jury had been swayed by the ER 404(b) evidence of massage, showering, kissing or threats, then it would have convicted on all counts.

In addition, the prosecutor only mentioned the ER 404(b) evidence in closing argument in the context that the trial court had ruled it admissible. For example, the prosecutor argued that F.H. delayed disclosing the abuse for years because of the threats that Carrillo-Alejo made to her. 8RP 40, 50-51. She argued:

Because when [F.H.] was six, almost seven . . . [to] tell her "Don't tell your parents. Big consequences." . . .that's a scary thing for someone who is like a third parent to her, . . .telling her. . .that he would hurt her family, the most important people in her life, of course she didn't tell right away. That makes sense and that makes her more credible. . .

8RP 51. The trial court had admitted the threat evidence for exactly this purpose: to explain F.H.'s delay in reporting. 2RP 115.

Overall, the prosecutor did not focus on the ER 404(b) evidence, but instead on why F.H. was credible. 8RP 36-37, 40-43.

Given the jury's careful verdicts and the prosecutor's proper argument about the ER 404(b) evidence, Carrillo-Alejo has not shown prejudice. The result of the trial likely would have been the same even if a limiting instruction had been provided.

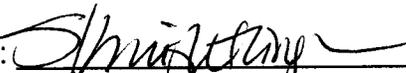
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Carrillo-Alejo's convictions.

DATED this 10th day of April, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE D. KNIGHTLINGER, WSBA #40986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Ramon Dejesus Carrillo-Alejo, Cause No. 71027-3, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 10th day of April, 2015.

U Brame

Name:

Done in Seattle, Washington