

NO. 35753-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

WALLACE W. GILPIN,
Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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Procedural History

On January 20, 2006, the defendant was charged by Information with one count of Incest in the First Degree and two counts of Rape in the Second Degree in Grays Harbor Superior Court Cause No. 06-1-42-3. (CP at 1-3). The State filed notice that it intended to seek aggravating factors on August 3, 2006. (CP at 12). The case proceeded to trial on August 22, 2006 and the jury returned its verdicts on August 24, 2006. The defendant was found guilty on Counts 1 and 3, and he was acquitted on Count 2. (CP at 47-49, 53). The jury also found the alleged aggravating factors on Counts 1 and 3. (CP at 47-49, 54).

The defendant was sentenced on January 2, 2007 and was given a standard range sentence on Count 1, and an exceptional sentence of 300 months to life on Count 3. (CP at 66-78). This appeal followed.

Factual History

A.R.S. was born on February 18, 1988 to Susan Smith and Wallace Gilpin. (Trial RP at 68-69). A.R.S. lived with her mother in Tacoma from approximately one year old until she was 13 years old and had very little contact with the defendant, her biological father. (Trial RP at 69). In 2002, A.R.S. and her mother moved into a house in Hoquiam with the defendant. (Trial RP at 69). After about nine months, the mother passed away and A.R.S. went to live with an aunt in Tacoma. (Trial RP at 69). Eventually, A.R.S. moved back in with her father at 907 Wood Street in Hoquiam. (Trial RP at 69-70).

In the summer of 2001, the defendant began making inappropriate comments about the way A.R.S. dressed. (Trial RP at 72). This progressed to the defendant touching A.R.S. on the breasts and vagina. (Trial RP at 72). This touching led to A.R.S. performing oral sex on the defendant, often for money. (Trial RP at 73). Eventually, the defendant and A.R.S. began having intercourse. (Trial RP at 74).

Prior to her mother's death, A.R.S. told her mother about the sexual contact with her father, the defendant. (Trial RP at 74). When the mother confronted the defendant he denied it. (Trial RP at 74). A.R.S. stated that her mother didn't believe her. (Trial RP at 98). The defendant later threatened A.R.S. that he would kill her and her mother if she told anyone else. (Trial RP at 74).

A.R.S. recalled specific sexual encounters between her and the defendant. She described a camping trip to Lake Sylvia in 2001 or 2002 where she performed oral sex on the defendant in a tent. (Trial RP at 76). She also remembered Thanksgiving of 2003 which she spent with her father, even though she was still living with her aunt in Tacoma at the time. (Trial RP at 77-80). The defendant had held a knife to her throat and had intercourse with A.R.S. (Trial RP at 77).

When A.R.S. moved back to Hoquiam, the defendant continued to have sex with his daughter on a weekly basis and she eventually found out she was pregnant on February 15, 2005. (Trial RP at 74-75). The only

person she told at this time was her father. (Trial RP at 75). A.R.S. gave birth to a male child on October 22, 2005. (Trial RP at 94).

A.R.S. also testified regarding the two charged rapes of February 25 and February 28, 2005. As to February 25, A.R.S. had great difficulty remembering any details. (Trial RP at 82). A.R.S. testified that she had “blocked out” that memory. (Trial RP at 94). Using the written statement she had made on February 28, 2005, A.R.S. testified that she and the defendant “got into a heated argument.” (Trial RP at 84). The defendant told A.R.S. that “he was going to use duct tape to gag [her] mouth and tie [her] hand and then have sex with [her]. (Trial RP at 84-85). A.R.S. was scared of the defendant and she agreed to comply with his demand for sex with him if wouldn’t bind her with tape. (Trial RP at 85). The defendant had intercourse with A.R.S. on the love seat in the living room at this time. (Trial RP at 85).

On February 28, 2005, A.R.S. met up with her counselor Susan Clark at approximately 3:30 in the afternoon. (Trial RP at 86-87). A.R.S. wanted to be removed from the defendant’s home and she wanted Ms. Clark to take her to the Department of Social and Health Services (DSHS) to discuss it. (Trial RP at 86-87). Ms. Clark did take A.R.S. to DSHS and the defendant followed in his own car. (Trial RP at 87). They met with the case workers, but A.R.S. only described her father as “physically abusive”, she did not disclose the sexual abuse. (Trial RP at 87). DSHS

was not able to place A.R.S. at that time, and she returned home with her father. (Trial RP at 87).

When they returned home, A.R.S. sat in the car for about a half an hour, because she “knew he was going to hurt [her] as soon as [she] got inside.” (Trial RP at 88). When A.R.S. went into the house, there was a physical altercation and A.R.S. fell to the ground. (Trial RP at 88). Again, the defendant threatened to bind A.R.S. with duct tape. (Trial RP at 88). The defendant put a blanket on the floor and began having intercourse with A.R.S. (Trial RP at 88). A.R.S. told the defendant that he was hurting her, and the defendant “stopped and told [A.R.S.] that [she] had to finish by giving him head to get him off.” (Trial RP at 89).

When the defendant ejaculated into her mouth, A.R.S. started gagging, spit and wiped her mouth with her shirt. (Trial RP at 89). A.R.S. left the residence and fled to a friend’s house. (Trial RP at 89-90). Eventually that evening, A.R.S. contacted the police and reported the rape. (Trial RP at 90).

Hoquiam Police Sergeant Roy Kinney observed A.R.S. on February 28, 2005 and saw a red mark on the top of her head, a scratch on her cheek under the right eye, and a slight abrasion to the inside of her lip. (Trial RP at 137-138). Sergeant Kinney also executed a search warrant at the defendant’s house that night. (Trial RP at 140). Evidence was collected, specifically an oral swab and penis swab of the defendant. (Trial RP at 142). Other evidence collected, were the shirt worn by A.R.S.

and the blanket described by A.R.S. as being where the intercourse occurred. (Trial RP at 153-154).

The uncontested DNA evidence showed a one in 11 million probability that the defendant is the father of A.R.S.'s baby. (Trial RP at 292). The DNA expert also found that the penis swab contained a mixture from at least three contributors. (Trial RP at 293). It was 1 in 150,000 that A.R.S. was one of the contributors. (Trial RP at 293). The shirt also produced a sperm and non-sperm fraction profile. (Trial RP at 294). There is a one in 43 quadrillion probability that the defendant contributed the sperm fraction, and a one in 44 quadrillion probability that A.R.S. contributed the non-sperm fraction. (Trial RP at 293-294).

RESPONSE TO ASSIGNMENTS OF ERROR

Defendant's failure to object to 404(b) evidence at trial constituted a waiver

When no objection is made to the evidence at trial, an evidentiary error is not preserved for appeal. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). The issue is different in the case at bar as the ER404(b) evidence was addressed in a motion in limine. Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, “[u]nless the trial court indicates that further

objections at trial are required when making its ruling.” *State v. Powell*, 126 Wash.2d 244, 256, 893 P.2d 615 (1995), citing *State v. Koloske*, 100 Wash.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by *State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988), 113 Wash.2d 520, 782 P.2d 1013 (1989); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 91, 549 P.2d 483 (1976); see also *State v. Kelly* 102 Wash.2d 188, 193, 685 P.2d 564 (1984); *Garcia v. Providence Med. Ctr.*, 60 Wash.App. 635, 641, 806 P.2d 766, review denied, 117 Wash.2d 1015, 816 P.2d 1223 (1991).

The Washington Supreme Court explained the difference between final ruling and those that are only tentative or advisory:

If a trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

Koloske, 100 Wash.2d at 896, 676 P.2d 456. “[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” *State v. Carlson*, 61 Wash.App. 865, 875, 812 P.2d 536 (1991), review denied, 120 Wash.2d 1022, 844 P.2d 1017 (1993).

In the case at bar, the only time the ER404(b) evidence was addressed by the court was via a pre-trial motion in limine. The judge told counsel:

...There is law supporting evidence of defendant's previous sexual contacts with the defendant [sic] under 404(b). And I—although I don't know all of the details other than what's been outline by the State, I believe that evidence is admissible. There may be something in the evidence that isn't admissible, but I don't know.

...
I am ruling [the 404(b) evidence] admissible. As I say, there may be something about it that I don't know that your might want to ask that I preclude, but I don't have any idea what that would be. Generally it's admissible.

(Motions RP at 147-150).

This ruling was tentative at best. The court certainly left the door open for reconsidering its position, basically stating that it didn't have enough information to rule it out. This was clear to counsel, defense counsel responded to the court "...I mean the risk is that we can wait. We can wait to see what comes out at trial, which, of course, you know, that's an option..." (Motions RP at 148).

By failing to object to the ER404(b) evidence as it developed at trial, the defendant waived the issue on appeal. If the Court finds that this issue was properly preserved, the conviction should still be affirmed as follows.

The trial court's failure to perform balancing test on the record does not mandate reversal

ER 404(b) is to be read in conjunction with ER 402 and ER 403. *State v. Gogolin*, 45 Wn.App. 640, 644, 727 P.2d 683 (1986). Before it can admit evidence of prior bad acts, the trial court must first decide whether the evidence is relevant to a material issue of the crime charged

and then must balance the probative value against the prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 66, 882 P.2d 747 (1994). There are circumstances in which failure to conduct this test on the record does not mandate reversal.

First, failure of the trial court to articulate its balancing test on the record may be harmless error if the record enables the reviewing court to rule on admissibility. *State v. Carleton*, 82 Wn.App. 680, 686, 919 P.2d 128 (1996). Second of all, the error is harmless when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence. *Carlton*, 82 Wn.App. at 686-87; *see State v. Jackson*, 102 Wash.2d 689, 696, 689 P.2d 76 (1984).

1. The record is sufficient to allow review of admissibility of 404(b) evidence.

The Court here can find that the trial court, if it had considered the relative weight of probative value and prejudice would still have admitted the evidence. *Carlton* at 686; *see State v. Gogolin*, 45 Wash.app. 640, 645-46, 727 P.2d 683 (1986).

The ER404(b) evidence introduced by the State was used to show the defendant's lustful disposition towards his daughter, and to explain her delay in reporting and other inconsistent behavior. It also explained why she was in fear of her father and complied with demands for sex on the

nights of the rapes. In order to present a full and fair version of the case to the jurors, this evidence must be admitted at trial.

Defendant's previous sexual contacts with the victim are admissible under ER 404(b).

Rule of Evidence 404(b) provides in part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes.

The Washington Supreme Court “has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER404(b) when it shows the defendant’s lustful disposition directed toward the offended female.” *State v. Ray*, 116 Wash.2d 531, 547, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wash.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wash.2d 131, 133-134, 667 P.2d 68 (1983); *see also State v. Medcalf*, 58 Wash.App. 817, 822-23, 795 P.2d 158 (1990) (misconduct directly connected to the offended female, which does not just reveal the defendant’s general sexual proclivities is admissible).

“In *Ferguson*, 100 Wash.2d at 134, 667 P.2d 68 (quoting *State v. Thorne*, 43 Wash.2d 47, 60-61, 260 P.2d 331 (1953)), the court emphasized that: Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.” *State v. Ray*, 116, Wash.2d at 547. In *Ray*, the defendant was charged with incest in connection with a March 1987 incident. *Ray* at 546.

The defendant objected when the court allowed in the victim's testimony that the defendant had initiated sexual contact with the victim, "D.", three times prior to the charged conduct. *Ray* at 546-47. The court, however, found that "[t]he evidence of prior sexual contact here is directly connected to the 'offended person,' D., and reveals Ray's lustful inclination toward D." *Ray* at 547. Further, the court did not find that the trial court abused its discretion by allowing D's testimony, even though the prior incidents happened approximately 10 years prior to the conduct charged and were not corroborated. *Ray* at 547.

In the case at bar, the State introduced evidence that the defendant pursued a sexual relationship with the victim from approximately 2001 until the time of the charged conduct. The details of these incidents go to prove the defendant's lustful disposition towards the victim in this case, and under Washington case law are admissible.

Prior acts are admissible to help jury understand victim behavior

Prior misconduct is admissible under ER404(b) to explain seemingly inconsistent behavior by the victim of domestic violence. *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (Div II, March 7, 2006); *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996).

In *Cook*, the defendant was charged and convicted of Assault in the Third Degree against his girlfriend. The victim initially informed the police and firefighters that the defendant had kicked her and broken her finger, but at trial she testified that her finger was broken in an accident.

Following the victim's recantation, the State questioned the victim about six prior incidents of domestic violence. Over defense objection, the trial court admitted evidence of the prior incidents. The Court of Appeals upheld the trial court's admission of evidence, finding that, "evidence of prior abuse is relevant and potentially admissible under ER404(b) to illuminate the victim's state of mind at the time of the inconsistent act." The Court further held that expert testimony regarding battered partner syndrome is not a foundational requirement for admission of the ER404(b) evidence. "The jury may draw from its own common knowledge and the evidence submitted at trial to determine if the victim's inconsistent behavior is a result of a fear of retaliation, internalized shame or blame, or a continuing dependence on the defendant."²

In *Grant*, the defendant was charged and convicted of Assault in Violation of a Protective Order. At trial, the victim testified that she permitted the contact with the defendant. The victim also minimized the assault with the defendant. Over defense objection, the trial court admitted evidence of the defendant's history of assault against the victim. On appeal, the court held that the prior assaults were relevant "to explain her statements and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge." *State v.*

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Although the Court of Appeals upheld the admission of the 404(b) evidence, the conviction was reversed due to the insufficiency of the jury instruction regarding prior bad acts. The Court held that the limiting instruction should have specifically advised the jury that the prior abuse may be considered to assess the victim's state of mind at the time of the inconsistent act.

Grant, 83 Wn. App. at 107. The Court of Appeals noted that,

“victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others. The Grants' history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no contact order, and why she minimized the degree of violence when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail. Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.”

State v. Grant, 83 Wn. App. at 108.

The Court of Appeals cited a variety of other jurisdictions which have upheld admission of prior acts of domestic violence for even broader purposes. *State v. Grant*, 83 Wn. App. 109.

See *State v. Gibbons*, 256 Kan. 951, 889 P.2d 772, 780 (1995) (holding that, notwithstanding the rule prohibiting admission of other crimes evidence, evidence of prior physical abuse of spouse may ordinarily be admitted to establish the relationship of the parties, to show the existence of a continuing course of conduct between the parties, to corroborate the testimony of witnesses, or to show motive or intent); *State v. Elvin*, 481 N.W.2d 571, 575 (Minn. App. 1992), (holding that evidence of prior domestic violence is admissible to illuminate the relationship between the defendant and the victim), review denied (1992). See also *State v. Johnson*, 73 Ohio Misc. 1, 657 N.E.2d 383, 384 (1994) (holding that defendant's prior convictions for crimes of violence against same victim are admissible in domestic violence threat cases as proof of element of crime charged, and as proof of defendant's intent, motive, or absence of mistake or accident); *State v. Kelly*, 89 Ohio App. 3d 320, 624 N.E.2d 733, 734-35 (1993) (holding that although history of domestic violence was not inextricably related to crimes charged and accordingly not admissible as "other acts" evidence under ER 404(b), history of domestic violence was admissible to show victim's state of mind and to explain why she did not try to escape from defendant or summon police); *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317, 320 (1986) (holding that evidence of defendant's prior assaults on victim he

was alleged to have murdered was admissible based solely on consideration of identical perpetrator and victim), *review denied* (1986); *Lindsey v. State*, 135 Ga. App. 122, 218 S.E.2d 30, 31 (1975) (holding that prior attempts to commit same crime against same victim are generally admissible).

The Court of Appeals affirmed the defendant's conviction finding that the prior assaults were properly admitted into evidence.

Prior misconduct is admissible under ER404(b) to demonstrate the victim's fear of the defendant even where the prior conduct was not against the victim. *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000). In *Barragan*, the trial court, in a harassment prosecution, admitted evidence of the defendant's prior uncharged assaults to show that the victim was placed in reasonable fear by the defendant's threats. Although the prior uncharged assaults did not involve the same victim, the evidence was relevant to show the basis for the victim's fear.

Prior misconduct is admissible under ER404(b) to explain a victim's delay in reporting abuse. *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). In *Wilson*, the defendant was charged and convicted of statutory rape and indecent liberties. The victim testified that the defendant began molesting her when she was 13 years old. As the sexual abuse continued, the defendant began hitting and kicking the victim. The physical abuse never occurred at the same time as the sexual abuse. The abuse continued until the victim turned 15 years old. The Court of Appeals upheld the admission of the physical assaults finding that "evidence of the assaults was offered to show something other than that [the defendant] had a violent character or to show that he acted in

conformity with that character.” *State v. Wilson*, 60 Wn. App. at 891. The evidence “was admissible to explain the delay in reporting the sexual abuse and to rebut the implication that the molestation did not occur.” *State v. Wilson*, 60 Wn. App. at 891.

In the case at hand, the State introduced evidence of the defendant’s history of violence against the victim to explain inconsistencies, demeanor, delay in reporting, and to allow the jury to evaluate credibility with full knowledge of a relationship marked by domestic violence and sexual abuse, and to provide a complete picture of the crime charged.

2. *The outcome of the trial would have been the same if the 404(b) evidence had been suppressed in this case.*

The defendant disingenuously argues that “[t]he critical issue in this case was the credibility of A.S. as there as [sic] no physical evidence regarding the charged rape incidents which were ultimately based solely on her testimony.” (Brief of Appellant at 18). “The jury did not believe A.S. regarding one of the allegations of rape as it acquitted Mr. Gilpin of that count. Thus, ‘there is a strong probability that the jury used’ the evidence concerning Mr. Gilpin’s use of a knife in a prior uncharged incident to convict him of the offense for which he was ultimately convicted.” (Brief of Appellant at 25).

The State concedes that there was no physical evidence to corroborate the rape charged in count two of the Information. In fact, this count did hinge solely on the testimony of A.R.S. and she had difficulty remembering the

events of that evening. Also, the defendant provided several alibi witnesses for the day in question. Accordingly, the jury acquitted him on this count.

However, the rape allegation in count three was supported by significant physical evidence. A.R.S. had a red mark on the top of her head, a scratch on her cheek under the right eye, and a slight abrasion to the inside of her lip, consistent with the testimony of A.R.S. that there was a physical altercation and she fell to the ground. (Trial RP at 88, 137-138). Also, the swab taken of the defendant's penis, on the night of the rape, contained DNA from the victim, strong evidence that intercourse had occurred. (Trial RP at 293). Also, the shirt A.R.S. was wearing at the hospital on the night of the rape was tested, and the crime lab found a sample containing sperm from the defendant and likely saliva from the victim. (Trial RP at 293-294). This corroborates the testimony of A.R.S. that the defendant ejaculated into her mouth and that she wiped her mouth out with her shirt. (Trial RP at 89).

The defendant focuses on the testimony regarding the prior bad acts; however, in the context of the entire trial they were insignificant. In fact, the incidents were not even argued to the jury by the State in closing argument. The defense had produced a witness that was in the trailer the night of the Thanksgiving rape at knife point that stated she hadn't heard anything. The defense used this to argue against the victim's credibility. It certainly wasn't argued in a way to prejudice the defendant.

In the end, the jury obviously based their verdict on the strong DNA evidence presented in counts 1 and 3. The only difference between Counts 2

and 3 was a lack of physical evidence as to Count 2. If the jury was improperly swayed or improperly used the ER404(b) evidence then they would have convicted on all counts. Instead, they returned a thoughtful verdict grounded in solid physical evidence.

The defendant received effective assistance of counsel.

The courts have recognized a two-pronged test when examining an allegation of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in all significant decisions. *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985). There must be a showing that the representation fell below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The defendant cannot make that showing in this case.

Defense counsel was retained and solely dealt with the defense, as three prosecutors handled the case. (Hearings RP at 119). Defense counsel interviewed numerous witnesses and spent a “great deal of time” in preparing for trial. (Hearings RP at 120). After the tentative ruling on the ER404(b) issues by the judge, it is a legitimate trial strategy to not object to the evidence, but to attempt to make it part of the defense.

If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *See State v. Adams*, 91 Wash.2d 86, 90, 586 P.2d 1168 (1978). Here, defense counsel chose to use the ER404(b) evidence to further undermine the victim’s credibility.

The error claimed in this case is that defense counsel failed to object to testimony at trial. It has been stated that “[t]he decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763; 770 P.2d 662 (1989). But, only in the most egregious circumstances when the testimony is central to the State’s case, will the failure to object to testimony justifying reversal. *Id.*

Defense counsel produced a witness, Beverly Lowry, who was present in the trailer at the time of the prior rape at knife point. (Trial RP at 405-406). Lowry testified that the trailer was small and that she would have heard any commotion or struggle as described by A.R.S. (Trial RP at 406-407). She

testified that she did not hear anything that would have corroborated the testimony of A.R.S. (Trial RP at 407).

The defense also produced testimony regarding the knife in question. Defense counsel called the defendant's girlfriend, Liane Benson. (Trial RP at 410). Benson testified that the knife in evidence had belonged to the defendant's father. (Trial RP at 410). She further testified that she saw the defendant give the knife to A.R.S. for protection because A.R.S. felt unsafe when she was alone. (Trial RP at 411). This would obviously not be consistent with what one would expect from an attacker. Usually, they would not present the weapon to the victim willingly.

Here, the decision to allow in admissible ER404(b) evidence and use it to undermine the victim's credibility was a legitimate trial strategy and was not ineffective assistance of counsel. In fact, it seems that this tactic worked to some extent as the defendant was acquitted on count two, the count with no corroborating physical evidence. The defendant cannot prove either ineffective assistance or prejudice and his argument must fail.

Failure to object to trial court's comment regarding nature of the case.

The defendant cites to *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001) for the proposition that "...the court's instruction that this in not a death penalty case was erroneous and counsel was ineffective for failing to object to it." (Brief of Appellant at 27). However, in *Townsend* the Court found the error harmless and the conviction was affirmed. *State v. Townsend*, 142 Wn.2d at 840.

Counsel's deficient performance is the failure to object to erroneous oral instructions to the jury. Under Washington law, when assessing the impact of an instructional error, reversal is automatic unless the error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Townsend*, 142 Wash.2d 838, 848, 15 P.3d 145 (2001); *State v. Golladay*, 78 Wash.2d 121, 139, 470 P.2d 191 (1970) (quoting *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947)); accord *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997).

Here the comment made by the judge was brief and in response to comments made by defense counsel. It was not in the form of a formal instruction and had no impact on the verdict. Any possible influence was counteracted by the court giving Instruction No. 1:

You have nothing whatever to do with the punishment to be imposed in case of a violation of law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

(CP at 37-45). The jury is presumed to follow the court's instructions, and there is nothing to indicate the contrary in this case. Any error in the court's comment was harmless beyond a reasonable doubt.

There is not cumulative error warranting reversal of the conviction.

The defendant's arguments fail to show any proposed, let alone actual,

prejudice. Defense counsel was not ineffective, and the jury's verdict is clearly based upon the uncontested DNA and physical evidence presented by the State. Since there is no individual error, there is not cumulative error.

DATED this 7 day of March, 2008.

Respectfully Submitted,



By _____
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 35753-4-II

v.

DECLARATION OF MAILING

WALLACE W. GILPIN,

Appellant.

DECLARATION

I, Taylor K. Wonnhoff hereby declare as follows:

On the 7 day of March, 2008, I mailed a copy of the Brief of Respondent to Thomas Michael Kummerow; Washington Appellate Project; 1511 Third Avenue, Suite 701; Seattle, WA 98101-3635, and Wallace W. Gilpin 300970; Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Taylor K. Wonnhoff