No. 99940-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTOINE JOSEPH PERRY,

Petitioner.

AMENDED PETITION FOR REVIEW

Court of Appeals No. 54165-3-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 17-1-01750-9
The Honorable Jerry Costello, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Antoine Joseph Perry, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 54165-3-II, which was filed on June 2, 2021. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit reversible error when it admitted C.B.'s testimony describing an unproved incident of rape committed against her by Perry as evidence of a common scheme or plan, where her allegations were dissimilar to the charged conduct?

2. Did the trial court abuse its discretion in admitting out-of-court statements made to a sexual assault nurse examiner under ER 803(a)(4), which requires statements to be reasonably pertinent to medical diagnosis or treatment, where the State did not establish that the complainant's motive was to promote her medical treatment and where the nurse testified that she does not provide medical treatment and she uses the complainant's statements only to guide her in collecting evidence for use in a possible criminal investigation?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Antoine Joseph Perry with one count each of second degree rape, second degree assault, and unlawful imprisonment, in connection with an incident that occurred on November 4, 2016, involving alleged victim T.G.. (CP 5-6) The State alleged that the assault and unlawful imprisonment offenses were sexually motivated. (CP 6) A jury convicted Perry of charged. (07/25/19 RP 875-76)[1] Perry filed a timely Notice of Appeal. (CP 236) The Court of Appeals affirmed Perry's convictions.

B. SUBSTANTIVE FACTS

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

T.G. had one follower with the username "FreeGameAP." (07/18/19 RP 384) That username belonged to Antoine Perry.

[1] The transcripts will be referred to by the date of the proceeding contained therein.

(07/23/19 RP 678) T.G. did not know Perry, but still gave him access to her posts and followed his posts in return. (07/18/19 RP 386-87) T.G. and Perry would occasionally write comments on each other's posts. (07/18/19 RP 391-92)

On the night of November 3, 2016, T.G. started a fire in her kitchen while she was making dinner. (07/18/19 RP 388, 392, 480) Fire fighters were called and extinguished the blaze. (07/18/19 RP 480) T.G. later posted about the fire on Snapchat, and complained that she did not get to eat her dinner. (07/18/19 RP 392) Perry responded with a message saying, "that sucks," and offering to bring her food. (07/18/19 RP 392-93) T.G. declined the offer, because she did not know Perry. (07/18/19 RP 393)

But T.G. and Perry continued to converse over text messages, and T.G. thought Perry seemed nice. (07/18/19 RP 393) When he again offered to bring her food, she accepted and gave him her home address. (07/18/19 RP 393) T.G. told Perry she was 16 years old. (07/18/19 RP 393-94)

T.G.'s mother and brother were asleep at the time, so T.G. told Perry to text her when he arrived and she would come out to the car. (07/18/19 RP 398) Perry did so, and T.G. cane outside and got into the front seat of the car. (07/18/19 RP409-10) T.G.

testified that Perry was flirting with her and tried to touch her, but she told him to stop. (07/18/19 RP 417, 420) According to T.G., Perry kept trying to touch her, then he began looking around the car and reaching under the seat. (07/18/19 RP 420) T.G. thought Perry might have a weapon, so when he told her to get into the back seat she was scared and complied. (07/18/19 RP 420-21)

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

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

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

to stop. (07/18/19 RP 427-28) According to T.G., Perry stopped and told T.G. that she was "killing the mood." (07/18/19 RP 428)

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

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

After T.G. was treated and medically cleared by emergency room medical staff, and after she had been interviewed by law enforcement officers, a sexual assault nurse examiner (SANE) conducted a forensic examination to collect evidence. (07/22/19AM 513; 07/23/19 RP 642, 644-45, 646, 667-68) Over defense objection, the trial court allowed Pollock to relate statements that

T.G. made to her during the examination. (06/10/19 RP 584-615; 07/23/19 RP 649-55)

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

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

According to C.B., Perry asked her to help him look for his phone. (07/22/19PM 560) While she was leaning into the car to look on the floor, Perry came around the car and pushed her face-

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

Perry testified on his own behalf. He testified that T.G. initiated their physical encounter, and he did not threaten or force her to move into the back seat or engage in any sexual activities. (07/23/19 RP 694, 695, 696, 697, 699) Perry also testified that neither T.G. nor C.B. indicated that they did not want to engage in sexual activities with him. (07/23/19 RP 700, 729) He also denied using threats or force or choking either woman. (07/23/19 RP 695, 699, 705, 728)

V. ARGUMENT & AUTHORITIES

The issues raised by Perry's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

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

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

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

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

preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. *Lough*, 125 Wn.2d at 852. "[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial." *State v. DeVincentis*, 150 Wn.2d 11, 19-20, 74 P.3d 119 (2003) (quoting *Lough*, 125 Wn.2d at 860).

Where the charged crime and the prior acts are not substantially similar (beyond mere similarity of outcome), the prior acts serve no purpose other than to show that the accused person is a bad person, and thus likely committed the charged crime. Such evidence is "clearly inadmissible." *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004).

Division 2's opinion in *State v. Harris* is helpful here. 36 Wn. App. 746, 677 P.2d 202 (1984). In that case, Harris and his co-defendant, Jamie Gibbs, were tried together for the rapes of two women, during two separate incidents that occurred a few weeks apart. 36 Wn. App. at 747. In the first incident, the female victim accepted a ride in a car with Harris and Gibbs, but they refused to let her out of the car when she asked to leave. Harris instead drove

to Gibbs' house, where the men alternated holding the victim down and having sexual intercourse with her. 36 Wn. App. at 747. In the second incident, a different female accepted a ride from Harris and Gibbs, and instead of taking her home as she requested, Harris drove to a dead end street. 36 Wn. App. at 748. The men forced the victim into the back seat and alternated forced sexual intercourse with her. 36 Wn. App. 748. Harris' and Gibbs' pretrial motion to sever the two counts was denied. 36 Wn. App. at 748.

On appeal, the State argued that the court's refusal to sever was justified in part because each rape was part of a common scheme or plan. *Harris*, 36 Wn. App. at 751. Division 2 disagreed:

> In its effort to justify admission the State points out that "both victims voluntarily entered vehicles with the defendants and in both instances the defendants drove the victims against their will to a location where the rapes occurred." In so urging, the State has fallen into the common error of equating acts and circumstances which are merely similar in nature with the more narrow common scheme or plan. … [I]t is obvious the two rapes here do not qualify as links in a chain forming a common design, scheme or plan. At most they show only a propensity, proclivity, predisposition or inclination to commit rape. Such evidence is explicitly prohibited by ER 404(b).

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

The common characteristics between the crimes relied on by the trial court include evidence that (1) Perry used Snapchat to make contact with T.G. and C.B., thus allowing him to "hide his identity" by using a made-up name, while "trying to gain the confidence of both" young women; (2) both T.G. and C.B. were 15 or 16 years old, an age that is "susceptible to online manipulation and curiosity about the opposite sex;" (3) Perry drove a car that did not belong to him; (4) Perry parked in front of both homes, thus "requiring the girls to come to" his car "to isolate them;" (5) Perry "used food as an excuse to meet the girls or gain their friendship or trust;" (6) the sex acts occurred in the car after Perry "pretends to be their friend or using the ruse of going on an "innocent drive;" (7) choking used as a method of subduing resistance; (8) the need for both girls to flee the car and Perry's "shift in demeanor" after the act was completed; (9) Perry's attempt to "prevent communication of both girls by not allowing them access to their cell phones; and, finally, (7) the closeness in time of both incidents. (CP 179-80; 06/10/19 RP 53-54)

However, the trial court mistakenly found similarities where none existed, and the remaining similarities are not so substantial that they rise to the high level of similarity required to find a

common scheme or plan. And the Court of Appeals mistakenly agreed by finding that the "record shows significant similarities between CB's and TG's rapes." (Opinion at 6)

First, Snapchat is an extremely common mode of communication and social contact for young people. (07/18/19 RP 385) It is standard for individuals to have a unique made-up "username." Also, Perry did not "hide his identity," as both T.G. and C.B. testified that they were able to see photos and messages Perry posted on his account. (07/18/19 RP 386-87, 391-92; 07/22/19PM RP 554-55, 574)[2]

Perry did not "require" both girls to come out to his car. T.G. testified she directed Perry to text her when he arrived at her house so that she could come out to the car. (07/18/19 RP 398) Likewise, the use of food is more coincidental than a scheme on Perry's part—both girls independently posted about being hungry, and C.B. testified that she posted a request specifically asking for someone to bring her food. (07/18/19 RP 392; 07/22/19PM RP 557)

There was no evidence that Perry used a "ruse" of an

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

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

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

The erroneous admission of ER 404(b) evidence, requires reversal if the error, "within reasonable probability, materially affected the outcome." *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *Acosta*, 123 Wn. App. at 438.

It is well recognized that evidence of a defendant's prior

criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. *State v. Calegar*, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); *State v. Perrett*, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the charged crime. *State v. Newton*, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). Furthermore, the potential for prejudice is even higher where the other act is for an offense that is nearly identical to a current charge. See *State v. Pam*, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983).

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

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

convictions must be reversed.

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

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

Hearsay is an out-of-court statement offered for the truth of the matter asserted. ER 801. Hearsay evidence is inadmissible unless an exception applies. ER 802. ER 803(a)(4) provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." A party demonstrates that a statement is reasonably pertinent to medical diagnosis or treatment when "(1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment." *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

Perry objected to the admission of T.G.'s statements to

Pollack because the purpose of the examination, and the statements she made during the exam, was to gather evidence and not to receive medical treatment. (70/22/19PM RP 584-85) The trial court found that there was a dual purpose to T.G.'s statements, forensic and medical, and that because there was a medical component they were admissible under ER 803(a)(4).[3] (07/23/19 RP 610-11, 614, 615) The Court of Appeals agreed, finding that "the trial court here reasonably concluded that TG's purpose was to seek medical treatment." (Opinion at 7) Both the trial court and the Court of Appeals were wrong.

In *Williams*, Division 2 Court found that statements made to a forensic nurse during a medical examination were admissible under ER 803(a)(4) because the examination was conducted for "'a combination' of purposes—medical as well as forensic," and because the evidence indicated that the declarant's motive was not purely forensic. 137 Wn. App. at 746-47. But here, the State did not demonstrate that T.G.'s motive was to promote treatment or that Pollack relied on the statements for the purpose of providing medical treatment.

[3] A trial court's evidentiary rulings are reviewed for abuse of discretion. *See State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

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

Pollock explained that a forensic "sexual assault nurse examiner is a nurse who collects evidence from patients who come in and have an alleged sexual assault." (07/23/19 RP 642) The SANE nurse will "do a full exam, but ultimately any injuries that need a full medical attention will be done by the ER doctor and the nurse." (07/23/19 RP 642) Pollock is not employed by the hospital. (07/23/19 RP 643) She works for a company that is based out of Oregon, which provides forensic nurses for all of the MultiCare and CHI hospitals in the region. (07/23/19 RP 643) She is dispatched to one of the hospitals if "someone presents to the ER and alleges that they were sexually assaulted[.]" (07/23/19 RP 644)

Before the forensic exam begins, the patient is first seen by medical personnel in the emergency room, and any treatment and diagnosis takes place there. (07/23/19 RP 667) Pollock testified that it is not her job to treat or diagnose the patient. (07/23/19 RP

667-68) Instead, her job is to collect evidence for use in a potential criminal investigation. (07/23/19 RP 668) Any evidence collected is handed over to the investigating officers. (07/23/19 RP 665)

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

Unlike in *Williams*, there was no evidence presented to show that T.G.'s motive in talking to Pollock was to obtain medical care and treatment. It was not T.G.'s idea to seek medical attention, and by the time she met Pollock she had already been seen by emergency room doctors or nurses and had already given a statement to a police officer. (07/18/19 RP 445; 07/23/19 RP 646, 667) There is nothing in T.G.'s testimony to indicate that her motive when she spoke to Pollock was to receive or promote additional medical treatment or diagnosis.

And Pollock did not rely on T.G.'s statements for the purpose of providing medical treatment. Pollock only asked T.G. to describe what happened so that she would know where to look for evidence. (07/23/19 RP 642-43) Finally, sexual assault forensic examinations are totally voluntary and not medically necessary. (07/23/19 RP

642, 656) The objective purpose of the exam is to collect evidence to assist in a criminal investigation and potential prosecution, not to provide needed medical care.

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

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

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

VI. CONCLUSION

For the reasons argued above, this Court should accept review, reverse Perry's convictions, and remand his case for a new trial.

DATED: July 15, 2021

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Antoine Joseph Perry

APPENDIX

Court of Appeals Opinion in *State v. Antoine J. Perry*, No. 54165-3-II

Filed
Washington State
Court of Appeals
Division Two

June 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTOINE JOSEPH PERRY, Appellant.	No. 54165-3-II UNPUBLISHED OPINION

VELJACIC, J. — A jury convicted Antoine Perry of rape in the second degree, assault in the second degree, and unlawful imprisonment. On appeal, Perry argues the trial court improperly admitted evidence of his prior misconduct under ER 404(b) and testimony from a sexual assault nurse examiner under ER 803(a)(4). We affirm his convictions.

FACTS

Perry used Snapchat, a social media application, to meet and groom 15-year-old TG. They commented on each other's stories and exchanged responses to photographs. After TG posted that she could not make food because she had "burned [her] kitchen down," Perry offered to bring her food. 4 Report of Proceedings (RP) at 392. Initially, TG refused, but Perry continued to text her with the offer and eventually she agreed. TG told Perry through Snapchat and in person that she was 16 years old, even though she was 15. When bringing TG food, Perry drove a car he did not own and parked it in front of TG's house. TG got into the front seat.

Initially, Perry tried touching and kissing TG, and she told him to stop. Perry reached under his seat and told TG to get into the backseat. Fearing Perry had a gun, TG complied. In the

backseat, Perry forcibly raped TG. When TG attempted to resist him, Perry strangled her. Perry took TG's phone and hid it after she tried using it to connect to her home's wireless Internet.

TG continually told Perry he was raping her and she eventually started crying. Perry ended the rape due to TG's crying, claiming she was "killing the mood." 4 RP at 428. When TG attempted to get her phone back from Perry, he coerced her into getting back into the car. He attempted to drive off, but TG kept her door open and accused him of kidnapping her. He stopped, and TG exited the car and returned home.

After the attack, TG was initially afraid to tell her mother what had happened because she had snuck out of the house, so she called a friend. At her friend's urging, she called the police and told her mother. At the hospital, TG was interviewed by a sexual assault nurse examiner (SANE).

The State charged Perry with rape in the second degree, assault in the second degree, and unlawful imprisonment.

Before trial, the State sought to admit evidence, under ER 404(b), that Perry had committed a similar rape against another teenage victim close in time to the rape of TG. Perry raped CB three weeks after raping TG. CB met Perry through Snapchat, and they met in person after Perry offered to bring CB food. Perry parked in front of CB's home, and she got into his car to eat. Perry strangled CB after she resisted his sexual advances. Perry also took CB's phone during the attack. The State sought to admit evidence of this misconduct to show a common scheme or plan, lack of consent, intent as to the assault, and knowing restraint as to unlawful imprisonment.

The State argued the following similarities between the rape of CB and TG constituted a common scheme or plan: the two incidents occurred a few weeks apart; in both cases Perry used Snapchat to meet and communicate with CB and TG; both victims were close in age, one was 15 and one was 16; he lured both CB and TG into his car with offers of food; when both victims

resisted, Perry strangled them; and Perry separated both victims from their phones during the attacks.

The trial court made findings of fact and conclusions of law and determined that the attack against CB was admissible as a common scheme or plan under ER 404(b). The court made the following findings of fact:

> a. The use of "Snapchat" to make contact with the girls. It allows the perpetrator to hide his identity from the women he is grooming while trying to gain the confidence of both. In both cases, the defendant used a made-up name.
> b. Both of the girls are in the age-range of 15 or 16. That range is susceptible to online manipulation and curiosity about the opposite sex.
> c. The defendant uses a car not owned by him in both instances.
> d. The defendant parks in front of both the homes and never enters, requiring the girls to come to the defendant's car to isolate them.
> e. The defendant uses food as an excuse to meet the girls or gain their friendship or trust.
> f. The fact that sexual acts occur in the car after the defendant pretends to be their friend or using the ruse of going on a[n] "innocent drive."
> g. The defendant's strangling of both girls to subdue their resistance. Both girls stated that if they didn't stop resisting, they felt as if they would be killed.
> h. The need for both girls to flee from the vehicle. The defendant's shift in demeanor after the act was completed was near identical in both cases.
> i. The defendant's attempt to prevent communication of both girls by not allowing them access to their cell phones.
> j. The closeness in time that these incidents occurred make it less likely to be a coincidence or random similarity.

Clerk's Papers at 179-80.

During trial, Perry objected to the testimony of the SANE nurse, arguing that ER 803(a)(4) was inapplicable because TG's purpose in speaking with the nurse was not for medical treatment. The trial court determined that although TG's statements to the nurse were in part to collect evidence, such statements were also necessary for medical treatment.

The jury convicted Perry of all charged counts. Perry appeals his convictions.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's admission of evidence for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

II. ADMISSION OF PRIOR MISCONDUCT

Perry argues that the trial court improperly found factual similarities between CB's and TG's rapes, and that the remaining similarities are too minor or innocuous to constitute a common scheme or plan.[1] We disagree.

A. Legal Principles

To admit evidence of a defendant's prior misconduct,

> "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (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) (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

One proper purpose for admitting evidence of prior misconduct is to show the existence of a common scheme or plan. *Gresham*, 173 Wn.2d at 421. Evidence of a common scheme or plan may be properly admitted under ER 404(b) because such evidence is not used to prove the character of the defendant. *Id.* at 422.

[1] The State argues, in part, that because Perry failed to object to the findings of fact, he failed to preserve his claim. However, Perry objected to the admittance of the prior conduct evidence by moving the court to exclude CB's testimony, which is sufficient to preserve the issue.

A plan exists when individual crimes constitute parts of a larger plan, and a common scheme occurs when a defendant devises a plan and uses it to commit similar crimes. *Id*. This case concerns a common scheme. To qualify as a common scheme, prior crimes must have common features that can be explained by a general plan, and each crime is a manifestation of that plan. *Id*.

A trial court may determine there are commonalities between crimes that constitute a scheme even if there was no unique method of committing the crimes. *Id*. In *Gresham*, the court admitted evidence of prior sex offenses after determining such crimes constituted a common scheme. *Id*. at 422-23. The court determined the crimes were similar because the defendant took trips with each victim, approached them at night when the other adults were asleep, and fondled their genitals. *Id*. at 422. The court held that, while the crimes were not identical, the similarities could be explained as "'individual manifestations'" of the same plan. *Id*. at 423 (quoting *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)).

B. Analysis

Perry challenges the trial court's finding that the evidence was admissible under ER 404(b) as a common scheme or plan, arguing that the court improperly found that Perry hid his identity on Snapchat, that Perry separated CB and TG from their phones during the attacks, and finally that Perry took both CB and TG on joy rides.

However, even if we were to exclude the challenged findings, the remaining findings are sufficient for the trial court to have determined that CB's and TG's rapes constitute a common scheme or plan. *Gresham* is instructive here. In that case, the court determined there was a common scheme or plan based on three similarities between crimes. Here, the court relied on numerous factual similarities: Perry used Snapchat to make contact with the girls; both girls were

similar in age; Perry used a car not owned by him; Perry parked in front of both the homes and never entered, requiring the girls to come to his car, thus isolating them; Perry used food as an excuse to meet the girls or gain their friendship or trust; the sexual acts occurred in the car; Perry strangled both girls to subdue their resistance; both girls needed to flee from the vehicle; and the two incidents were close in time.

This record shows significant similarities between CB's and TG's rapes. Based on this record, the trial court's conclusion that the similarities between CB's and TG's rapes constitute a common scheme or plan is not manifestly unreasonable or based on untenable grounds. Accordingly, we hold that the trial court did not abuse its discretion in admitting the evidence.

III. ADMISSION OF SANE NURSE TESTIMONY

Perry argues that the trial court improperly admitted the SANE nurse's testimony under ER 803(a)(4) because the only purpose of TG's exam was to collect evidence. We disagree.

A. Legal Principles

A court may admit a declarant's hearsay statements made to medical professionals under ER 803(a)(4). *State v. Burke*, 196 Wn.2d 712, 740, 478 P.3d 1096 (2021). On review, we consider the declarant's subjective purpose in making statements to a medical professional. *Id*. "The medical diagnosis exception applies only to statements that are "reasonably pertinent to diagnosis or treatment."" *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007) (quoting ER 803(a)(4)). A party demonstrates that a statement is reasonably pertinent to medical diagnosis or treatment when the declarant's motive in making the statement is to promote treatment, and the medical professional reasonably relied on the statement for purposes of treatment. *Burke*, 196 Wn.2d at 740.

Unless a declarant's statements show they spoke with a medical professional purely for a forensic purpose, a court may infer statements were made in part to promote treatment. *Williams,* 137 Wn. App. at 746. In *Williams,* the victim testified that she initially did not believe she needed medical treatment and understood medical professionals would be collecting evidence. *Id*. at 746-47. Notably, she did not state that her only purpose for going to the hospital was forensic. *Id.* at 747.

On appeal, the court determined that although the victim's initial purpose in speaking with the nurse was to collect evidence, this was not her only purpose. *Id*. at 746-47. When asked whether she went to the hospital for medical treatment, she responded "Not right at first." *Id*. at 747. The court also pointed out that certain statements that may appear to be about evidence, like identifying an attacker, also help with medical treatment because part of reasonable treatment is to prevent future injury from the same perpetrator. *Id*. at 746. Ultimately, the court ruled that the trial court properly admitted testimony under ER 803(a)(4) because the victim's statements did not show her purpose in going to the hospital was purely forensic. *Id*.

B. Analysis

Here, TG's purpose in communicating with the SANE nurse was not purely forensic. The only testimony provided by TG about her hospital visit shows she did not realize medical staff would be collecting evidence. She stated that she was surprised when the collection of evidence began. These statements imply she believed her visit was solely to seek medical treatment, while the forensic purpose arose later. These facts are stronger than those in *Williams*. Like the trial court in *Williams,* the trial court here reasonably concluded that TG's purpose was to seek medical treatment. Therefore, the court's reasoning was not manifestly unreasonable or based on untenable

grounds. We hold that the trial court did not abuse its discretion when it determined the SANE nurse's testimony was admissible under ER 803(a)(4).

IV. STATEMENT OF ADDITIONAL GROUNDS (SAG)

A defendant seeking review of a criminal case "may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." RAP 10.10(a).

Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider the appellant's SAG for review "if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c).

Perry's SAG consists of a cover sheet indicating two additional grounds for appeal, attachments of a motion to arrest judgment, correspondence with his trial attorney, and finally pages marked as containing his SAG. Perry argues that the State committed prosecutorial misconduct and ineffective assistance of counsel. However, the issues Perry raises are either not errors, are too vague, or are not supported by the record. We refuse to reach them. *See* RAP 10.10(c).

CONCLUSION

We affirm Perry's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, P.J.

Cruser, J.

July 15, 2021 - 4:24 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Antoine Joseph Perry
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