

NO. 40929-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN TROY ABRAM, APPELLANT

11 APR 20 PM 1:15
STATE OF WASHINGTON
BY [Signature]
RECEIVED

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 09-1-03660-0

RESPONDENT'S BRIEF

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Whether defendant has failed to show that the trial court erred in not giving a limiting instruction regarding evidence of defendant's prior bad acts when counsel did not request such an instruction. 1

 2. Whether defendant has failed to meet his burden of showing that defense counsel's performance was deficient and resulted in prejudice to defendant..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 7

 1. THE TRIAL COURT DID NOT ERR IN ADMITTING 404(B) EVIDENCE WITHOUT A LIMITING INSTRUCTION BECAUSE SUCH AN INSTRUCTION WAS NOT REQUESTED AND *STATE V. RUSSELL* HOLDS THAT A LIMITING INSTRUCTION IS NOT REQUIRED WHEN ADMITTING 404(B) EVIDENCE UNLESS COUNSEL EXPLICITLY REQUESTS SUCH AN INSTRUCTION..... 7

 2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. 12

D. CONCLUSION..... 16

Table of Authorities

State Cases

<i>State v. Barragan</i> , 102 Wn.App. 754, 762, 9 P.3d 942 (2000).....	15
<i>State v. Boot</i> , 89 Wn. App. 780, 788, 950 P.2d 964 (1998)	8
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	13
<i>State v. Dennison</i> , 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....	9
<i>State v. Donald</i> , 68 Wn. App. 543, 551, 844 P.2d 447, <i>review denied</i> , 121 Wn.2d 1024, 854 P.2d 1084 (1993).....	15
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980)	14
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)	12
<i>State v. Hernandez</i> , 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), <i>review denied</i> , 140 Wn.2d 1015 (2000).....	8
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).....	13
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	8
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662, <i>review denied</i> , 113 Wn.2d 1002, 777 P.2d 1050 (1989).....	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).....	12, 13
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	12
<i>State v. Noyes</i> , 69 Wn.2d 441, 418 P.2d 471 (1966).....	11
<i>State v. Price</i> , 126 Wn. App. 617, 649, 109 P.3d 27, <i>review denied</i> , 155 Wn.2d 1018, 124 P.3d 659 (2005).....	15
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 843 P.2d 651 (1992)	7
<i>State v. Roth</i> , 75 Wn. App. 808, 816, 881 P.2d 268 (1994).....	9
<i>State v. Russell</i> , 154 Wn. App. 775, 225 P.3d 478 (2010).....	11

<i>State v. Russell</i> , 2011 WL 662927	7, 10
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 362, 655 P.2d 697 (1982).....	8
<i>State v. Saunders</i> , 91 Wn. App. 575, 578, 958 P.2d 364 (1998)	14
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 790 P.2d 610 (1990).....	7
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	12
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994)	13
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	14, 15

Federal and Other Jurisdictions

<i>Harrington v. Richter</i> , 131 S. Ct 770, 789, 178 L.Ed.2d 624 (2011)	13
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)	2
<i>Strickland v. Washington</i> , 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)	12, 13, 14

Constitutional Provisions

Article I, Section 22 of the Washington Constitution.....	12
Sixth Amendment to the United States Constitution	12

Rules and Regulations

ER 105	10
ER 404(b).....	8, 11, 14

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant has failed to show that the trial court erred in not giving a limiting instruction regarding evidence of defendant's prior bad acts when counsel did not request such an instruction.

2. Whether defendant has failed to meet his burden of showing that defense counsel's performance was deficient and resulted in prejudice to defendant.

B. STATEMENT OF THE CASE.

1. Procedure

On August 7, 2009, the Pierce County Prosecutor's Office charged ADRIAN TROY ABRAM, hereinafter "defendant" with one count of failing to register as a sex offender and one count of intimidating a witness (domestic violence) in Pierce County Cause No. 09-1-03660-0. CP 1-2.

On April 30, 2010, the State amended the information to include an additional charge for tampering with a witness (domestic violence). CP 6-7.

Trial commenced on June 14, 2010, before the Honorable Elizabeth P. Martin. After hearing all the evidence, the jury returned a verdict finding defendant not guilty of failing to register as a sex offender,

and guilty of intimidating a witness and tampering with a witness. CP 44, 45, 47. The jury also returned a special verdict on domestic violence finding that defendant and the victim were members of the same family or household for both the intimidating a witness conviction and the tampering with a witness conviction. CP 46, 48. On July 2, 2010, the court vacated and dismissed the tampering with a witness conviction, finding that the conviction merged with the conviction for intimidating a witness. CP 96-98. The court sentenced defendant to 23 months confinement, the low end of the standard range sentence, and 12 months of community custody. CP 82-95. Defendant filed a timely notice of appeal from entry of this judgment. CP 99-113.

2. Facts

On August 6, 2009, Officers Eric Barry and Dean Waubanasum, with the Tacoma Police Department, responded to a domestic disturbance call at 2028 East 34th Street in Tacoma, Washington. RP 61, 65, 66. When the police arrived, Officer Barry made contact with defendant in the kitchen, patted defendant down for weapons, and read defendant his *Miranda*¹ rights. RP 67-68. Defendant indicated that he understood his rights and agreed to speak with Officer Barry. RP 68.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Defendant admitted to Officer Barry that he and Sharonea Larkins had been arguing and that defendant had been living at Ms. Larkins house for about a year. *Id.* Officer Barry conducted a records check on defendant and discovered that defendant was registered as a transient sex offender. RP 71. Since defendant admitted to living with Ms. Larkins for a year and his identification confirmed that Ms. Larkins's house was listed as defendant's residence, Officer Barry arrested defendant for failing to register as a sex offender. RP 68, 70, 71.

Defendant stated to Officer Barry "[t]his is bullshit. I registered with them. I'm transient and that's what I'm registered as." RP 72. When Officer Barry reminded defendant that he had admitted to living in Ms. Larkins's house for a year, defendant stated "I'm not living here." *Id.*

Officer Waubanascum testified that he spoke with Ms. Larkins while Officer Barry spoke with defendant. RP 185, 186. Officer Waubanascum testified that Ms. Larkins appeared to be very afraid, she didn't want to talk and her body was shaking. RP 187. Ms. Larkins kept whispering to Officer Waubanascum that she wanted defendant gone. RP 188.

Officer Barry observed defendant give Ms. Larkins a "mean look" and defendant began yelling. RP 73. Officer Barry then proceeded to put defendant in the back of his patrol vehicle. *Id.* During this time, defendant was scowling at Ms. Larkins and yelling "[y]ou better not tell them nothing. I'll be out soon." RP 73-74, 191.

Ms. Larkins was standing at the front door during this time. RP 74. Both Officer Barry and Officer Waubanascum testified that it appeared that Ms. Larkins heard defendant's threats. RP 74, 192-193. Ms. Larkins looked away and then shut the front door. RP 74.

After transporting defendant to jail, Officer Waubanascum and Officer Barry returned to further question Ms. Larkins. RP 194. During that time, Ms. Larkins kept asking "[a]re you sure he's not getting out?" RP 195. Ms. Larkins then admitted to the police that she and defendant had gotten into a verbal argument that night. *Id.* She stated that defendant had assaulted her in the past and that defendant had pushed her from behind that night. *Id.* Ms. Larkins told the police that usually when she and defendant get into an argument, it leads to her being assaulted by him. RP 196.

When the police asked Ms. Larkins why she didn't call the police herself, she stated that she called defendant's grandmother instead of the police because she didn't want defendant to know she was calling for help. *Id.*

The police then asked Ms. Larkins to fill out a handwritten statement. RP 196. Ms. Larkins refused because she was afraid. RP 199. She told the officers that when she filled out a handwritten statement in the past, defendant got a hold of it and gave her "the worst beating of my [Ms. Larkins's] life." RP 204.

At trial, Ms. Larkins testified that on August 6, 2009, defendant was at her house and would not leave. RP 106. Ms. Larkins testified that she wanted defendant out of her house so she called defendant's grandmother to come get him. *Id.*

Ms. Larkins further testified that defendant did not push her that night and that he did not yell "[y]ou better not tell them nothing. I'll be out soon." RP 108, 113. She stated that she did not see the officers put defendant in the patrol vehicle because she was inside the house. RP 111.

Ms. Larkins denied telling the officers that she didn't call the police herself because she was fearful that defendant would physically assault her. RP 115. She also denied saying that she wouldn't give a written statement because last time she did defendant gave her the worst beating she had ever had. RP 117. She testified that defendant "never gave me no worse beating . . ." *Id.*

When confronted with the statements she had given to police regarding previous altercations between her and defendant, Ms. Larkins admitted that defendant had pushed her on June 14th, 2006. RP 121, 123. Her exact testimony was "[i]t says that he pushed me and took my phone, pushed my face." RP 123. Ms. Larkins denied that defendant slapped her on May 24, 2009, but admitted that the officers told her she had a scratch

on her nose. RP 123, 125. Ms. Larkins then changed her testimony to “[h]e could have slapped me. I don’t know. I could have scratched myself.” RP 125, 126.

Ms. Larkins denied that defendant had ever displayed a gun in her presence and denied telling the officers that defendant said “[b]odies are going to be dropping.” RP 126, 127.

After denying most of the history of altercations between her and defendant, Ms. Larkins admitted that this was the first time she had testified with regard to an incident where she had called the police on defendant. RP 147.

The State called Officer Christopher Shipp to rebut Ms. Larkins denial about the prior altercations between Ms. Larkins and defendant. Officer Shipp testified that on May 24, 2009, he responded to a domestic violence call at Ms. Larkins house. RP 226.

When Officer Shipp arrived, he noticed that the main door to the house had been kicked in and the side of the door jam was blown completely off. RP 228. Officer Shipp noticed that on the floor inside the house there was drywall dust and wood fragments, indicating that the door had recently been kicked in. *Id.*

Officer Shipp testified that Ms. Larkins informed him that defendant kicked in the door when Ms. Larkins refused to let defendant inside. RP 228-229. Ms. Larkins told Officer Shipp that after defendant

knocked down the door, he began arguing with her and slapped her in the face which is why she had a scratch on her nose. RP 229.

After that, defendant pulled out a pistol which Ms. Larkins described as a black semi-automatic pistol, and began to waive it around while yelling at her and intimidating her. *Id.* While defendant was waving the gun around, he made comments that bodies were going to drop and blood was going to be shed. *Id.*

After the State rested, the defense called several witnesses to testify on behalf of defendant, including two cousins, defendant's brother, and defendant. *See* RP 339, 359, 394, 408. The testimony from the defense witnesses was primarily regarding where defendant lived and when for the failure to register as a sex offender charge.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ADMITTING 404(B) EVIDENCE WITHOUT A LIMITING INSTRUCTION BECAUSE SUCH AN INSTRUCTION WAS NOT REQUESTED AND ***STATE V. RUSSELL*** HOLDS THAT A LIMITING INSTRUCTION IS NOT REQUIRED WHEN ADMITTING 404(B) EVIDENCE UNLESS COUNSEL EXPLICITLY REQUESTS SUCH AN INSTRUCTION.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 843 P.2d 651 (1992).

The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

ER 404(b) provides that evidence of "other crimes, wrongs, or acts" is inadmissible to prove "action in conformity therewith" on a particular occasion. However, that rule also provides a non-exhaustive list of purposes for which such evidence can be admissible: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), *citing State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence

to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994).

In the present case, the State brought a pretrial motion seeking to admit certain prior incidents of domestic violence between defendant and Ms. Larkins in the event that Ms. Larkins recanted her statements to police at trial. RP 14. The State explained that the prior domestic violence incidents were relevant to the current charges against defendant. In order to prove the charge of intimidating a witness, the State must show that defendant was attempting to induce the victim to withhold information regarding a criminal investigation by way of threat. RP 15. To prove the charge of tampering with a witness the State must prove that defendant attempted to induce the victim not to testify but doesn't necessarily have to be by threat. *Id.*

The State informed the court that Ms. Larkins told the police that she would not provide a written statement because defendant had previously gotten out of jail and beaten her for giving a prior written statement. RP 16. The State argued that the prior incidents went directly to defendant's intent behind his statement that "you better not tell them nothing. I'll get out soon." *Id.*

The State argued that the purpose of admitting the prior incidents between defendant and Ms. Larkins was to impeach Ms. Larkins if she recanted. RP 17. Defense counsel agreed that if Ms. Larkins recanted, these prior incidents would be admissible. RP 18-19.

The trial court ruled that the events were admissible if Ms. Larkins recanted. RP 20-21. The court further stated that it would be up to counsel to work out whether or not a limiting instruction should be given. RP 21.

The Washington State Supreme Court has held that a trial court is not required to give a limiting instruction regarding prior bad acts absent a request for such an instruction. *State v. Russell*, 2011 WL 662927².

The Washington Supreme Court relied in part on ER 105 which provides “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” ER 105; *State v. Russell*, 2011 WL 662927. The Court found that “[n]othing in ER 105 creates an affirmative duty on the part of the trial court to sua sponte give a limiting

² The Washington State Supreme Court decided this case on February 24, 2011. Therefore, the full citing references are not yet available. The case is attached as Appendix A.

instruction in the context of ER 404(b) evidence.” *Id.* The Court further found that “[t]his holding is consistent with over 40 years of Washington case law expressly addressing this issue.” *Id.*

“[T]his court disavows any interpretation of our previous case law suggesting a trial court commits reversible error by failing to give a limiting instruction for ER 404(b) evidence absent a request for such instruction.” *Id.*, see also *State v. Noyes*, 69 Wn.2d 441, 418 P.2d 471 (1966).

Appellant relies on the court of appeals case *State v. Russell*³, 154 Wn. App. 775, 225 P.3d 478 (2010) to support his argument that a limiting instruction is required when evidence of the defendant’s prior bad acts is admitted at trial. Appellant’s Brief, p. 11. However, that case is no longer good law. See *State v. Russell*, 2011 WL 662927.

The Washington Supreme Court expressly held that a limiting instruction is not required unless requested by counsel. Since counsel did not request a limiting instruction in the present case, such an instruction was not required.

³ Counsel for appellant filed Appellant’s Opening Brief on February 15, 2011. *State v. Russell*, 154 Wn. App. 775 was not reversed until February 24, 2011.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, and Article I, Section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *State v. Hendrickson*, 129 Wn.2d at 77-78.

Under the first prong, the appellate court will presume the defendant was properly represented. *Id.* Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In order to prevail on a claim of ineffective assistance of counsel, both prongs of the test must be met. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If either part of the test is not satisfied, the inquiry need go no further. *State v. Hendrickson*, 129 Wn.2d at 77-78.

Additionally, the reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489 (*internal citations omitted*). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). "Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." *Harrington v. Richter*, 131 S. Ct 770, 789, 178 L.Ed.2d 624 (2011).

There are "countless ways to provide effective assistance [of counsel] in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Harrington v. Richter*, 131 S. Ct. at 788-789. In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d at 336. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Counsel's choice of whether or not to object at trial is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*, (citing *Strickland v. Washington*, 466 U.S. 668, *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). Furthermore, in order to prevail on a claim of ineffective assistance of counsel for a failure to object at trial defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Appellant argues that defense counsel was ineffective for failing to request a limiting instruction with regard to the prior incidents of domestic violence between defendant and Ms. Larkins. Appellant's Brief, p. 16.

Defense counsel's decision not to request a limiting instruction is a classic example of trial tactics. In *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009), the defendant claimed that his defense counsel's failure to request a limiting instruction for evidence admitted under ER 404(b) amounted to ineffective assistance of counsel. *Id.* at 90. The court affirmed the defendant's conviction stating that "prior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to

reemphasize damaging evidence.” *Id. citing State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005); *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993). The court went on to state that “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim.” *State v. Yarbrough*, 151 Wn. App. at 91.

Furthermore, when reviewing the record as a whole, it cannot reasonably be claimed that defense counsel’s performance fell below an objective standard of reasonableness. At trial, defense counsel made objections and cross examined the State’s witnesses. *See* RP 36, 39, 43, 153, 330, 510. Defense counsel called their own witnesses to testify on defendant’s behalf. *See* RP 338, 358, 393, 408. Additionally, defendant was acquitted of the charge for failing to register as a sex offender.

When viewed in the context of the entire record, defense counsel’s decision not to request a limiting instruction does not amount to ineffective assistance of counsel.

D. CONCLUSION.

For the above reasons, the State respectfully requests the Court affirm defendant's conviction and sentence below.

DATED: April 18, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

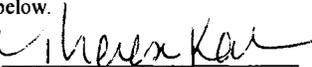


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Karen Judy
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-18-11 
Date Signature

STATE OF WASHINGTON
11 APR 20 PM 1:15
BY 
DEPT. OF CRIMINAL JUSTICE
TACOMA, WA 98401

APPENDIX “A”

--- P.3d ----, 2011 WL 662927 (Wash.)

Briefs and Other Related Documents

Judges and Attorneys

Only the Westlaw citation is currently available.

Supreme Court of Washington,
En Banc.
STATE of Washington, Petitioner,
v.
Arthur C. RUSSELL, Respondent.

No. 84307-4.
Argued Jan. 18, 2011.
Decided Feb. 24, 2011.

Background: Defendant was convicted by jury in the Superior Court, Kitsap County, Anna M. Laurie, J., of first-degree rape of a child. Defendant appealed. The Court of Appeals, 154 Wash.App. 775, 225 P.3d 478, reversed and remanded. State petitioned for review.

Holding: Following grant of petition, the Supreme Court, Fairhurst, J., held that trial court was not required to give limiting instruction regarding other bad acts evidence absent a request for such an instruction.

Court of Appeals' decision reversed; conviction and sentence affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1038 Instructions

110k1038.3 k. Necessity of Requests. Most Cited Cases

Issue of whether trial court erred in failing to give a limiting instruction when admitting other bad acts evidence was properly before the Supreme Court, though defendant failed to request a limiting instruction in the trial court in his prosecution for first-degree rape of a child, as Court of Appeals accepted review of this issue, and nothing in rule of appellate procedure allowing appellate court to refuse to review any claim of error which was not raised in the trial court expressly prohibited the Court of Appeals from accepting review of an issue not raised in the trial court. RAP 2.5(a).

[2] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1028 k. Presentation of Questions in General. Most Cited Cases

Use of the term "may" in rule of appellate procedure allowing appellate court to refuse to review any claim of error which was not raised in the trial court indicates that it is a discretionary decision of the appellate court to refuse review. RAP 2.5(a).

[3] KeyCite Citing References for this Headnote

110 Criminal Law

110XX Trial

110XX(H) Instructions: Requests

110k824 Necessity in General

110k824(8) k. Purpose and Effect of Evidence. Most Cited Cases

Trial court was not required to give a instruction to jury limiting its consideration of evidence of defendant's uncharged prior and subsequent sexual misconduct with child victim to the issue of defendant's lustful disposition toward the victim, in prosecution for first-degree rape of a child, absent a request for such a limiting instruction, as trial court had a duty to issue a limiting instruction only upon request for such an instruction, pursuant to rule providing that when evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. ER 105, 404(b).

Russell Duane Hauge, Randall Avery Sutton, Kitsap Co. Prosecutor's Office, Port Orchard, WA, for Petitioner.

Bryan G. Hershman, Attorney at Law, Tacoma, WA, for Respondent.

FAIRHURST, J.

*1 ¶ 1 The Court of Appeals reversed Arthur C. Russell's conviction for first degree rape of a child (domestic violence) because the trial court admitted ER 404(b) evidence without sua sponte giving the jury a limiting instruction regarding the limited purpose for which the evidence was admitted. The State argues that the trial court was not required to give a limiting instruction absent a request for such an instruction. We reverse the Court of Appeals and affirm Russell's conviction.

I. FACTUAL BACKGROUND AND PROCEDURAL INFORMATION

¶ 2 CR, born on May 22, 1992, was the youngest of Marilou Russell's five children. Marilou married Russell in 1995. Because Russell was in the navy, the family moved a lot, and between the years of 1995 and 2006 they moved from the Philippines to Japan, to Hawaii, to Washington, to Florida, to Indiana, and finally to Nevada. At trial, the State offered evidence that Russell engaged in an escalating degree of sexual abuse against CR, beginning with caressing CR's body in Hawaii, proceeding to oral intercourse in Washington, and ultimately penile-vaginal intercourse in Florida and Indiana. Russell's abuse of CR is alleged to have continued until she reported the abuse around the age of 13 or 14.

¶ 3 The State charged Russell by amended information with first degree rape of a child (domestic violence) for the alleged abuse of CR occurring in Washington. Before trial, the State sought, under ER 404(b), to admit evidence of Russell's abuse of CR in Japan, Hawaii, Florida, and Indiana.

¶ 4 The State argued that while it intended to focus on the events in Washington, the evidence of these prior and subsequent acts of sexual misconduct was relevant because it was corroborative of the alleged sexual misconduct in Washington and showed Russell's "[lustful] disposition" ^{FN1} toward CR. 1 Verbatim Report of Proceedings at 22. The trial court excluded the evidence of abuse in Japan because CR had no independent recollection of those events. The trial court admitted the evidence of abuse in Hawaii, noting that concerns about CR's competency could be addressed on cross examination. The court also admitted evidence of abuse in Florida because it was not more prejudicial than probative.

¶ 5 The trial court did not give, and counsel for Russell did not request, a limiting instruction

informing the jury to limit its consideration of the evidence of prior and subsequent sexual misconduct to the issue of lustful disposition and not to use it to infer Russell has a general propensity toward raping CR. The jury found Russell guilty as charged, and Russell appealed.

¶ 6 The Court of Appeals held that the trial court did not abuse its discretion under ER 404(b) by admitting evidence of prior and subsequent abuse in order to prove Russell's lustful disposition toward CR. State v. Russell, 154 Wash.App. 775, 784, 225 P.3d 478 (2010). However, the Court of Appeals went on to hold that even though the evidence was admissible, the trial court's failure to sua sponte give a limiting instruction was reversible error and was not harmless. Id. at 784-86, 225 P.3d 478. We granted the State's petition for review. State v. Russell, 169 Wash.2d 1006, 234 P.3d 1172 (2010).

II. ISSUES

- *2 A. Under RAP 2.5(a), should the Court of Appeals have denied review of Russell's claim of error regarding the jury instructions?
- B. If the Court of Appeals properly granted review of the jury instruction issue, was the trial court required to sua sponte issue a limiting instruction regarding the limited purpose for the ER 404(b) evidence?

III. ANALYSIS

A. RAP 2.5(a)

[1] ✓ [2] ✓ ¶ 7 Under RAP 2.5(a),^{FN2} the State argues that Russell's failure to request a limiting instruction regarding the ER 404(b) evidence precludes Russell from claiming on appeal that the omission of the instruction was reversible error. Subject to three exceptions not applicable here, RAP 2.5(a) provides that if a party fails to raise an issue in the trial court, the appellate court may decline to review the issue on appeal. However, the rule's use of the term "may" indicates that it is a discretionary decision to refuse review. Roberson v. Perez, 156 Wash.2d 33, 39, 123 P.3d 844 (2005) (citing State v. Ford, 137 Wash.2d 472, 477, 484-85, 973 P.2d 452 (1999)). Nothing in RAP 2.5(a) expressly prohibits an appellate court from *accepting* review of an issue not raised in the trial court. Id. Because the Court of Appeals accepted review, its decision on the limiting instruction issue is properly before this court.

B. *Limiting instructions for ER 404(b) evidence*

[3] ✓ ¶ 8 The State argues that the trial court is not required to sua sponte give a limiting instruction regarding ER 404(b) evidence admitted against a defendant. ER 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.) Under the plain language of ER 105, the trial court has a duty to issue a limiting instruction only *upon request* for such an instruction. Nothing in ER 105 creates an affirmative duty on the part of the trial court to sua sponte give a limiting instruction in the context of ER 404(b) evidence. This holding is consistent with over 40 years of Washington case law expressly addressing this issue. In 1966, this court affirmed a conviction where the judge admitted evidence of quarrels between a defendant and a decedent for the purpose of proving motive. State v. Noyes, 69 Wash.2d 441, 446-47, 418 P.2d 471 (1966). In Noyes, no limiting instruction was requested by defendant but, for the first time on appeal, defendant raised as error the trial court's failure to sua sponte give a limiting instruction. Id. The Noyes court held that "a request for a limiting instruction is a prerequisite to a successful claim of error on appeal." Id. at 447, 418 P.2d 471.

¶ 9 Since Noyes, this court has continued to hold that absent a request for a limiting instruction, the trial court is not required to give one sua sponte. State v. Athan, 160 Wash.2d 354, 383, 158 P.3d 27 (2007) (the omission of a limiting instruction is not reversible error where defendant fails to request the instruction during trial); State v. Myers, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997) ("The failure of a court to give a cautionary instruction is not error if no instruction was requested."); State v. Hess, 86 Wash.2d 51, 52, 541 P.2d 1222 (1975) (no reversible error for the lack of a limiting instruction where no instruction requested).

*3 ¶ 10 Russell argues that this court has created an exception to the above rule for cases involving evidence of prior acts of sexual misconduct admitted under ER 404(b) in prosecutions for sex crimes. The Court of Appeals agreed with Russell and held that the trial court erred by failing to sua sponte give a limiting instruction. Russell, 154 Wash.App. at 786, 225 P.3d 478. Both Russell and the Court of Appeals relied on cases where the issue of reversible error for failure to give a limiting instruction was not before the court. State v. Foxhoven, 161 Wash.2d 168, 163 P.3d 786 (2007); State v. Lough, 125 Wash.2d 847, 889 P.2d 487 (1995); State v. Brown, 113 Wash.2d 520, 782 P.2d 1013 (1989); State v. Saltarelli, 98 Wash.2d 358, 655 P.2d 697 (1982); State v. Goebel, 36 Wash.2d 367, 218 P.2d 300 (1950). Their reliance on the dictum in these cases is mistaken. As we have previously held, this court disavows any interpretation of our previous case law suggesting a trial court commits reversible error by failing to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction. See Noyes, 69 Wash.2d at 446-47, 418 P.2d 471 ("Appellant relies on State v. Goebel, ... where this court stated that in such circumstances it was the duty of the trial court to inform the jury of the limited purpose of the evidence, and to admonish them that it was to be considered for no other purpose. This 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.").

¶ 11 Because neither Russell nor the State requested a limiting instruction for the ER 404(b) evidence, we hold that the trial court was not required to sua sponte give a limiting instruction.

IV. CONCLUSION

¶ 12 A trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction. We reverse the Court of Appeals, and affirm Russell's conviction and sentence.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, GERRY L. ALEXANDER, TOM CHAMBERS, SUSAN OWENS, JAMES M. JOHNSON, DEBRA L. STEPHENS, and CHARLES K. WIGGINS, Justices.

FN1. The record actually says "lawful disposition." 1 Verbatim Report of Proceedings at 22. However, from the context, it is clear that this is either a typographical error or the deputy prosecutor merely misspoke. The State clearly meant the proffered evidence showed Russell's *lustful* disposition.

FN2. RAP 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Wash., 2011.

State v. Russell

--- P.3d ----, 2011 WL 662927 (Wash.)

Briefs and Other Related Documents ([Back to top](#))

- [843074 \(Docket\) \(Mar. 17, 2010\)](#)

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Alexander, Hon. Gerry L.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Chambers, Hon. Tom**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Fairhurst, Hon. Mary E.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Johnson, Hon. Charles W.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Johnson, Hon. James M.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Laurie, Hon. Anna M.**

State of Washington Superior Court, Kitsap County
Port Orchard, Washington 98366

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **Madsen, Hon. Barbara A.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Owens, Hon. Susan J.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Stephens, Hon. Debra L.**

State of Washington Supreme Court
Olympia, Washington 98504

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

Attorneys

Attorneys for Petitioner

- **Hauge, Russ**

Port Orchard, Washington 98366

[Litigation History Report](#) | [Profiler](#)

Attorneys for Respondent

• **Hershman, Bryan G.**

Tacoma, Washington 98402

Litigation History Report | Profiler

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.