

71027-3

71027-3

NO. 71027-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAMON CARRILLO-ALEJO,

Appellant.

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

The Honorable Lori K. Smith, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective for failing to propose a 404(b)¹ evidence limiting instruction.

Issue Pertaining to Assignment of Error

Appellant was charged with two counts each of first degree child molestation and first degree child rape for incidents involving the complaining witness. The court ruled, over defense objection, that other uncharged incidents between appellant and the complainant witness were admissible under ER 404(b) to prove lustful disposition, res gestae, and the complaining witnesses delay in reporting the alleged incidents. Defense counsel failed to request a limiting instruction, propose her own, or explain that she did not want an instruction. Where a proper limiting instruction could have sufficiently mitigated the harm from the 404(b) evidence, was appellant denied his constitutional right to effective representation when defense counsel failed to propose such an instruction?

¹ The rule 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.

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Ramon Carrillo-Alejo with two counts of first degree child rape and two counts of first degree child molestation for incidents with F.H. between April 9, 2005 and July 31, 2012. CP 8-9. A jury found Carrillo-Alejo guilty of both counts of child molestation and one count of child rape. CP 49, 51-52. The jury found Carrillo-Alejo not guilty of one count of child rape. CP 50; 9RP² 8-9.

The trial court imposed standard range indeterminate concurrent sentences of 165 months to life on the child rape conviction and 100 months to life on each of the child molestation convictions. CP 53-63; 10RP 14. Carrillo-Alejo timely appeals. CP 65-77.

2. Trial Testimony

Carrillo-Alejo met Maria Ontiberros-Aguirre while working at a golf course. 6RP 34, 58, 84; 7RP 16. They soon became friends and Carrillo-Alejo moved in with Ontiberros-Aguirre's family. 6RP 34, 59, 82-83. Also living at the apartment were Ontiberros-Aguirre's husband,

² This brief refers to the verbatim report of proceedings as follows: 1RP – August 1, 2013; 2RP – August 5, 2013; 3RP – August 6 & 7, 2013 (voir dire); 4RP – August 7, 2013; 5RP – August 13, 2013; 6RP – August 19, 2013; 7RP – August 20, 2013; 8RP – August 21, 2013; 9RP – August 22, 2013; 10RP – October 11, 2013.

Abraham May Mex, and daughter, F.H. 6RP 34-35, 59, 82-83; 7RP 15, 20.

Carrillo-Alejo moved to different housing several times with the family. 6RP 38, 42, 61. Carrillo-Alejo always had his own bedroom. 6RP 35, 38, 42, 61, 71; 7RP 17. Carrillo-Alejo and F.H. had a good relationship and she called him "uncle." 6RP 44; 7RP 22-23. Carrillo-Alejo would sometimes watch F.H. while Ontiberros-Aguirre and May Mex worked. 6RP 41, 44, 48; 7RP 18-19, 21.

Eventually, Carrillo-Alejo's wife also moved in with F.H.'s family. 6RP 46, 62, 86, 104; 7RP 45. Carrillo-Alejo and his wife moved out shortly before Ontiberro-Aguirre gave birth to a son. 6RP 46, 62-63, 105; 7RP 46, 96-97.

Carrillo-Alejo visited the family after moving out and would occasionally take F.H. and her brother out. 6RP 48, 52, 69, 89, 108. Ontiberros-Aguirre noticed F.H. "happily" went with Carrillo-Alejo the first time but went to her room and refused to talk to Carrillo-Alejo the second time he came to take F.H. and her brother out. 6RP 52-55. May Mex noted that F.H. did not appear to respect or trust Carrillo-Alejo. 6RP 88, 90, 109.

Around this same time, F.H. also began crying at night and refused to sleep in her own bedroom. 6RP 54-55, 91-92, 107. F.H. would sleep with Ontiberro-Aguirre and May Mex. 6RP 54, 92.

In the fall of 2012, F.H. told her school counselor, Amy Cameron, about sexual contact between herself and Carrillo-Alejo. 6RP 20-21, 24; 7RP 73, 82-83. Cameron described F.H. as very agitated and teary-eyed during the disclosures. 6RP 20-21, 24. Cameron reported the allegations to child protective services (CPS). 6RP 21.

Some time later, F.H. and Ontiberros-Aguirre attended a church service where they prayed for another person allegedly sexually abused in an unrelated incident. 6RP 56. F.H. disclosed the alleged incidents between herself and Carrillo-Alejo to Ontiberros-Aguirre when they returned home. 6RP 54-55. Ontiberros-Aguirre did not call the police. Police contacted the family after receiving Cameron's CPS referral. 6RP 57, 72-73, 113-14.

Police interviewed Carrillo-Alejo. 7RP 129-30. He acknowledged living with F.H. and her parents and watching F.H. while her parents worked. 7RP 131-33. Carrillo-Alejo denied ever touching F.H., explaining he would never disrespect "her [F.H.] or her family in such a way." 7RP 133.

At trial, Ontiberros-Aguirre explained Carrillo-Alejo would sometimes buy F.H. clothing or give her money. 6RP 44-45, 64. Ontiberros-Aguirre acknowledged she never saw any strange behavior between F.H. and Carrillo-Alejo. F.H. never appeared afraid around Carrillo-Alejo. 6RP 65.

May Mex also never saw or suspected any inappropriate behavior between F.H. and Carrillo-Alejo. May Mex noted F.H. never appeared afraid around Carrillo-Alejo. 6RP 104.

F.H. described several alleged incidents. One time, Carrillo-Alejo carried F.H. from the bathroom to his bedroom. F.H. said Carrillo-Alejo took her underwear off and licked her “privates.” 7RP 25-27, 38. Carrillo-Alejo stopped when she heard May Mex’s car come into the driveway. 7RP 28. F.H. did not tell May Mex about the incident because Carrillo-Alejo told her not to and said there would be consequences if she spoke about the incident. 7RP 30, 54-55, 59. F.H. explained she was scared of Carrillo-Alejo after this incident and did not want to talk to him. 7RP 31-32.

Another time Carrillo-Alejo tried to grab F.H. but she ran out of the house. F.H. had to massage Carrillo-Alejo on the shoulder as punishment. 7RP 32-36. During this time, Carrillo-Alejo gave F.H. gifts of money, clothes, and stuffed animals. 7RP 37, 65.

F.H. described an incident where Carrillo-Alejo took F.H. and her friend, Anna, to his bedroom. Carrillo-Alejo removed F.H. and Anna's pants. Carrillo-Alejo kissed Anna and licked F.H.'s "privates." 7RP 38-41, 107-08, 111. F.H. pushed Carrillo-Alejo away and went to her room with Anna. Anna and F.H. did not discuss the incident. 7RP 42-43, 108.

On another occasion, Carrillo-Alejo made F.H. grab his "private part" until "white things came out." 7RP 60-63, 70, 86-87. Carrillo-Alejo then put the "white things" on F.H.'s stomach. 7RP 88-89.

On separate occasions F.H. said Carrillo-Alejo kissed her mouth and breast, and came into the shower with F.H. 7RP 64, 78-80, 84-85. Carrillo-Alejo also said he would buy F.H. an iPhone if "they did it." F.H. refused even though she was not sure what Carrillo-Alejo meant. 7RP 46-50.

F.H. acknowledged it was about two years between when Carrillo-Alejo kissed her and when she told her mother about the alleged incidents. 7RP 118. F.H. did not tell her parents sooner because she was afraid Carrillo-Alejo would hurt them since he said he previously killed people. 7RP 54-55, 59, 125. F.H. also worried Carrillo-Alejo would break up her family because Carrillo-Alejo had romantic feelings for Ontiberros-Aguirre. 7RP 118-19. F.H. eventually told Cameron about the incidents because she was having nightmares. 7RP 73, 75, 82-83.

3. 404(b) Evidence

Before trial, the State moved to admit evidence of several uncharged acts between Carrillo-Alejo and F.H. Relying on F.H.'s interviews with child forensic interviewer, Carolyn Webster, defense counsel, and her disclosure to school counselor Amy Cameron, the prosecutor sought to introduce three types of uncharged incidents under ER 404(b). Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 9-15); 2RP 67-69, 73, 109-11, 113-14.

The prosecutor offered Carrillo's-Alejo threats to F.H. not tell to her parents about the charged incidents or "something bad would happen," as well as his gifts of clothes, candy, and money to explain F.H.'s delay in reporting the alleged incidents and to rebut accusations that F.H. fabricated the alleged incidents. Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 9-10, 12-14); 2RP 109-10. The prosecutor explained the gifts "explain how F.H. delayed in telling because she feared that he [Carrillo-Alejo] may not continuing her gifts, especially when her family was so poor as to not to be able to normally afford such luxuries for her." Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 12).

The prosecutor offered F.H.'s disclosures that Carrillo-Alejo would kiss her, put his tongue in her mouth, touch her, and ask her to massage him as evidence of Carrillo-Alejo's lustful disposition toward

F.H. Supp. CP ____ (sub no. 33, State's Trial Memorandum, at 14-15); 2RP 110-11.

Finally, the prosecutor argued, "the threats and collateral sexual contact" between Carrillo-Alejo and F.H. were relevant to show the res gestae of the charged crimes. Supp. CP ____ (sub no. 33, State's Trial Memorandum, at 15); 2RP 109-10 2RP 111.

Defense counsel objected, arguing Carrillo-Alejo also bought F.H.'s brother candy and clothing and there were no allegations of inappropriate contact in those instances. 2RP 111-12. Defense counsel explained, "I'm not seeing the connecting between buying her [F.H.] things specifically and that either being part of his threat to her not to tell or her being fearful that she would no longer receive these gifts." 2RP 112. Defense counsel also noted that she recalled F.H. disclosing only one threat by Carrillo-Alejo not to tell her parents. 2RP 113.

The trial court granted the prosecutor's request. The court found by a preponderance of the evidence all the acts described by F.H. in the interview occurred. The court further explained the uncharged acts offered by the prosecutor were relevant to show Carrillo-Alejo's lustful disposition, res gestae, and to explain F.H.'s delay in reporting the alleged incidents. 2RP 115-18.

Defense counsel failed to request a limiting instruction, propose her own, or explain she did not want an instruction.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION FOR 404(b) EVIDENCE

Carrillo-Alejo's counsel was ineffective for failing to propose a 404(b) limiting instruction. Reversal is required because there is a reasonable probability the lack of a limiting instruction materially affected the outcome at trial.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the

defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

a. Counsel's Failure to Demand an Instruction was Deficient.

The prosecution may not use evidence to demonstrate a defendant's criminal propensity:

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.

ER 404(b).

The rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's ER 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

“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 423-424. Consistent with the express language of ER 404(b), jurors in Carrillo-Alejo’s case needed to be told the one way in which they absolutely could not use the evidence. 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.”), rev. denied, 168 Wn.2d 1012 (2010); 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).

Counsel must nevertheless request the instruction and the failure to do so generally waives the error. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). In Carrillo-Alejo’s case there was no legitimate reason not to insist on a limiting instruction given the prejudicial nature of the character

evidence. Had counsel requested an instruction, the court would have been required to give one. Foxhoven, 161 Wn.2d at 175. Defense counsel's decision not to request an instruction, or to propose a limiting instruction of her own, is puzzling since she acknowledged the ER 404(b) evidence demonstrated Carrillo-Alejo's propensity to victimize F.H.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" rationale is inapplicable here. Evidence that Carrillo-Alejo threatened, kissed, and bribed F.H. with money, clothes, and candy was not of a fleeting nature. F.H. testified to these things. 7RP 32-25, 37, 49-50, 54-55, 59, 64-65, 125. Even without a limiting instruction, the jury could not reasonably be expected to forget this testimony. In fact, the prosecutor made a point of arguing Carrillo-Alejo's alleged threats and bribes toward F.H. corroborated the veracity of her testimony. 8RP 40, 43-44. This is not a case where a limiting instruction

raised the specter of “reminding” the jury of briefly referenced evidence. This evidence formed a central piece of the State’s case.

Counsel’s failure to propose an adequate limiting instruction fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting a limiting instruction. Counsel was aware of the risk of prejudice from the 404(b) evidenced by her objection to its admission. Counsel simply neglected to request a necessary limiting instruction. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel’s Deficient Performance Prejudiced Carrillo-Alejo.

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including for an improper purpose. There is no reason to believe the jury did not consider the uncharged acts as evidence of Carrillo-Alejo’s propensity to commit the charged crimes against F.H. Nor is there any reason to believe the jury disregarded the prosecutor’s argument that Carrillo-Alejo’s alleged threats

and bribes toward F.H. corroborated the veracity of her testimony. The jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020 (1991); see also Micro Enhancement Intern, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (“Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.”). Indeed, the need for an instruction explaining the purpose of uncharged acts is “particularly important in sex cases, where the potential for prejudice is at its highest.” State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (citations and internal quotation marks omitted)

Moreover, given the dearth of physical evidence, F.H.’s credibility was the primary issue in the case. The prosecutor acknowledged as much. 8RP 37, 39, 45-46. No DNA or other physical evidence connected Carrillo-Alejo to the alleged incidents. No witnesses observed the alleged incidents. When interviewed by police, Carrillo-Alejo consistently denied any sexual contact had occurred. 7RP 133. It is reasonably likely the jury would have reached a different result absent an inference that Carrillo-Alejo was of a character to victimize and commit sexual offenses. See 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). Carrillo-Alejo's constitutional right to effective assistance counsel was violated. This Court should reverse his convictions.

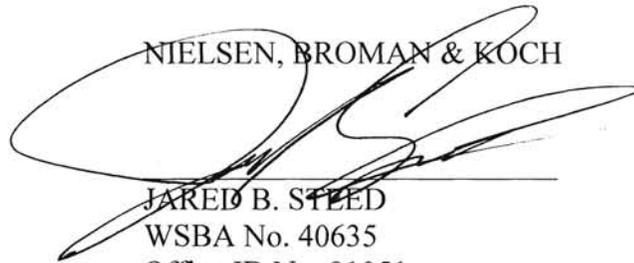
D. CONCLUSION

For the reasons discussed above, this Court should reverse Carrillo-Alejo's convictions and remand for a new trial.

DATED this 16th day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and extends upwards into the 'Respectfully submitted' line.

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

STATE OF WASHINGTON)	
Respondent,)	
vs.)	COA NO. 71027-3-I
RAMON CARRILLO-ALEJO,)	
Appellant.)	

CORRECTED 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 16TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] RAMON CARRILLO-ALEJO
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JANUARY 2015.

x Patrick Mayovsky

2015 JAN 16 PM 14:09
Office of the Clerk of the Court
State of Washington