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NO. 65157-9-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GILBERTO R. VARGAS,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Is the defendant entitled to a new trial because the trial court did not give a limiting instruction in connection with evidence uncharged acts which were admitted to establish the defendant's lustful disposition toward the two child victims in a child molestation prosecution when the defendant did not request a limiting instruction?

2. Did the defendant receive ineffective assistance of counsel which would entitle him to a new trial when trial counsel did not request an instruction limiting the purpose for which uncharged acts could be used when the instruction was unnecessary to the defense strategy and the defendant was not prejudiced?

## **II. STATEMENT OF THE CASE**

R.G.S, born December 8, 1995 and A.V.S., born July 5, 1997 were related to the defendant, Gilberto Vargas. Although he was a cousin they referred to him as their uncle. They had a loving relationship with the defendant and his family, and often spent the weekend at their home. The last day they went to the defendant's home was June 19, 2009. 1 RP 153-158; 2 RP 270-276, 279-282; 3 RP 334, 393-398.

June 19 was the last day of school. The defendant had arranged with R.G.S and A.V.S's mother, Tanya Snow, to have the girls for an entire week. After school the defendant picked the girls up from their home and took the girls and his daughter, A.V., to the Children's Museum. When they got back to the defendant's home R.G.S., A.V.S., and A.V. watched movies in the downstairs living room. Eventually the girls fell asleep on the floor. 1 RP 162-164; 2 RP 188-191, 293,296-298, 331, 334-338; 3 RP 397-399.

The next morning when R.G.S. awoke she heard the defendant come downstairs. The defendant lay next to R.G.S. face to face with her. The defendant took R.G.S.'s left leg and put it in between his legs. He then put his right arm around her, placing his hand on her buttock underneath her clothes, and touched her skin. The defendant massaged first one and then another of R.G.S. buttock cheeks. After that the defendant moved his hand to R.G.S's vagina and rubbed it, eventually opening the lips to her vagina and pushing down. The defendant then moved his hand up toward R.G.S's breasts. R.G.S. tried to resist the defendant putting his hand under her bra, while still pretending to be asleep. The defendant stopped and went upstairs when he heard a thump. 2 RP 192-196.

The defendant came back downstairs and lay next to A.V.S. The defendant began touching her breasts under her bra and rubbing her buttocks. The defendant then moved his hand to A.V.S.'s vagina. R.G.S. heard the defendant say "oh yours isn't shaved." When R.G.S. and A.V. started stirring the defendant got up and sat on the sofa. 2 RP 198-201, 299-306, 352.

R.G.S. and A.V.S did not say anything about what happened to anyone until the defendant left the house. R.G.S. then used A.V.'s computer to contact her mother on MySpace. R.G.S. asked her mother to come and get them, and to make up an excuse for why they were leaving early. R.G.S. would not tell her mother on MySpace why she wanted to leave early. Neither R.G.S. nor A.V.S. usually called their mother when they were staying at the defendant's home. Ms. Snow did call the defendant and told him that she needed to get the girls in order to get ready for the next day, which was Sunday. When Ms. Snow picked them up, R.G.S. and A.V.S were crying. The girls then told their mother what had happened. 2 RP 204-208, 306-308, 400-407.

The defendant was charged with Child Molestation Second Degree involving R.G.S. (count I) and Child Molestation First Degree involving A.V.S. (count II) 1 CP 125. Before trial the State

sought to introduce evidence that the defendant had touched R.G.S and A.V.S.'s breast before the charged incidents. On the night before the charged incident the defendant was alleged to have pulled R.V.S.'s shirt and bra down, exposing her breast. The defendant was also alleged to have taken A.V.S. into the bathroom on the pretext of teaching her to shave her legs. During the course of the "lesson" the defendant pulled down A.V.S.'s underpants to look at her vagina and remarked "that needs to be shaved too, but I'm not going to do that for you." The evidence was offered to show the defendant's lustful disposition toward the two girls. 2 CP 140-14; 1 RP 7-10.

The defense objected to evidence of other misconduct. 1 RP 9. The court granted the motion to admit the evidence pending the outcome of a hearing to determine that there was a reasonable basis to believe that those acts occurred. 1 RP 11.

The court held a hearing outside the presence of the jury in which both R.V.S. and A.V.S. testified. 1 RP 79-94. At the conclusion of the hearing the court found the prior acts of misconduct had been proven by a preponderance of the evidence and were relevant to prove the defendant's lustful disposition

toward the two girls. It therefore ruled the evidence was admissible. 1 RP 107.

During trial R.G.S. and A.V.S testified to the earlier incidents in which the defendant had touched their breasts. A.V.S. also testified about the shaving incident. A jury convicted the defendant of Second Degree Child Molestation involving R.G.S. It acquitted him of First Degree Child Molestation involving A.V.S. 1 RP 159-161; 2 RP 176-177, 283-288; 1 CP 19, 75-76,

### **III. ARGUMENT**

#### **A. THE DEFENDANT WAIVED ANY CLAIM THAT THE TRIAL COURT SHOULD HAVE GIVEN THE JURY A LIMITING INSTRUCTION FOR THE EVIDENCE OF UNCHARGED ACTS WHEN HE DID NOT REQUEST THAT INSTRUCTION AT TRIAL.**

The defendant argues the trial court committed reversible error when it failed to give the jury an instruction limiting the purpose for which the jury could consider evidence he touched R.G.S. and A.V.S.'s breasts, and looked at A.V.S's vagina. This argument should be rejected because the defense neither requested a limiting instruction prior to admission of the evidence nor did it request a written limiting instruction. 1 RP 107-08, 152; 2 RP 269; 4 RP 644; 1 CP 93-106.

The Court has stated that if evidence of prior act is admissible for some proper purpose under ER 404(b) the court

should instruct the jury that the evidence is admitted for that limited purpose. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). However, the court's failure to give a limiting instruction is not grounds for reversal if the defendant does not request such an instruction. State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966), cert. denied, 386 U.S. 968, 87 S.Ct. 1053, 18 L.Ed.2d 122 (1967), State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975), State v. Mahmood, 45 Wn. App. 200, 212-13, 724 P.2d 102, review denied, 107 Wn.2d 1002 (1986), State v. Ellard, 46 Wn. App. 242, 244, 730 P.2d 109 (1986), review denied 108 Wn.2d 1011 (1987), State v. Myers, 82 Wn. App. 435, 439, 918 P.2d 183 (1996), affirmed, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997), State v. DeVincentis, 150 Wn.2d 11, 23 n.1, 74 P.3d 119 (2003), State v. Williams, 156 Wn. App. 482 ¶14, 234 P.3d 1174 (2010).

The defendant argues the court was required to sua sponte instruct the jury on the limited purpose for which evidence the defendant sexually touched R.V.S. and A.V.S. was to be considered. He relies on the holding of State v. Russell, 154 Wn. App. 775, 225 P.3d 478 (2010), review granted, 169 Wn.2d 1006, 234 P.3d 1172 (2010). There Division II of this Court broke with nearly 45 years of precedent to hold that it is incumbent upon the

trial court to give a limiting instruction even in the absence of a request for one. The Court in Russell said that failure to do so will only be excused if the outcome of the trial would not have been materially affected. Id. at 785-86. This Court should decline to follow the holding in Russell for several reasons.

Russell relied on the Supreme Court's "recent articulation of the ER 404(b) evidence admission requirements" which stated that a limiting instruction "must be given to the jury." Id. at 784 quoting Foxhoven, 161 Wn.2d at 175. The issue in Foxhoven was whether the court erred in allowing evidence of prior bad acts under ER 404(b). The trial court had given a limiting instruction in that case, so whether it was error not to give one was not before the Supreme Court. The Court's articulation of the rule in Foxhoven is the same as the general rule announced in Lough, Brown, Salterelli, and Goebel, which the Russell court also relied on. State v. Lough, 125 Wn.2d 847, 860 n.18, 889 P.2d 487 (1995), State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989), State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982), State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950). Like Foxhoven the Court in each of these cases did not address whether the defendant was entitled to a new trial because the trial court did not give a limiting instruction

in the absence of a request to do so. Nothing in Foxhoven overruled prior authority which held there was no reversible error for failure to give a limiting instruction which was not requested.

The Court has previously rejected the argument asserted here when it rested on the authority relied upon by the Court in Russell. In Noyes the defendant relied on Goebel to argue the trial court should have given a limiting instruction. The Court rejected the argument stating “[t]his court did not say that in the absence of a request by the objecting party it was error for the trial court not to give the limiting instruction sua sponte. Appellant has cited no authority so holding, and we are aware of none.” Noyes, 69 Wn.2d at 447.

In Brown the Court found the limiting instruction given to the jury was erroneous, because it allowed jurors to consider the evidence on the issue of lack of absence or mistake which was not at issue. The Court declined to consider whether the instruction was reversible error because the defendant had not excepted to the instruction at trial. Brown, 113 Wn.2d at 529. Rather than supporting the Court’s decision in Russell, Brown actually supports the conclusion that absent a request for a limiting instruction, the failure to give one is not reversible error.

Division III has declined to follow Russell's interpretation of Foxhoven in Williams, 156 Wn. App. at ¶14. There the Court, citing Foxhoven, stated the general rule that the court is required to give a limiting instruction if requested. The Court concluded the defendant's failure to request an instruction waived any argument that it was error not to do so. Id.

Moreover, the rule announced in Russell does not respect defense counsel's role in making strategic decisions affecting the presentation of the defense case.

Representation of a criminal defendant entails certain basic duties. . . . Counsel also has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process....

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decision regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland v. Washington, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Court has recognized that trial counsel may well have strategic reasons for not wanting a limiting instruction, such as to avoid re-emphasizing damaging evidence. State v. Yarbrough, 151

Wn. App. 66, 90, 210 P.3d 1029 (2009). If the trial court is required to give a limiting instruction whether or not defense counsel deems it advantageous to his client, the court will have effectively taken away some of the discretion that it has recognized defense counsel should have in the presentation of the defense case

The weight of authority holds the defendant waives any argument that it was error not to give a limiting instruction when he does not request one. Only one case has held the trial court has a duty to sua sponte give a limiting instruction when evidence is introduced pursuant to ER 404(b). That case does not accurately interpret Supreme Court authority on this issue. The Court should reject the defendant's argument that he is entitled to a new trial because the court did not give the jury a limiting instruction in this case.

#### **B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

During pre-trial motions defense counsel articulated her theory of the case; "the girls made up the allegation from its conception..." 1 RP 19. During cross-examination defense counsel established that R.G.S thought that S.V. was spoiled. S.V. had many privileges such as a television and Wii in her room.

R.G.S. and A.V.S. learned the last weekend they spent at the defendant's house that the defendant and his family was buying a new home. In addition counsel established that when R.G.S. contacted her mother, it was her mother who first suggested that the defendant had inappropriately touched R.G.S. Counsel also introduced evidence that S.V. was upset that R.G.S. and A.V.S. wanted to celebrate Father's Day with her family, and made a cutting remark to them in that regard which hurt their feelings. 2 RP 227-228, 252, 363-365.

Defense counsel argued that not only were the charged offenses made up, but the allegation that the defendant had previously touched the girl's breasts was also made up. Counsel noted that even though their mother had educated the girls about inappropriate touching, they never told their mother the defendant had been touching their breasts until after they reported the charged incidents. Counsel suggested the motivation for the "false" allegations was jealousy. The girls were jealous because S.V. wanted to exclude them from their family Father's Day dinner. They were also jealous because S.V. was getting a new cell phone, and she and her family were buying a new house. 4 RP 660-674.

The defendant now argues that if he is not entitled to a new trial because the court did not instruct the jury in regard to the limited purpose of prior touching evidence, then he is entitled to a new trial because counsel was ineffective for not requesting that instruction. He points to counsel's affidavit appended to the Motion for Reconsideration in which she states that she did not think about asking for a limiting instruction. 1 CP 50. From that the defendant concludes that counsel admitted that she did not have a legitimate strategy for not requesting the instruction. He argues her performance was therefore per se deficient. BOA at 12.

A criminal defendant has a right to assistance of counsel under both the federal and state constitutions. Sixth Amendment, Art. 1, §22, Washington Constitution. The right to counsel includes the right to effective assistance of counsel. Strickland, 466 U.S. at 686, State v. Rockl, 130 Wn. App. 293, 299, 122 P.3d 749 (2005). A defendant alleging that he is entitled to a new trial due to ineffective assistance of counsel has the burden to prove both (1) that counsel's performance was deficient, and (2) that as a result of the deficient performance the defense was prejudiced. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), quoting, Strickland, 466 U.S. at 687.

## **1. Defense Counsel Effectively Assisted The Defendant.**

In order to prove the first prong the defendant must show that counsel's representation fell below an objective standard of reasonableness based on a consideration of all the circumstances. Strickland, 466 U.S. at 688. The Court is highly deferential when evaluating counsel's conduct. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 489 (emphasis added). If counsel's conduct can be characterized as a legitimate trial strategy or tactics, then it does not support a claim of ineffective assistance of counsel. State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004), State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The defendant states that trial counsel admitted in her affidavit that she had no tactical reason for the failure to request a limiting instruction. BOA at 12. That overstates what his trial counsel actually said. She did say that she did not think of a limiting instruction. She did not say that she had no strategic reason for failing to request one. Nor did she say that had she

thought about a limiting instruction that she would have made the choice to request one. 1 CP 50.

The defendant argues that “only legitimate trial strategy or tactics constitutes reasonable performance.” BOA at 12. From that statement he then argues that failure to request an instruction which counsel did not specifically consider as part of her trial strategy constitutes deficient performance. It is true that defense counsel’s strategic choice to request or not request a specific instruction may not be the basis for an ineffective assistance of counsel claim. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Counsel’s failure to consider whether to request a limiting instruction is not necessarily deficient performance where, as here, the defense theory of the case does not require it.

It is clear from counsel’s representations to the court, her cross-examination of witnesses, and her closing, that she had a legitimate trial strategy. That strategy involved discrediting all of the girl’s statements regarding the defendant’s sexual touching in total as a recent fabrication. Counsel did a thorough job of presenting evidence and arguing her theory of the case. The Court must consider in light of these circumstances whether the failure to request a limiting instruction were outside the wide range of

professionally competent assistance. Strickland, 466 U.S. at 690. The defense strategy did not require an instruction limiting the purpose for which evidence of other touching could be used, because the defense argued that all claims were equally unbelievable. In fact, had counsel considered whether to request a limiting instruction she may have decided not to ask for one. Where the argument is that all claims were a recent fabrication, an instruction telling the jury that it could consider the uncharged acts for the purpose of assessing the defendant's lustful disposition toward the victims may have been considered counterproductive. Counsel may have thought it would have caused jurors to individually assess each act testified to, instead of considering the defense argument that R.G.S. and A.V.S's entire testimony was a fabrication that became more elaborate as time went on. 4 RP 661-67. Under these circumstances counsel did not render deficient performance.

**2. The Defendant Was Not Prejudiced When His Attorney Did Not Request A Limiting Instruction.**

The defendant does not address the prejudice prong except to make the cursory statement that he was prejudiced because had counsel requested the instruction it would have been clear error not

to give it. BOA at 12. That argument should fail because there is no evidence that had it been requested the trial court would not have given it.

Rather the defendant must show that there is a reasonable probability that had counsel requested the instruction that the result of the proceeding would have been different. Strickland. 466 U.S. at 694. It is not likely that had counsel requested a limiting instruction, and it had been given, that the outcome would have been any different.

The defendant does not state what counsel should have requested as a limiting instruction. A limiting instruction drafted from the format in WPIC 5.30 might have said

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of incidents in which the defendant touched R.G.S. and A.V.S.'s breasts, and in which the defendant viewed A.V.S.'s vagina during a shaving lesson. It may be considered by you only for the purpose of the defendant's lustful disposition toward R.G.S. and A.V.S. You may not consider it for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation.

The instruction does not tell jurors they may not use the evidence to determine whether or not the defendant is guilty. It does point out a purpose for which the jury may use the evidence of

uncharged acts to resolve questions of credibility regarding the charged incidents. Evidence of the defendant's lustful disposition is only relevant if it shows the defendant's sexual desire for the victim. State v. Guzman, 119 Wn. App. 176, 182, 79 P.3d 990 (2003). That evidence bears on the credibility of the victim's testimony regarding the charged incident; if the defendant has a sexual desire for the victim as demonstrated by past acts, then it is more credible that he acted on that desire on the date at issue.

Thus even had defense counsel proposed a limiting instruction, the jury would still have been permitted to use the evidence for the purpose which both the prosecutor and defense counsel suggested that it be used – to assess the credibility of R.G.S. and A.V.S.'s testimony that the defendant sexually molested them on the morning of June 20.

In closing the prosecutor reviewed the evidence that the defendant has touched each girl's breast on the pretext of fixing her bra, and that he had looked at A.V.S.'s vagina during the shaving lesson. She argued R.G.S. and A.V.S.'s accounts of events were credible because they were consistent with one another, and the details of the morning on which the charged events occurred were consistent with A.V.'s account. 4 RP 650-56.

The defense used the evidence to its advantage when it pointed out the girls did not raise the subject of sexual touching until their mother suggested it. Also they did not talk about other incidents of sexual touching before that date, even though they had been educated about sexual touching from a young age. The defense used these facts to argue that all of the testimony regarding the defendant sexually touching the girls was false. 3 RP 431-436; 4 RP 673 -- 678.

Although there was more evidence of misconduct involving A.V.S. the jury acquitted the defendant of the count involving A.V.S. This result suggests that the jury gave little weight to the other bad acts evidence. Had there been a jury instruction limiting the use of that evidence, it is not likely the results would have been different. The defendant has not shown he was prejudiced by counsel's failure to request a jury instruction.

**IV. CONCLUSION**

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on September 29, 2010.

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