

No. 41807-0-II

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

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**STATE OF WASHINGTON,**  
**Respondent,**

v.

**MELCHESTER PHILLIPS, JR.,**  
**Appellant.**

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Melchester Phillips, Jr., appeals his convictions for residential burglary and trafficking in stolen property.

On appeal, Mr. Phillips argues inflammatory 404(b) testimony that he grabbed an eleven-year-old witness by the neck, slammed him to a table and cut off his air supply was erroneously admitted. The totality of that child's testimony provided the primary evidence of Mr. Phillips's guilt. When the State had sufficient emotion-neutral testimony from the child, the trial court erred in its admission of the alleged assault by Mr. Phillips. Moreover, there was a reasonable probability that such highly prejudicial evidence led to Mr. Phillips's conviction as it tainted Mr. Phillips in the eyes of the jury, portraying him as a violent, ruthless man with a propensity to commit crimes.

Further, when Mr. Phillips was entitled to a limiting instruction regarding the jury's use of such testimony, and no tactical reason prevented his attorney from requesting such an instruction, his

counsel's performance was ineffective when he failed to seek such an instruction.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

1. The superior court erred in permitting the State's key witness to testify regarding Mr. Phillips's alleged assault upon him.

2. The superior court erred in permitting Mr. Phillips to be tried in violation of his constitutional rights to competent counsel.

### **B. Issues Pertaining to Assignment of Error**

1. The State's evidence in this case was not overwhelming, resting primarily on the testimony of a single witness. Under these circumstances, did the trial court err in admitting highly prejudicial 404(b) testimony that Mr. Phillips grabbed that eleven-year-old witness by the neck, slammed him to a table and choked him and is there a reasonable probability the outcome of the trial would have been different had the court properly excluded the testimony?

2. When Mr. Phillips was entitled to a limiting instruction regarding the use of the 404(b) evidence and there was no strategic reason for failing to ask for such an instruction, was Mr. Phillips's trial counsel ineffective in failing to propose an instruction limiting the purpose for which the jury could consider the disputed testimony?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

By information filed August 19, 2010, the State charged Mr. Phillips with the following crimes: 1) residential burglary committed on July 4, 2010, by entering or remaining unlawfully in the dwelling of Howard Gore, located on South Sprague Avenue, Tacoma, in violation of RCW 9A.52.025; 2) trafficking in stolen property in the first degree, a keyboard belonging to Howard Gore, committed on July 5, 2010, in violation of RCW 9A.82.050(1); and 3) trafficking in stolen property in the first degree, a router belonging to Howard Gore, committed on July 5, 2010, also in violation of RCW 9A.82.050(1). Clerk's Papers on Appeal (CP) 1-2.

Mr. Phillips's statements to the police were deemed admissible following a CrR 3.5 hearing, the Honorable Brian Tollefson presiding. CP 5-7.

After a jury trial, Mr. Phillips was convicted of the charged crimes. CP 32-34. The court denied his motion for a new trial, 6VRP at 386, and sentenced him to a total of 80 months in confinement, plus costs, fees and assessments. CP 42-44.<sup>1</sup>

This appeal followed. CP 51.

## **B. Substantive Facts**

### **1. Trial Testimony**

In early July 2010, Howard Taft Gore was in the process of moving some belongings out of a house on South Sprague Avenue, Tacoma. Although Gore had not lived there for about a year, his former roommate, Ronnie Carter, lived in the house until the beginning of that July. Gore spent July 4th packing a U-Haul. At the end of the day, he locked the truck and the house and left for the night. When he returned the

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1. The Verbatim Reports of Proceedings filed in this case are numbered 1 through 6. In this brief, Appellant refers to the volumes by the number assigned by the court reporter, for example, the volume marked Volume 6 is 6VRP herein.

next day, a door to the house had been broken down and several possessions were missing, including a keyboard, a weed eater, and some power tools. 1VRP at 27-41; 143-45. Gore later identified at two separate pawn shops a keyboard, router, and weed eater that had been stolen. 3VRP at 230-31.

Eleven-year-old Gary Robinson testified pursuant to an immunity agreement with the State. 2VRP at 111. He knew he could be detained in a juvenile detention facility if he did not testify. 2VRP at 133-34.

On the evening of July 4, 2009, Robinson and Mr. Phillips went to the house where Gore had lived and walked through the open door that looked like it had been kicked open. 2VRP 99-105; 107. Once inside, using Mr. Phillips's flashlight, the two dug through boxes looking for power tools and other goods. Robinson grabbed a heater. Mr. Phillips found some fireworks and gave them to the boy. When Robinson saw police approaching, the two fled. 2VRP at 105-09.

Robinson and Mr. Phillips stole power tools, a trumpet, a heater, fireworks and some milk. The next

day, he and Mr. Phillips went to two different pawn shops to try to pawn a keyboard, trumpet and some power tools. 2VRP at 109-11; 131-32.

Robinson and Mr. Phillips made just one trip out of the house with everything, except the heater, or maybe it was the fireworks, in a box Mr. Phillips carried. 2VRP at 106; *cf.* 2VRP at 133. He later said that Mr. Phillips got the keyboard when he kicked the door open and got the other things "the next time." 2VRP at 132-33.

When asked about entering Gore's house through an open door on cross-examination, Robinson alleged for the first time that Mr. Phillips kicked open the door. 2VRP at 130. On redirect, the State had to resolve the confusion with a leading question: "Did you find out at some later time that Mel [Mr. Phillips] had kicked it open?" 2VRP at 135. Robinson agreed with that statement. Id.

Robinson testified that when he was interviewed about the incident by DOC or police officers, he told them what happened. 2VRP at 111-13. On cross

examination, Robinson insisted he did not tell the officers he and Mr. Phillips were not involved in the incident. 2VRP at 127-28; 131; & 136-37. However, an officer who spoke to Robinson said that Robinson indicated he and Mr. Phillips were not involved in the incident. 4VRP at 274-75. About five weeks later, when Robinson was interviewed again, he told the officers a story consistent with his trial testimony. 4VRP at 280-285.

Gore's former next door neighbor also knew Mr. Phillips. After initially denying seeing Mr. Phillips at all the day of July 4, she said she heard him ask someone else one or two times if the occupants of the Sprague Avenue house were gone yet. 3VRP at 158-161.

A former resident of the house, Ronnie Carter, saw Mr. Phillips about a week after the incident. Mr. Phillips told him he had a keyboard from the house and offered to sell it back to him. 3VRP at 169-75; see also 2VRP at 113-15.

The State introduced a pawn receipt in Mr. Phillips's name for July 5, 2010, for a Yamaha

keyboard, 3VRP at 188, and, from a different pawn shop, two pawn receipts in Phillips's name for the same day for two power tools and a weed eater. 3VRP at 200.

Police met with Mr. Phillips about five weeks after the incident, after numerous individuals from the neighborhood had been questioned about the matter and the incident was generally known. 3VRP at 251-44. When an officer told Mr. Phillips she was with the burglary unit, he volunteered something like, "oh, this is about that burglary at . . . South Sprague." 3VRP at 240. Mr. Phillips said he did not take any items from the house but Ronnie Carter had given him a class ring, which he pawned. 3VRP at 241-42. He admitted pawning a keyboard, weed eater and router, and said that three different people, Showtime, Leonard, and Randy, had given those items to him. 3VRP 247-48.

## **2. Trial Court Ruling on the 404(b) Evidence**

Mr. Phillips objected to the admission of testimony regarding his alleged assault upon State's witness Gary Robinson, on the grounds that it was irrelevant, inadmissible under Evidence Rule 404(b),

and highly prejudicial. 2VRP at 115-16 & 118-19. He described the prejudice inherent in the evidence:

[T]he State wants to introduce evidence that Mr. Phillips picked up a child by the throat and carried him or pinned him against the wall, basically assault of a child in the second degree. Now, again, Mr. Phillips is not charged with witness tampering, he's not charged with witness intimidation, so the prejudicial value of that is very, very high, Your Honor.

This jury is going to basically be told by this witness, an 11-year-old boy, that he was assaulted by my client and he's not charged with that.

2VRP at 118-19. In addition, counsel for Mr. Phillips asked the court to require an offer of proof as to the disputed testimony. When the State objected, stating it had already made a proffer, counsel said he would leave the matter to the judge's preference. 2VRP at 120.

The State proffered Robinson would testify Mr. Phillips picked him up around his neck and called him a snitch. It argued the evidence was relevant for two reasons, as proof of Mr. Phillips's consciousness of guilt and to explain the witness's reluctance to come forward, and that its probative value was not

substantially outweighed by the risk of prejudice.

2VRP at 116-17 & 119-20.

The court allowed the testimony. It ruled the evidence was prejudicial "because it is 404(b) evidence," but that it was also relevant for one reason: to show Mr. Phillips's consciousness of guilt. 2VRP 120-21. It further found that the probative value was not outweighed by the risk of prejudice because the witness had already provided evidence of Mr. Phillips's guilt:

the witness has already testified that he and Mr. Phillips went into the home and he was there when Mr. Phillips was removing items from the home. And he went with Mr. Phillips afterwards to two pawn shops to try and pawn the items taken from the home, so that's the reason.

2VRP at 121.

Pursuant to this ruling, Gary Robinson testified that, a week or two after the incident, Mr. Phillips accused him of "snitching" and assaulted him:

Mel [Mr. Phillips] came out, grabbed me by the neck and picked me up and then went back in the garage, shut the door, and slammed me on the table. And I just started crying because I was shocked. And then so Joe's like, Man, let the little kid go, just let

him talk. He can't breath right now, if you want to talk, let him talk -

2VRP at 122. Robinson also said Mr. Phillips said, "you snitched on me?" 2VRP at 123.

Mr. Phillips's trial counsel did not request and the court did not provide a limiting instruction regarding the jury's use of this testimony. See VRP; CP 8-31.

The State used the alleged assault in closing arguments to bolster Robinson's credibility. In listing seven reasons Robinson should be found credible, the State explained:

Number seven, if you take a look at the motive for not telling Officer Munson that he and the defendant were involved, it makes sense. . . . We've got an 11-year-old boy here who testified that shortly after this happened the defendant picked him up by the neck and raised him up and said you're snitching on me, to the point where Gary told you he was crying when this happened. It's fear.

4VRP at 348-49.

#### IV. ARGUMENT

**Point I: The Trial Court Erred in Admitting Evidence that Mr. Phillips Assaulted an Eleven-Year-Old and that Error Prejudiced Mr. Phillips**

**A. The Trial Court Misinterpreted ER 403 and 404(b)**

At trial, the jury heard evidence that Mr. Phillips choked, "slammed," and otherwise assaulted an eleven-year-old child, the State's key witness. Admission of this testimony requires reversal of Mr. Phillips's convictions because 1) the trial court failed to determine the misconduct likely occurred prior to admitting it, 2) the court misapplied the test in weighing the testimony's probative value against the risk of unfair prejudice, and 3) admission of this highly prejudicial evidence was not harmless.

The disputed testimony was introduced under a misinterpretation of ER 404(b). Interpretation of an evidentiary rule is a question of law, reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (citations omitted). Evidence of a party's other acts are inadmissible to show propensity to commit a crime, but may be admissible to prove other

elements, such as motive, plan or identity. ER 404(b); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001) (reversing conviction where probative value of evidence of defendant's possession of items from uncharged thefts substantially outweighed by risk of prejudice).

A four-part test is used to determine whether other acts evidence is admissible. "To admit evidence of other wrongs, the trial court must (1) find 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 whether the evidence is relevant to prove an element of the crime charge[d], and (4) weigh the probative value against the prejudicial effect." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citation omitted). This analysis must be conducted on the record. Foxhoven, 161 Wn.2d at 175.

Here, although the trial court identified the purpose for admission of the evidence and properly found it relevant to imply Mr. Phillips's consciousness of the crime, it otherwise failed to follow the

requisite 404(b) analysis. See 2VRP at 120-21; State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) (testimony that a defendant threatened a witness is normally admissible to imply guilt) (citation omitted); State v. Moran, 229 Wn. App. 197, 81 P.3d 122 (2003) (similar). The superior court admitted the 404(b) evidence without first finding by a preponderance of the evidence that the misconduct had occurred and by application of an incorrect balancing of its probative value as compared to its prejudicial effect.

To start, the court erroneously interpreted ER 404(b) because it failed to establish the assault happened before ruling testimony about it admissible, even after Mr. Phillips requested an offer of proof. 2VPR at 120; State v. Barragan, 102 Wn. App. 754, 758, 9 P.3d 942 (2000) (noting that if the prior act could be an offense if charged, court must be satisfied by preponderance of evidence it occurred). While the State gave a proffer as to the witness's testimony, the court did not consider the credibility of the witness or other indicators of reliability. The court made no determination that the act likely occurred.

Accordingly, the court failed correctly to interpret Rule 404(b) and the testimony should not have been admitted.

Further, the court employed the incorrect standard in evaluating the probative value of the contested evidence in violation of both ER 404(b) and ER 403. See State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982) (noting ER 404(b) inquiry involves ER 402 and ER 403). ER 403 provides that evidence may be excluded if "its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury." ER 403; Trickler, 106 Wn. App. at 733 (in a 404(b) analysis, "[t]he trial court must balance the probative value of the evidence against any unfair prejudicial effect and this balancing test must be conducted on the record"). Evidence is unfairly prejudicial "if it appeals to the jury's sympathies, arouses its sense of horror, [or] provokes its instinct to punish." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quotation omitted). In close cases, the balance must be tipped

in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Contrary to the court's ruling here, contested evidence is more prejudicial than probative when it is cumulative and would add "little to the scale" of existing evidence of an element of a crime, *not* when there is sufficient other evidence. State v. Venegas, 155 Wn. App. 507, 526, 228 P.3d 813 (2010); see Carson v. Fine, 123 Wn.2d at 223 (noting unfair prejudice is caused by evidence of "scant or cumulative probative force") (quotation omitted).

In Venegas, the Court found that the prejudicial effect of certain motive evidence would likely have outweighed its probative value because the State already had other powerful motive evidence. Venegas, 155 Wn. App. at 526. By contrast, here the court turned the test upside down. Although it essentially found that the contested evidence would add little to the scale of existing evidence, it found that the probative value of the evidence was nevertheless not outweighed by the unfair risk of prejudice. The court held the evidence was not unduly prejudicial because:

the witness has already testified that he and Mr. Phillips went into the home and he was there when Mr. Phillips was removing items from the home. And he went with Mr. Phillips afterwards to two pawn shops to try and pawn the items taken from the home, so that's the reason.

2VRP at 121. In other words, the court got the test exactly wrong, allowing the testimony because it was cumulative to other, emotionally-neutral, testimony regarding Mr. Phillips's guilt.

While the court did not properly gauge the probative value of the disputed testimony, in reality, it was only marginally probative. See e.g., State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001) (holding similar evidence, evidence of flight, "to be only marginally probative as to the ultimate issue of guilt or innocence"). Robinson testified that Mr. Phillips asked him if he was snitch, choked him and slammed him to a table. That behavior may indicate a guilty conscience, but it fails to reveal the source of the guilt. There was nothing connecting that alleged behavior with the charged crime -- no mention of a burglary, the sale of stolen goods, or the South Sprague house. While Mr. Phillips allegedly asked if

Robinson was a snitch, Mr. Phillips could have been referring to a completely separate incident. Indeed, an information was filed against Mr. Phillips in another case on June 29, 2010. Pierce Co. Sup. Ct. No. 10-1-03193-8.

Not only did the trial court fail to weigh the probative value of the contested evidence correctly, it also failed to evaluate the risk of unfair prejudice inherent in the proffered testimony. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Here, the court apparently gave no consideration to the testimony's prejudicial nature whatsoever. See 2VRP at 120-21. Yet the risk of prejudice was very real, because the testimony portrayed Mr. Phillips as a violent and ruthless criminal not above assaulting a child. As counsel for Mr. Phillips argued at trial:

[T]he State wants to introduce evidence that Mr. Phillips picked up a child by the throat and carried him or pinned him against the wall, basically assault of a child in the second degree. Now, again, Mr. Phillips is not charged with witness tampering, he's not charged with witness intimidation, so the

prejudicial value of that is very, very high,  
Your Honor.

This jury is going to basically be told by  
this witness, an 11-year-old boy, that he was  
assaulted by my client and he's not charged  
with that.

2VRP 118-19. Troublingly, the superior court did not consider this blatantly prejudicial aspect of the testimony, merely finding that because there was other evidence of guilt, the testimony was not prejudicial. But the disputed testimony was exactly the kind of emotionally-inflammatory testimony ER 403 was designed to exclude. In sum, the trial court conducted an incorrect ER 404(b) analysis, resulting in the erroneous admission of the disputed testimony. See State v. Venegas, 155 Wn. App. at 526 (holding trial court erred in failing to conduct proper balancing test on the record).

Because the 404(b) evidence in this case involved actual violence, cases holding admissible 404(b) evidence of mere threats of violence are inapposite. For example, in State v. McGhee, 57 Wn. App. 457, 788 P.2d 603 (1990), the Court held the prejudice involved in the admission of testimony that the defendant called

a witness a snitch and made a threatening gesture did not outweigh its probative value because it did not suggest the defendant acted in conformity with a violent nature. 57 Wn. App at 461-62; see Moran, 229 Wn. App. at 218-19 (without conducting analysis, relying on McGhee to hold probative value of threat of witness outweighed the possibility of unfair prejudice).

Here, by contrast, the testimony, involving alleged violence against a child, was much more prejudicial. Unlike the testimony in McGhee, here the testimony primarily portrayed Mr. Phillips as violent, ruthless, and possessed of a criminal nature. Moreover, it suggested he acted in conformity with that nature. Accordingly, its slight probative value was greatly outweighed by the risk of unfair prejudice.

For these reasons, the trial court erroneously interpreted ER 404(b), and the disputed testimony should not have been admitted. Alternatively, if the Court finds no error in interpreting the rule, it should find the trial court abused its discretion in admitting the evidence. When the trial court has

correctly interpreted the rule, the decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Venegas, 155 Wn. App. at 525 (citation omitted). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174. In this case, because the court either misinterpreted 404(b) or failed to adhere to its requirements, the disputed testimony should not have been admitted.

**B. Erroneous Admission of the Testimony was Harmful**

Reversal of Mr. Phillips's conviction is necessary because there is a reasonable probability that he would not have been convicted without the disputed testimony. Error is prejudicial if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Bourgeois, 133 Wn.2d at 403 (balancing substantial evidence of guilt against slight risk of prejudice from erroneously-admitted evidence and finding error harmless) (quotation omitted). Harmless error will not

be found only if the erroneously admitted evidence was of minor significance in the case. Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Here, there was a reasonable probability Mr. Phillips would not have been convicted without the admission of the highly prejudicial evidence when the State's case against Mr. Phillips was not overwhelming. The disputed testimony led to his conviction because it suggested his propensity to commit crimes and unfairly heightened the emotional impact of Robinson's testimony. See State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (holding erroneous admission of highly prejudicial prior bad act evidence not harmless error).

The primary evidence of Mr. Phillips's guilt rested in Robinson's testimony. Although other testimony provided indirect evidence of guilt, for example the pawning of the keyboard, router and weed eater, that evidence was also consistent with both Mr. Phillips's innocence and his story that he was given these items from other people. Thus, the case against

Mr. Phillips largely rested on the jury's willingness to believe Robinson over Mr. Phillips.

But the State's key witness had credibility issues. He was testifying to stay out of a juvenile detention facility. His testimony required the jury to believe he had initially lied to the police about his involvement in the crime but was telling the truth on the witness stand. In addition, his testimony was internally confusing and somewhat incredible: For example, at the prosecutor's prompting, he changed his story about Mr. Phillips kicking in the door. He also seemed unclear about how things were taken from the house. And he said he and Mr. Phillips stole milk. Thus, Robinson's testimony alone provided a shaky scaffold on which the State attempted to build its case.

For this reason, the erroneous admission of the prior acts evidence likely resulted in Mr. Phillips's conviction. The disputed testimony suggested Mr. Phillips was a ruthless, criminal type who acted in conformity with a criminal nature. In many cases, "evidence of other unrelated crimes generates a good

deal more heat than light, and may well be the basis upon which the jury convicts the accused." Smith, 106 Wn.2d 772, 781 (finding error not harmless when other acts evidence used to prove identity). Here, the testimony that Mr. Phillips brutally assaulted Robinson suggested he was a bad person who did criminal things and, thus, was likely to have done what Robinson said. The absence of a limiting instruction in this case, one to inform the jury of the appropriate uses for the testimony, greatly exacerbated this problem.

Even if the jury did not use the evidence to convict solely based on propensity, the testimony unfairly acted on the jury's emotions by eliciting sympathy for Robinson and antipathy for Mr. Phillips. Its prejudicial effect tainted Mr. Phillips in the jury's eyes and enhanced the sympathy and stature of the State's witness, Gary Robinson: The jury was not merely judging a man accused of burglary and trafficking in stolen goods; they were judging a man who grabbed a child around the neck, slammed him to the table and choked him. Similarly, Gary Robinson was not just an accomplice giving State's evidence, he was a

boy willing to testify against the man who assaulted him.

For all these reasons, the erroneously admitted testimony was not of minor significance in this case, there was a reasonable probability Mr. Phillips would not have been convicted without the disputed testimony and this Court should reverse his convictions.

**Point II: Defense Counsel was Ineffective in Failing to Request a Limiting Instruction Regarding the Use of the 404(b) Evidence**

Mr. Phillips's State and federal constitutional rights to effective counsel were violated by his attorney's failure to ask for a limiting instruction regarding the ER 404(b) testimony. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 690-91, 104 S.

Ct. 2052, 80 L. Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995).

The Court starts with a strong presumption of counsel's effectiveness. McFarland, 127 Wn.2d at 335, 899 P.2d 1251. Moreover, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

Trial counsel's performance was deficient when he failed to request a limiting instruction that would have prevented the jury from considering Mr. Phillips's alleged assault on Robinson as evidence of his propensity to commit crimes. Mr. Phillips had a right to such an instruction if his attorney had only requested it. ER 105 ("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."); State v. Russell, 171 Wn.2d 118, 122

249 P.3d 604 (2011) (holding trial court not required to give limiting instruction sua sponte).

Moreover, there was no legitimate reason not to propose proper limiting instructions given the prejudicial nature of this evidence. Failure to propose a limiting instruction is only a legitimate trial tactic if there is reason to believe it was done for a strategic reason. For example, in State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005), this Court found the failure to request a limiting instruction as to four prior acts tactical when the attorneys had requested such an instruction as to a fifth. In addition, the 404(b) evidence was evidence of motive, and the trial court had already limited the jury's consideration of other testimony for proof of motive. Under those circumstances, the Court held that counsel reasonably wanted to avoid further emphasizing the defendant's motive to commit the charged crime.

Similarly, in State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000), the Court deemed tactical trial counsel's failure to seek a limiting instruction regarding evidence that defendant had been involved in

prior prison assaults. There, the trial court had offered to give a limiting instruction, but defense counsel did not propose one. Moreover, counsel instead sought to diminish the impact of the evidence by showing that assaults were common in the prison. See also State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (assuming defense counsel did not request limiting instruction so as not to reemphasize the material).

In contrast to the indications in those cases that failure to request a limiting instruction was legitimate trial strategy, there were no such indications here. Unlike the situations in Price, Barragan, and Donald, here there was no mention of a limiting instruction at trial, no reason to assume the defense attorney considered and rejected the idea, no indication that failure to ask for an instruction would decrease rather than emphasize the jury's attention to the 404(b) evidence. As noted earlier, the primary evidence of Mr. Phillips's guilt was Robinson's testimony. The emotional center of that testimony was his description of Mr. Phillips's alleged assault.

There was no question that that evidence was in the forefront of the jury's mind, the only question was to what use it should be put. A limiting instruction would have prevented it from being used as propensity evidence. For these reasons, counsel's failure to request a limiting instruction as to the 404(b) evidence was not tactical but, instead, deficient performance.

Further, but for this deficient representation, there is a reasonable probability Mr. Phillips would have been acquitted of the charges. Prejudice created by evidence of a prior conviction is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). As discussed earlier, testimony that Mr. Phillips grabbed eleven-year-old Gary Robinson around the neck, slammed him on a table and choked him was extremely prejudicial. Without a limiting instruction, the jury was free to use the 404(b) evidence as proof of Mr. Phillips's evil nature and propensity to commit crimes. Given the fact that the other evidence against Mr. Phillips was not overwhelming, there is a reasonable

probability that without the jury's use of the 404(b) evidence to show criminal propensity, Mr. Phillips would not have been convicted.

For all these reasons, trial counsel's performance was deficient and this Court should reverse Mr. Phillips's convictions.

**V. CONCLUSION**

For all of these reasons, Melchester Phillips, Jr., respectfully requests this Court to reverse his convictions.

Dated this 8th day of July, 2011.

Respectfully submitted,

  
Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that on this 8th day of June, 2011, I caused the original and a true and correct copy of Appellant's Brief to be served by U.S. mail on:

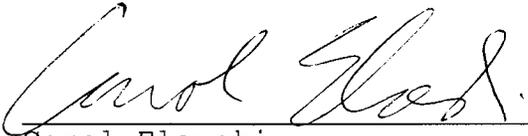
The Court of Appeals  
Of the State of Washington  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Pierce County Prosecutor's Office  
Attention: Appellate Unit  
930 Tacoma Avenue South  
Tacoma, Washington 98402-2102; and  
Respondent's Attorney; and

Mr. Melchester Phillips, Jr.  
DOC # 813361  
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Carol Elewski