

NO. 41807-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

MELCHESTER PHILLIPS, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Brian Tollefson

No. 10-1-03526-7

Brief of Respondent

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

1. Whether the trial court properly admitted evidence of Defendant's assault on G.R. as evidence of Defendant's consciousness of guilt and/or evidence necessary to properly assess G.R.'s credibility under ER 404(b) where such evidence was relevant and not unduly prejudicial.
2. Whether Defendant has failed to show ineffective assistance of counsel where his trial counsel's choice not to propose a limiting instruction regarding the use of ER 404(b) evidence can be characterized as a legitimate tactical decision not to reemphasize damaging evidence.

B. STATEMENT OF THE CASE.

1. Procedure

On August 19, 2010, Melchester Phillips, Jr., hereinafter referred to as the "defendant," was charged by information with residential burglary in count I, and trafficking in stolen property in the first degree in counts II and III. CP 1-2. See RP 3.

The case was called for trial before the Honorable Judge Brian Tollefson, and the parties selected a jury on February 1, 2011. RP 6-14.

The parties gave their opening statements, RP 26, and the State called Howard Taft Gore, Jr., RP 26-47, 53-72, 229-35, J.R., RP 73-82, Tacoma Police Crime Scene Technician Melissa Boyce, RP 82-88, 90-98, G.R., RP 98-137, Tacoma Police Officer Martin Price, RP 141-53, Sheila Brooks, RP 156-63, Ronald Carter, RP 164-83, Kenton Dale, RP 183-94, Lemzy Reed, RP 194-206, and Tacoma Police Detective Castora Hayes, RP 235-55. The State then rested. RP 255.

The defendant called Tacoma Police Officer Terry Munson, and rested. RP 270-79.

The State then called Detective Hayes in rebuttal. RP 279-85.

The parties discussed jury instructions, RP 213-15, 267-69, 286-87, 304-15, and the court presented its proposed instructions to the jury and to the parties. RP 288. Neither party had any objection or took any exception to these instructions, RP 288, and the court read the instructions to the jury. RP 289. *See* CP 8-31.

The State gave its closing argument, RP 291-303 (State's closing). The defendant then moved to dismiss, apparently based on prosecutorial misconduct under *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010). RP 315-20. The court found no misconduct and denied the motion. RP 320-21.

The defense attorney gave his closing argument and the State its rebuttal argument. RP 322-41 (Defendant's closing); RP 341-51 (State's rebuttal).

The jury returned verdicts of guilty as charged to count I, residential burglary, count II, trafficking in stolen property in the first degree, and count III, trafficking in stolen property in the first degree. CP 32-34; RP 358-64.

The defendant made a motion for a new trial, apparently based on juror misconduct, and that motion was denied. RP 367-86.

The court sentenced the defendant to 80 months in total confinement on counts I, II, and III, to be served concurrently, payment of legal financial obligations, and no contact with Gore or G.R. CP 38-50; RP 394-96.

The defendant filed a timely notice of appeal on February 24, 2011. CP 51. *See* RP 399.

2. Facts

Howard Gore, Jr., was a counseling psychologist at Madigan Army Medical Center, who worked with soldiers who had returned home after combat in Afghanistan and Iraq. RP 27. In June and July, 2010, he lived in a house located at 713 South Sprague Avenue in Tacoma, Washington.

RP 28. His girlfriend, Cheri Stewart, brother, Ronnie Carter, and Carter's girlfriend, Rachelle Dixon, also resided at that residence. RP 28. A fence extended around the perimeter of the property. RP 30-33.

Gore had lived at the residence for about a year, but felt it was an undesirable neighborhood in which to live. RP 64-65. So, he decided to move. RP 64. On July 4, 2010, Gore was moving his belongings from the house and was in possession of a "U-Haul" truck. RP 33. On July 4, 2010, he parked that truck in the alley, next to a second garage on his property, worked until about 7:00 in the evening, and left the residence for the night, but secured the door before leaving. RP 34-39.

When Gore returned to the residence early in the morning of July 5, 2010, the door to the house was open, and "looked like somebody just kicked it in." RP 36-37, 61-62. The dead bolt lock in the door was completely destroyed and the door itself no longer worked. RP 37. Gore called the police. RP 40-41.

When Gore entered the garage afterwards, he noticed that it had been ransacked, and that a lot of boxes, which had been full of papers, had been turned upside down. RP 41-42. A scroll saw and a blue bicycle, inscribed with the initials BCA were missing from the garage. RP 42-43. Two personal computers, a musical keyboard, a safe, which contained some coins, and a planer were missing from the interior of the house. RP 43-45. One to two "weed-eaters" were also missing from a second garage on the property. RP 45-46.

Gore testified that a man he identified as Lavatte stopped by later that day to return his bicycle. RP 46, 68.

Gore did not know the defendant and never gave him permission to enter his residence on July 4, 2010, to remove any items from that residence, or to sell, trade, or dispose of any items from that residence. RP 62-63. Gore did not know G.R. RP 65.

Tacoma Police Officer Martin Price responded to the Gore residence on July 5, 2010, at about 8:15 a.m., and contacted Mr. Gore. RP 142-44. Price noted that the back door to the residence had been forced in and damaged. RP 144. He testified that the door frame was broken and that it appeared as though the door had been “kicked or hit with something very hard.” RP 144. Officer Price called for forensics to respond and photograph the scene and gave Gore a theft inventory report with which to list the items stolen from his residence. RP 144-45.

Tacoma Police Department Crime Scene Technician Melissa Boyce responded to the residence, took photographs of the scene and processed the scene, including door handles, cabinet handles, and items that had been moved around, for latent fingerprint impressions. RP 94-96. She did not recover any such impressions from anything inside the residence. RP 94-96.

Shiela Brooks, who lived next door to Gore in July, 2010, testified that, as she was helping Ronnie and his girlfriend move out of Gore’s

residence, the defendant came up to and asked “are they gone yet” one or two times. RP 158-61.

Ronald Carter lived at Gore’s residence with his sister, Cheri Stewart, and his fiancée, Rachelle Dixon, for about two years until the end of June, 2010. RP 165-66. Carter testified that he was familiar with the defendant and that, about a week after the burglary, he saw the defendant and asked him about a keyboard which had been taken from Gore’s residence. RP 168-74. The defendant told Carter that he had the keyboard and then offered to sell it back to Carter. RP 174. Carter testified that the keyboard had been purchased for his nephew, who plays the piano, and that he refused to buy it back from the defendant. RP 174-75.

Eleven-year-old G.R. testified that he knew the defendant through his mother, and that the defendant would sometimes take him to breakfast and to the park to play basketball. RP 99-102. On July 4, 2010, G.R. went to watch fireworks on the Tacoma waterfront, after which he went to a friend’s house in the area of 8th and Grant, near Sprague Street in Tacoma. RP 102-04. While there, G.R. met with the defendant. RP 103.

G.R. went with the defendant down an alley to Gore’s residence, which he described as the house at which “Ronnie” lived. RP 104-05. No one was home at the time. RP 106-07. G.R. testified that he and the defendant entered the house through a door from the garage. RP 107. He indicated that this “[d]oor was open, but it was crooked,” and broken as though “it had been kicked open,” and characterized their entry into the

residence as trespassing. RP 107. G.R. later clarified that the defendant had kicked open the door. RP 130.

It was dark inside the residence, but the defendant used a flashlight to see instead of turning on any interior lights. RP 108. The defendant started going through boxes inside the residence. RP 108-09. G.R. testified that they took power tools, a piano keyboard, a trumpet, a heater, fireworks, and some milk from the residence, and pawned some of the items at a pawn shop on Martin Luther King, Jr. Way, and at the Pawn X-Change on 6th Avenue. RP 109-10, 131.

G.R. indicated that his testimony was made in exchange for an agreement with the State not to file charges against him as a result of his actions at the residence. RP 111, 133-34.

Although G.R. had earlier spoken to Officer Terry Munson and denied that either he or the defendant was involved in the burglary, RP 274-75, G.R. also testified that about one to two weeks after the burglary, the defendant grabbed him by the neck, picked him up, and slammed him on a table, saying, "you snitched on me?" RP 122-24.

Kenton Dale was part owner of Hill-Top Loans, a pawn shop. RP 184. Dale testified that the defendant pawned a Yamaha keyboard at his shop on July 5, 2010, RP 189. Gore later identified that keyboard as the one stolen from his residence on July 4, 2010. RP 230.

Lemzy Reed, an assistant manager at Cash for America pawn shop, which was known as Pawn X-Change before October 5, 2010, testified

that, on July 5, 2010, the defendant pawned a sander, a router, and a “weed-eater” at her shop. RP 200-02. Gore identified this router as the one taken from his residence on July 4, 2010. RP 229-30. Gore testified that the “weed-eater” belonged to his landlord and that it was one of two stolen from his residence on July 4, 2010. RP 231. However, Gore testified that the sander did not belong to him. RP 231-32.

Detective Castora Hayes testified that when she introduced herself to the defendant as a detective with the burglary unit, the defendant made a response to the effect of, “oh, this is about that burglary at 713 South Sprague”. RP 240. Detective Hayes then advised the defendant of his “constitutional rights.” RP 241. The defendant indicated that he knew two people who lived at the residence at 713 South Sprague, Ronnie and Shelly. RP 241.

The defendant told Detective Hayes that he got the keyboard that he pawned at Hill-Top Loans from a man he knew as “Showtime.” RP 246-47. The defendant said he got the “weed-eater” he pawned from “a tall white boy by the name of Leonard.” RP 247. Finally, the defendant indicated that he got the router he pawned from a man he identified as Randy. RP 247-48.

Detective Hayes accompanied Gore to Hill-Top loans, where Gore identified the keyboard as the one stolen from his house and to Pawn X-Change where Gore identified the router and “weed-eater” as items stolen

from his residence. RP 248-49. Gore did not identify the sander as belonging to him. RP 249.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S ASSAULT ON G.R. AS EVIDENCE OF DEFENDANT'S CONSCIOUSNESS OF GUILT AND/OR EVIDENCE NECESSARY TO PROPERLY ASSESS G.R.'S CREDIBILITY UNDER ER 404(B) BECAUSE SUCH EVIDENCE WAS RELEVANT AND NOT UNDULY PREJUDICIAL.

ER 404(b) provides that

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

Prior to admission of such evidence, the court must (1) find 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 charged, and (4) weigh the probative value of such evidence against its prejudicial effect. *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010); *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009); *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). Thus, “[e]vidence of other bad acts can be

admitted under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact.” *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009).

With respect to the first prong of the ER 404(b) analysis, the Washington State Supreme Court has held that an evidentiary hearing is not necessary. *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial. We should be slow, therefore, to allow defendants to confront the witnesses twice, particularly where testifying just once can be a difficult experience for any witness. ***We believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.*** We recognize, as did the Court of Appeals, that there may be instances where the trial court cannot make the decision it must make based simply on an offer of proof. In such cases, it would be entirely proper for the court to conduct an evidentiary hearing outside the presence of the jury. ***The decision whether or not to conduct such a hearing, though, should be left to the sound discretion of the trial court. We conclude, finally, that there was no error here on the part of the trial court in allowing the evidence of prior bad acts to come in following the State's offer of proof.***

Kilgore, 147 Wn.2d at 294-95 (emphasis added). Thus, the Supreme Court in *Kilgore* agreed with this Court's conclusion that "the trial court needs only to hear testimony when it cannot fairly decide, based upon the proponent's offer of proof, that the ER 404(b) incident probably occurred." *Kilgore*, 147 Wn.2d at 294.

Whether by offer of proof or through an evidentiary hearing, "[a] prior bad act offered under ER 404(b) must be proved to the court by a preponderance of the evidence." *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993)(citing *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

However, an appellate court "will not disturb a trial court's ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did." *State v. Yarbrough*, 151 Wn. App. 66, 81 P.3d 1029, 1036 (2009); *State v. Moran*, 119 Wn. App. 197, 81 P.3d 122 (2003)(appellate courts "review a trial court's evidentiary decision on the issue of whether probative value outweighs prejudicial effect for abuse of discretion."). A trial court only "abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons." *Yarbrough*, 151 Wn. App. 66 (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

“When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), a reviewing court should decide issues of admissibility if it appears possible after reviewing the record as a whole.”

State v. McGee, 57 Wn. App. 457, 460, 788 P.2d 603 (1990)(citing)

[W]hat purpose is served by reversing a conviction where the questioned evidence is relevant and admissible? The trial court’s failure to articulate its balancing process on the record does not make admissible evidence inadmissible.

Id.

Rather, because “[e]videntiary errors under ER 404 are not of constitutional magnitude,” where a trial court fails to engage in the proper ER 404(b) analysis, a reviewing court employs a harmless error analysis to “determine whether the trial outcome would have differed if the error had not occurred.” *State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005).

In the present case, although the defendant concedes that the trial court properly conducted steps (2) and (3) of the ER 404(b) analysis, he argues that “it otherwise failed to follow the requisite 404(b) analysis.” Appellant’s Brief, p. 13-14. The record shows otherwise.

With respect to the first step in that analysis, the defendant contends that the trial court “failed to establish the assault happened before ruling testimony about it admissible, even after [the defendant]

requested an offer of proof,” Appellant’s Brief, p. 13-15, but this contention is unsupported.

Indeed, the deputy prosecutor gave the court the following offer of proof:

Your Honor, what I anticipate that the witness [G.R.] will essentially testify to is an incident where the defendant picked him up around his neck and essentially called him a snitch. There was a certain sense of fear that Mr. R[.] experienced or intimidation as a result of that.

RP 116-17.

The defendant did not contest that the incident described by the prosecutor in this offer of proof occurred. *See* RP 115-24. Nor did he make a contrary offer of proof or present any evidence whatsoever. *See* RP 115-24. Rather, the defense attorney seemed to assume the incident occurred, stating in response to the State’s offer:

Your honor, I’d just say that it’s more prejudicial than probative. Again [the defendant] is not charged with that offense.

RP 117.

Although the defense attorney later asked for an offer of proof, he had, as quoted above, already been presented with one. The deputy prosecutor therefore, presumed that the defense attorney was actually seeking a testimonial hearing, stating, “I said I just did [give an offer of proof] but it’s [the defense attorney] asking that the witness come in and

answer questions related to the incident.” RP 120. The defense attorney, however, refused the opportunity to contest the State’s offer of proof at a testimonial hearing, telling the court, “Well, I’ll leave that up to what the Judge would prefer”. RP 120.

In this case, the judge did not prefer to conduct a testimonial hearing, and simply admitted the testimony after conducting the remaining steps of the ER 404(b) analysis. RP 120-21. Because there is no error “in allowing the evidence of prior bad acts to come in following the State’s offer of proof,” *Kilgore*, 147 Wn.2d at 294-95, the trial court here did not error in admitting evidence of the defendant’s assault on G.R. after the State here gave an uncontested offer of proof.

Indeed, because there was absolutely no contrary evidence, even in the form of an offer of proof presented by the defense, the State here “proved to the court by a preponderance of the evidence,” *Benn*, 120 Wn.2d at 653, that the misconduct occurred. *See Kilgore*, 147 Wn.2d 288. Therefore, the first step in the ER 404(b) analysis was properly conducted.

The second step in that analysis requires the court to identify the purpose for which the evidence is sought to be introduced. Here, the deputy prosecutor identified two purposes, stating that “it goes to the defendant’s consciousness of guilt, as well as to explain any reluctance on the part of the witness as far as coming forward”. RP 116-17. The court agreed that evidence of Defendant’s assault on G.R. “has relevance because it shows [the defendant’s] knowledge, and, as [the deputy

prosecutor] says, his consciousness of guilt.” RP 120-21. Thus, as the defendant concedes, Appellant’s Brief, p. 13, the trial court here properly identified the purpose for which the evidence was sought to be introduced. Therefore, the second step of the ER 404(b) analysis was properly conducted.

The third step requires the court to determine whether the evidence is relevant to prove an element of the crime charged.

Evidence that a defendant threatened a witness is relevant because it reveals a consciousness of guilt. Its probative value outweighs the possibility of unfair prejudice. Likewise, evidence that the defendant, or a person acting on behalf of the defendant, tried to prevent a witness from appearing and testifying at trial is relevant because it is evidence of the defendant’s guilt.

Moran, 119 Wn. App. at 218-19 (citing *McGhee*, 57 Wn. App. 457, 460-62; *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)); *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997).

In the present case, the evidence at issue was that the defendant picked his accomplice, G.R., up by the neck and called him a “snitch,” thereby placing G.R. in fear and intimidating him. RP 116-17. The fact that the defendant called G.R. a “snitch” made clear that the reason for the assault was that the defendant believed G.R. had informed the police of defendant’s role in the burglary. Evidence of such behavior could certainly be considered evidence that the defendant here threatened a

witness. Such evidence was, therefore relevant under *Moran* and *McGhee* because it revealed consciousness of guilt.

Nevertheless, Defendant argues that such evidence was “only marginally probative” because, while his behavior may have indicated a guilty conscience, it failed to reveal the source of that guilt where the defendant “could have been referring to a completely separate incident.” Appellant’s Brief, p. 17-18. This argument, however, fails to consider the fact that G.R. described the extent of his relationship with the defendant, and testified that the only criminal events in which he had been involved with the defendant were the burglary and subsequent trafficking in stolen goods at issue here. *See* RP 98-137. Thus, there could be no doubt that when the defendant demonstrated that he was willing to assault G.R. for being a snitch, he was referring to these incidents and to no other.

Therefore, the trial court properly completed the third step of the ER 404(b) analysis, finding that the proffered evidence was relevant.

The fourth and final step in that analysis required the court to weigh the probative value of such evidence against its prejudicial effect. *Yarbrough*, 151 Wn. App. at 81-82. “A trial court has wide discretion in balancing probative value versus prejudice.” *State v. Stein*, 140 Wn. App. 43, 67, 165 P.3d 16 (2007)(citing *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)).

In the present case, the court found that the evidence was more probative than prejudicial. RP 120-21. The court reasoned that while

G.R.'s testimony about the assault was evidence that demonstrated the defendant's consciousness of guilt in this case, it added little to the juror's impression of the defendant as a criminal type, *see State v. Brown*, 132 Wn.2d, 570, 940 P.2d 546 (1997), given that G.R. "ha[d] already testified that he and [the defendant] went into the home and he was there when [the defendant] was removing items from the home," and "went with [the defendant] afterwards to two pawn shops to try and pawn the items taken from the home." RP 121.

Division 1 has held that the "probative value [of evidence that a defendant threatened a witness] outweighs the possibility of unfair prejudice." *Moran*, 119 Wn. App. at 218.

Certainly, it cannot be said that "no reasonable judge would have ruled as the trial court did," *Yarbrough*, 151 Wn. App. at 81, here. Therefore, the trial court did not abuse its discretion, *see Id.*, in ruling that the probative value of the evidence outweighed its prejudicial effect.

Although the defendant argues that the probative value of the evidence at issue here "was cumulative to other, emotionally-neutral, testimony regarding [his] guilt," and therefore outweighed by its prejudicial effect, Appellant's Brief, p. 16-20, the record demonstrates otherwise.

Indeed, there was no clear evidence of the defendant's consciousness of guilt aside from the evidence that the defendant assaulted G.R. and asked G.R. if he "snitched" on him. RP 123. *See* RP 26-279.

While it is true that the defendant guessed the reason for Detective Hayes' contact, RP 240, the contested testimony was the only testimony that could really have been considered an indirect admission of guilt on the part of the defendant. See *McGhee*, 57 Wn. App. at 461 (quoting *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)(holding that "[c]onduct on the part of an accused person... having for its purpose the prevention of witnesses appearing and testifying at his trial, is a circumstance for the jury to consider... as tending to show an indirect admission of guilt.")). Hence, it was not cumulative to anything, but carried a strong and unique probative value that would have been lost had such evidence been excluded.

Moreover, it was the only evidence that explained the reason for G.R.'s seemingly inconsistent statements regarding his involvement in the crimes. Without such evidence, the jury would have been left with no possible conclusion but that G.R. was simply dishonest, and hence incredible. With such evidence, however, the jury could consider the very real possibility that he was initially intimidated by the defendant into being less than forthright with law enforcement. As a result, such evidence was not cumulative. It was necessary to a proper assessment of G.R.'s credibility.

Contrary to defendant's assertion that the court "found that the contested evidence would add little to the scale of existing evidence," Appellant's Brief, p. 16, it properly found that while such evidence was

some of the only evidence that demonstrated the defendant's consciousness of guilt, it added little to the juror's impression of the defendant as a criminal type, given G.R.'s testimony that the defendant committed the crimes charged. RP 120-21. As a result, it cannot be said that no reasonable judge would have ruled as the trial court did here.

Thus, the trial court properly conducted the fourth and final step in that analysis, and, as has been shown above, all steps in the ER 404(b) analysis.

Therefore, the trial court did not abuse its discretion, in ruling that the disputed evidence was admissible, and its decision to admit such evidence should be affirmed.

Even assuming the trial court erred in the admission of such evidence, however, its admission was harmless.

Where a trial court fails to engage in the proper ER 404(b) analysis, a reviewing court must "determine whether the trial outcome would have differed if the error had not occurred." *Thach*, 126 Wn. App. at 311. In this case, there is no reasonable probability that the outcome would have differed.

Here, even without the contested evidence, G.R. testified that the defendant unlawfully entered Gore's home and stole goods therefrom before selling them at two pawn shops. RP 104-10, 131. This testimony in itself would arguably have formed sufficient evidence upon which to

convict the defendant as charged. *See* CP 1-2; RCW 9A.52.025; RCW 9A.82.050(1).

While there may have been good reason to question G.R.'s credibility without the contested evidence, *see* RP 111, 133-34, there was other evidence, which corroborated his testimony, including that of Gore and the pawn shop owners. *See* RP 43-46, 189, 200-02. Although the defendant contends that his pawning of items stolen from the Gore residence was consistent with his story that he was given these items by other people, that story itself was incredible. As the deputy prosecutor pointed out in her closing argument, according to the defendant's story, he obtained three different items stolen from the same residence from three different people he could not fully identify, and pawned them at two different shops, all within less than 24 hours of the burglary in which they were stolen. RP 246-48, 343.

Although defendant argues that the testimony that he assaulted G.R. "suggested he was a bad person who did criminal things, and thus, was likely to have done what [G.R.] said," Appellant's Brief, p. 24, such a theory was never advanced to the jury. *See* RP 1-405. Indeed, the deputy prosecutor did not so much as mention the assault in her closing argument. *See* RP 291-303. It was not until after the defense attorney attacked G.R.'s credibility by noting his seemingly inconsistent versions of events, RP 333, that the deputy prosecutor stated the following in rebuttal:

de novo. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the Strickland test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also, e.g., *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must

show that trial counsel's performance fell below an objective standard of reasonableness." *Johnston*, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001)(citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." *Rice*, 118 Wn.2d at 888-89. "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." *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

“[F]ailure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence.” *Id.* at 90 (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)). *State v. Ellard*, 46 Wn. App. 242, 730 P.2d 109 (1986). Indeed, this Court has “presume[d] that counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because ‘to do so would reemphasize this damaging evidence’ to the jury.” *Price*, 126 Wn. App. at 649 (quoting *Barragan*, 102 Wn. App. at 762).

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Yarbrough*, 151 Wn. App. at 90. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

Although the defendant here alleges that his trial counsel was ineffective by failing to propose a limiting instruction regarding the jury’s use of ER 404(b) evidence, Appellant’s Brief, p. 25-30, his counsel’s

conduct can be characterized as a legitimate tactical decision not to reemphasize damaging evidence and therefore, cannot be ineffective assistance of counsel.

In *Yarbrough*, this Court considered and rejected an argument similar to that advanced by the defendant here. In that case, the trial court granted the State's motion to admit gang-related evidence, but "ruled that it would be 'prepared to sign an appropriate limiting instruction in order to reduce the risk of unfair prejudice.'" *Yarbrough*, 151 Wn. App. at 89-90. However, Yarbrough's defense attorney did not propose such an instruction and, on appeal, Yarbrough claimed that this constituted deficient performance. *Id.* at 90.

In rejecting this claim, this Court relied on *Price, Barragan, Donald*, and *Yarbrough*, 151 Wn. App. at 90. These cases all involved claims of ineffective assistance of counsel where counsel had failed to propose a limiting instruction regarding the use of ER 404(b) evidence. *Id.*; *Price*, 126 Wn. App. at 648-50; *Barragan*, 102 Wn. App. at 762-64; *Donald*, 68 Wn. App. at 550-51.

The Court in *Donald*, relying on the *Rice* presumption that counsel's conduct constituted sound trial strategy, held that it could "presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence."

Donald, 68 Wn. App. at 551 (citing *Rice*, 118 Wn.2d at 888-89). The Courts in *Barragan* and *Price* employed similar presumptions. *Barragan*, 102 Wn. App. at 762 (“we can presume counsel decided not to request a limiting instruction because to do so would reemphasize this damaging evidence”); *Price*, 126 Wn. App. at 649 (“We can presume that counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because ‘to do so would reemphasize this damaging evidence’ to the jury”).

Because Yarbrough did not attempt to distinguish these cases, this Court presumed “that Yarbrough’s trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence.” *Yarbrough*, 151 Wn. App. at 90-91. Since “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim,” this Court rejected Yarbrough’s claim and affirmed his convictions. *Id.* at 91-98.

The trial court here, like that in *Yarbrough*, granted the State’s motion to admit ER 404(b) evidence. *See* RP 120-21; *Yarbrough*, 151 Wn. App. at 90. The defendant’s trial attorney, like trial counsel in *Yarbrough*, failed to propose a limiting instruction relating to this evidence, *see* RP 213-15, 267-69, 286-88, 304-15, and the defendant now

claims that counsel's failure to do so constituted deficient performance.

Appellant's Brief, p. 25-30.

However, his trial counsel was clearly aware that he was entitled to a limiting instruction similar to WPIC 4.64.01. *See* ER 105. Indeed, contrary to defendant's contention that "there was no mention of a limiting instruction at trial," Appellant's Brief, p. 28, the parties actually discussed a limiting instruction. RP 268-69. Specifically, the deputy prosecutor proposed a limiting instruction modeled on WPIC 4.64.01 pertaining to the testimony of a defense witness. RP 268-69. After the deputy prosecutor proposed this instruction, the following exchange occurred between the court and defense counsel:

THE COURT: Okay. I'll give the suggested instruction. So, the one that's going to come in about –the first one, the 4.64.01, that one comes just before the impeachment testimony of Officer Munson, correct?

[DEFENSE ATTORNEY]: Correct.

RP 269. Clearly then, defense counsel was aware that he could have obtained a limiting instruction.

The fact that he chose not to propose such an instruction, must be presumed to be a tactical decision. *See Donald*, 68 Wn. App. at 551 (citing *Rice*, 118 Wn.2d at 888-89); *Barragan*, 102 Wn. App. at 762; *Price*, 126 Wn. App. at 649.

That presumption finds support in the record in the fact that the defense attorney here indicated to the court that his choice of which jury instructions to propose was a tactical decision. *See* RP 304-15. Indeed, in discussing whether the defense attorney should have proposed instructions on a lesser included offense of criminal trespass, the defense attorney responded that he made a “tactical decision not to do it.” RP 304.

Given that the defense attorney knew he had the right to a limiting instruction, and that, in another context, he chose not to propose an instruction to which he was entitled for tactical reasons, his choice not to propose a limiting instruction regarding the use of ER 404(b) evidence can be characterized as a legitimate tactical decision not to reemphasize damaging evidence.

Because “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.” *Yarbrough*, 151 Wn. App. at 90. Therefore, the defendant has failed to show ineffective assistance of counsel and his convictions should be affirmed.

Even assuming *arguendo* that counsel should have proposed a limiting instruction, this would not mean that counsel’s performance was constitutionally deficient. To prevail on a claim of ineffective assistance

of counsel, the defendant must show, “based upon the entire record below,” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145(2001), “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. This is something the defendant here has not and cannot do.

The entire record reflects that counsel below zealously and aggressively represented the defendant throughout the trial and particularly with respect to the State’s efforts to admit ER 404(b) evidence. Indeed, counsel argued at every opportunity against the admission of such evidence, even after his initial objection, heard outside the presence of the jury, was denied. *See* RP 115-24

Even assuming *arguendo* that his failure to propose a limiting instruction was in error, it was an isolated incident and, viewing the record in its entirety, in no way left the defendant without the counsel guaranteed by the Sixth Amendment.

However, the court should assume no error here. Rather, under *Yarbrough*, it must be presumed that “trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence.” *Yarbrough*, 151 Wn. App. at 90-91. Moreover, given that the defense attorney knew he had the

right to a limiting instruction, and that, in another context, he chose not to propose an instruction to which he was entitled for tactical reasons, his choice not to propose a limiting instruction regarding the use of ER 404(b) evidence can be characterized as a legitimate tactical decision. Because “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim,” *Yarbrough*, 151 Wn. App. at 91-98, the defendant cannot establish deficient performance and his claim of ineffective assistance of counsel must fail.

Therefore, the defendant’s convictions should be affirmed.

D. CONCLUSION.

The trial court properly admitted evidence of Defendant’s assault on G.R. as evidence of Defendant’s consciousness of guilt and/or evidence necessary to properly assess G.R.’s credibility under ER 404(b), because such evidence was relevant and not unduly prejudicial.

Moreover, Defendant has failed to show ineffective assistance of counsel because his trial counsel’s choice not to propose a limiting

Instruction regarding the use of ER 404(b) evidence can be characterized as a legitimate tactical decision not to reemphasize damaging evidence.

Therefore, Defendant's convictions should be affirmed.

DATED: October 7, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

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.

10-7-11 Phesecka
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