

70768-0

70768-0

NO. 70768-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LUDWIG,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
JENNIFER M. WINKLER~~

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Joseph P. Wilson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by incorrectly instructing a jury as to the limitations on the use of ER 404(b) evidence.

2. Counsel provided ineffective assistance by failing to object to the improper limiting instruction.

3. The court erred in imposing combined terms of incarceration and community custody that exceeded the statutory maximum for each count.

Issues Pertaining to Assignments of Error

1. The appellant was charged with four counts of incest involving his teenage daughter. The court ruled, over defense objection, that previous incidents involving the appellant's older stepdaughter were admissible to show a common scheme or plan of sexual abuse. The court also ruled that incidents involving the complainant occurring before the charging period were admissible. But the court gave a "limiting" instruction that was based on a RCW 10.58.090, a statute that was held invalid more than a year before trial, and which permitted such evidence to be admitted for "any . . . relevant" purpose rather than the limited purposes permissible under ER 404(b).

Did the trial court err by providing the jury a “limiting” instruction that, in fact, failed to limit the jury’s consideration of the ER 404(b) evidence to its proper purposes?

2. For similar reasons, was defense counsel ineffective for failing to object to the inadequate limiting instruction?

3. Did the court err in imposing combined terms of incarceration and community custody that exceeded the statutory maximum for each count?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Timothy Ludwig with one count of first degree incest and two counts of second degree incest occurring between June 2009 and April 2012 (counts 1, 3, and 4). The State charged an additional count of second degree incest occurring between April 2012 and May 3, 2012. CP 60-70. The complainant as to each charge was S.L., Ludwig’s daughter, who was between 15 and 18 during the charging period. CP 60.

Following a jury trial, Ludwig was convicted as charged. CP 33-36. The court sentenced him to concurrent standard range terms of incarceration plus three years of community custody on each count. CP 9-

¹ This brief refers to the verbatim reports as follows: 1RP – 5/2/13; 2RP – 6/10/13; 3RP – 6/11/13; 4RP – 6/12/13; and 5RP – 8/19/13.

11. The combined terms of incarceration and community custody exceed the statutory maximum for the offenses. CP 9-11

Ludwig timely appeals. CP 5-6.

2. Pretrial ruling to admit ER 404(b) evidence

The State moved to admit evidence that Ludwig engaged in sexual activity with his former stepdaughter L.T. when she was in her early teens. 2RP 32-35. The prosecutor argued the incidents were evidence of Ludwig's "design" to sexually assault young women, as well as to show a common scheme and lack of mistake. 2RP 35. The prosecutor acknowledged that, should such evidence be admitted, a limiting instruction was required. He informed the court his proposed limiting instruction was "well accepted and has been recognized by the courts." 2RP 36. In contrast, Ludwig argued the proposed evidence should not be admitted because the allegations were too remote in time and insufficiently similar in character. 2RP 37-40.

The court ruled L.T.'s testimony was admissible to show Ludwig's design to commit sexual assault as well as a pattern of grooming children for abuse. 2RP 41-42. The court also ruled that S.L. would be permitted to testify to incidents of sexual touching occurring before the charging period. These incidents were admissible to show Ludwig's "lustful disposition" toward S.L. and as well as the "res gestae" for the charged

offenses. 2RP 37, 42. The court agreed the proposed limiting instruction should be given. 4RP 276.

3. Trial testimony

S.L. was 19 years old at the time of trial. 3RP 54. Ludwig and her mother separated when she was very young. 2RP 55-56. S.L. eventually moved in with Ludwig. 3RP 56, 84-85. The family lived in a number of different locations before moving to Vancouver, Washington when S.L. was 13 years old. 3RP 57.

In Vancouver, Ludwig engaged in activity that made S.L. feel uncomfortable. 3RP 59. The first incident occurred when Ludwig opened the shower curtain and began washing S.L. 3RP 59-60. When S.L. protested, Ludwig told her the activity was normal because S.L. was his daughter. 3RP 60. After that first incident, Ludwig would shower with S.L. and have S.L. wash him. 3RP 61. Ludwig's penis became erect and he would ejaculate. 3RP 62.

S.L. and Ludwig moved to the city of Snohomish when S.L. was about 16. 3RP 63-65, 76. Ludwig resumed the habit of showering with S.L. about six months after the move. 3RP 66-67. Ludwig asked S.L. to wash his penis and masturbate him. 3RP 67. This occurred about once a week, usually while S.L.'s stepmother was at work. 3RP 68.

S.L. recalled a particular incident occurring in the shower. 3RP 70. Ludwig slid his finger back and forth outside S.L.'s vaginal area. 3RP 70. Then, his finger slid between the outer lips of her genitals, and S.L. felt painful pressure. 3RP 101-02. S.L. moved away before Ludwig penetrated her vagina. 3RP 71.

Besides showering, Ludwig had S.L. touch his penis with her hand or a rubber device that he kept beside his bed. 3RP 69, 71-75. On a few occasions Ludwig asked S.L. to put her mouth on his penis, but she always refused. 3RP 69.

S.L. was often subject to physical discipline by Ludwig. 3RP 97-98. She recalled an incident in Alaska during which she and her step-siblings, including L.T., were punished by being required to eat dinner naked. 3RP 76.

In early May of 2012, S.L. told her high school counselor that Ludwig had sexually abused her. 3RP 77, 139-40. The final sexual touching occurred a few days before the disclosure.² 3RP 163-64, 169. S.L. recalled that Ludwig had her masturbate him while her stepmother was at work. 3RP 82, 95, 101. After the disclosure, S.L. met with a

² S.L. testified the incident occurred in May but told a responding police officer it occurred in April. 3RP 163-64, 169.

forensic nurse and reported sexual abuse, but she declined a genital exam. 3RP 227, 234-36.

Ludwig's former stepdaughter L.T. was 23 years old at the time of trial. 3RP 112-13. L.T. recalled that when the family lived in Texas, Ludwig asked L.T. bathe him because he had a broken hand. He covered his genitals with a washcloth, but the incident made L.T. feel uncomfortable. 3RP 117.

The family later moved to Alaska. 3RP 114-15. Ludwig would watch L.T. while she showered. 3RP 115-16. Ludwig said he had a right to watch. 3RP 116. Ludwig also touched L.T.'s body, usually over clothes, while the two lay in bed together. 3RP 116. Once, as part of a "dare" game, Ludwig put the head of his penis in L.T.'s mouth, then masturbated, while L.T.'s brother waited in the car. 3RP 118-19, 121.

Like S.L., L.T. recalled the incident in which Ludwig punished the children by having them eat dinner naked. 3RP 120. As a child, L.T. was interviewed by Alaskan Child Protective Services but never revealed any sexual abuse until S.L.'s allegations came to light. 3RP 131-32.

Following S.L.'s disclosure to her counselor, police obtained a search warrant for Ludwig's home. Police seized the sex toy that S.L. described from Ludwig's nightstand. 3RP 148, 151. Forensic testing revealed a mixture of DNA consistent with that of Ludwig and S.L., as

well as a small amount of DNA from an unknown person. 3RP 252-54. The State's forensic scientist acknowledged that S.L. could have transferred her DNA to the device by simply touching it. 3RP 254, 258.

Police arrested Ludwig after the search and he agreed to an interview. 3RP 169-70. During trial, a detective read portions of the interview to the jury. 3RP 171-79. Despite various ruses by detectives during the interview, Ludwig consistently denied any sexual touching of S.L. E.g. 3RP 174, 191, 193, 213.

Ludwig told police S.L. would have no reason to touch the sex toy. But he also informed police she was frequently in the bedroom where the toy was kept. 3RP 185, 190.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY PROVIDING THE JURY A "LIMITING" INSTRUCTION THAT FAILED TO LIMIT THE JURY'S CONSIDERATION OF PRIOR MISCONDUCT EVIDENCE TO ITS PROPER PURPOSES.

ER 404(b) provides:

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

The rule is a categorical bar to the admission of evidence to prove a person's character and to show the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). There are no “exceptions” to this rule. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.9, at 497 (5th ed.2007). Instead, there is one improper purpose and an undefined number of proper purposes. Gresham, 173 Wn.2d at 420.

Here, the evidence as to stepdaughter L.T. was limited to showing Ludwig had a common scheme to engage in sexual behavior with young women in his household. “Common scheme” evidence is admissible if it contains common features and a substantial degree of similarity such that the acts can be “explained as caused by a general plan of which [the charged crime and the prior misconduct] are the individual manifestations.” State v. DeVincentis, 150 Wn.2d 11, 19-20, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)).

Uncharged acts involving S.L. were, in contrast, admitted to show Ludwig’s “lustful disposition” toward her. The purpose of such evidence is not to demonstrate the defendant's character, but to show the nature of the defendant's relationship with and feelings toward the complainant. In

that way, such evidence is probative of motive and intent. Gresham, 173 Wn.2d at 430 n.4 (citing State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010)).

The State proposed, and the court gave, the following “limiting” instruction for evidence of other sexual misconduct:

In a criminal case in which the defendant is accused of incest, evidence of the defendant’s commission of another offense or offenses of sexual misconduct is *admissible and may be considered for its bearing on any matter to which it is relevant*. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in an Amended Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of the offenses charged in the amended information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Amended Information.

CP 49 (Instruction 9) (emphasis added); Supp. CP ___ (sub no. 40, Plaintiff’s Proposed Jury Instructions); 2RP 36.

As the proposed instruction notes, it was based on State v. Scherner, 153 Wn. App. 621, 639, 25 P.3d 248 (2009), *aff’d*, Gresham, 173 Wn.2d 405. While the *result* in Scherner was ultimately affirmed, the Court of Appeals’ rationale did not survive the Supreme Court’s Gresham decision.

In light of Gresham, the instruction is inadequate as a limiting instruction for purposes of ER 404(b). Gresham held that RCW 10.58.090, the statute the Scherner instruction was based on, violated the

separation of powers doctrine. Gresham, 173 Wn.2d at 426-32. It was therefore error to admit evidence under that statute. Id. At 432-33.

As for petitioner Scherner, the challenged evidence was admissible under ER 404(b). Gresham, 173 Wn.2d at 420-23. But explaining the need for a limiting instruction consistent with ER 404(b), the Court reasoned:

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.

Gresham, 173 Wn.2d at 423-24.

The instruction given in this case was based on a statute held invalid over a year before trial in this case. It was, moreover, legally insufficient because it did not inform the jury of the limited purpose of the ER 404(b) evidence and did not inform them such evidence could not be used to show that the defendant acted in conformity with his prior behavior.

Limiting jurors' consideration of the prior bad acts evidence to "any matter to which it is relevant" is no limitation at all. Cf. State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated "the jury could not use the testimony

to judge Kennealy's character or propensity to commit such acts, but that it could only consider the testimony in determining whether it showed that Kennealy had a common scheme or plan.”), review denied, 168 Wn.2d 1012 (2010); see also State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (noting court properly instructed jurors that evidence could only be considered for whether there was a common scheme or plan and not to prove defendant's character).

Recognizing the legal necessity of a limiting instruction, the prosecutor asked that one be given. 2RP 36. While the defense clearly wanted the misconduct evidence excluded, it appeared to agree that – short of exclusion – a limiting instruction was necessary and did not object. 2RP 45. And where a limiting instruction is requested, the court must give a correct one. Gresham, 173 Wn.2d at 424. The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome at trial. Id. At 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In Gresham, the Court held that the error was harmless as to petitioner Scherner because the remaining evidence, including the victim's detailed testimony and a recorded phone conversation of the defendant admitting the charged molestation, persuaded the court that the result was not materially affected. Gresham, 173 Wn.2d at 425.

That is not true in this case. The only physical evidence, S.L.'s DNA on the sex toy, was ambiguous because S.L. had access to the bedroom and could have transferred her DNA to the device by merely touching it. 3RP 185, 190, 252-54, 258. When interviewed by police, Ludwig consistently denied any sexual contact had occurred, despite the officers' best efforts to foster his confession. 3RP 174, 191, 193, 213. Credibility was thus the primary issue. The deliberative process was therefore vulnerable to an instruction that failed to prevent jurors from using the evidence of prior misconduct to infer Ludwig had a propensity to commit such acts. This error requires reversal of Ludwig's convictions.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INADEQUATE INSTRUCTION.

For similar reasons, Ludwig's counsel was ineffective for failing to object to the inadequate limiting instruction that allowed the jury to consider the evidence of other misconduct for any purpose, including Ludwig's propensity to engage in such acts.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is

deficient, and (2) there is a reasonable probability the deficient representation prejudiced him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). This is a separate question from whether there was sufficient evidence to convict. State v. Jury, 19 Wn. App. 256, 268, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Counsel's agreement to an instruction that was based on a statute invalidated over a year before trial, and which failed to limit the evidence to its proper purpose, was clearly deficient. See State v. Kylo, 166 Wn.2d 856, 868-69, 215 P.3d 177 (2009) (failure to research and apply relevant law cannot be considered reasonable tactics).

The next question is whether the deficient representation prejudiced Ludwig. It did. First, the court understood the evidence was admissible only for non-character, non-propensity purposes and that a limiting instruction was appropriate. Had the court been made aware that the proposed instruction was inadequate, it is likely the court would have given a proper instruction.

Second, the error was prejudicial. Again, given the dearth of physical evidence, witness credibility was the primary issue in the case. Although Ludwig did not testify, the jury heard that he denied the acts S.L. alleged. It is reasonably likely the jury would have reached a different result absent an inference that Ludwig was of a character to commit sexual offenses. See State v. Edvalds, 157 Wn. App. 517, 525, 237 P.3d 368 (2010) (juries are presumed to follow a court's instructions), review denied, 171 Wn.2d 1021 (2011); see also Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (test for "reasonable probability" of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result).

3. THE COURT ERRED IN IMPOSING COMBINED TERMS OF INCARCERATION AND COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM FOR EACH COUNT.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(1)(a), a court is directed to sentence an offender to three years of community custody if he is convicted of a sex offense that is not sentenced under RCW 9.94A.507. Ludwig's offenses

qualify as sex offenses, RCW 9.94A.030(46)(a)(2), but are not punishable under RCW 9.94A.507.

Sentencing courts, however, must ensure that the combination of incarceration and community custody does not exceed the statutory maximum sentence. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701(9)).

The court sentenced Ludwig to 36 months of community custody on each count. The court also sentenced Ludwig to 90 months of incarceration on the first degree count. CP 9-10. Thus, Ludwig was sentenced to a total of 126 months on a crime with a 120-month statutory maximum. RCW 9A.20.021(1)(b); RCW 9A.64.020(1)(b).

The court sentenced Ludwig to 60 months of incarceration on the remaining counts. Thus, the court sentenced Ludwig to a total of 96 months on charges with a 60-month statutory maximum. RCW 9A.20.021(1)(c); RCW 9A.64.020(2)(b).

The proper remedy is to remand to the trial court to specify a combined term of community custody and incarceration that does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 295 P.3d 782, 786-87 (2013).

D. CONCLUSION

The court's failure to provide a proper limiting instruction as to the ER 404(b) evidence was prejudicial error. Counsel was, moreover, ineffective for failing to object to the instruction.

In any event, resentencing is required to ensure Ludwig's combined terms of incarceration and community custody do not exceed the statutory maximum for each offense.

DATED this 3rd day of January, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70768-0-1
)	
TIMOTHY LUDWIG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF JANUARY 2014.

X *Patrick Mayovsky*