

NO. 42422-3-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

CHRISTIAN L. GAGNON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Carol Murphy, Judge  
Cause No. 11-1-00134-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence of Gagnon's prior sexual misconduct under RCW 10.58.090.
02. The trial court erred in admitting evidence of Gagnon's prior sexual misconduct under ER 404(b).
03. In ordering that evidence of Gagnon's prior sexual misconduct was admissible under RCW 10.58.090 and ER 404(b), the trial court erred in entering Findings of Fact 7, 8 and 10 as fully set forth herein at page 4.
04. In ordering that evidence of Gagnon's prior sexual misconduct was admissible under RCW 10.58.090 and ER 404(b), the trial court erred in entering Conclusions of Law in unnumbered paragraph form as fully set forth herein at pages 5-7.
05. The trial court erred in permitting Gagnon to be represented by counsel who provided ineffective assistance by failing to request a ER 404(b) limiting instruction for the prior sexual misconduct evidence.
06. The trial court erred in failing to dismiss Gagnon's conviction where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Evidence of Gagnon's prior sexual misconduct was improperly admitted under RCW 10.58.090 and ER 404(b). [Assignment of Error Nos. 1-4].

02. Whether the trial court erred in permitting Gagnon to be represented by counsel who provided ineffective assistance by failing to request a ER 404(b) limiting instruction for the prior sexual misconduct evidence?  
[Assignment of Error No. 5 ].
03. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Gagnon's conviction?  
[Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Christian L. Gagnon (Gagnon) was charged by information filed in Thurston County Superior Court on January 31, 2011, with rape in the second degree, contrary to RCW 9A.44.050(1)(a). [CP 5].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. On June 6, the court ruled that Gagnon's prior act of rape would be admissible at trial and entered the following findings of fact, conclusions of law and order:

**FINDINGS OF FACT**

1. On August 4, 2008, deputies of the Whatcom County Sheriff's Office contacted Raven Lebray, who had called 911 to report her 17-year old son, Christian Gagnon, had raped her on the evening of August 3, 2008 in her home.
2. Lebray reported to the deputy that at approximately 2200 hours she had been home with her son. As both were preparing for bed, Lebray had disrobed and made a trip to

the bathroom. Gagnon's bedroom door was closed and Lebray had covered herself with her arms. Lebray reported that on leaving the bathroom she stopped at Gagnon's closed door to remind him to wake early the next morning.

3. Lebray reported that as she was talking to him through the closed door Gagnon opened the door and proceeded to give Lebray a hug. Lebray reported that as he tried to kiss her mouth, she attempted to push him away and commanded, "No, stop." Gagnon then forcefully threw Lebray onto his bed.

4. Lebray reported that Gagnon threw her legs up and she felt his penis penetrate her vagina. She told him to stop but was afraid of what he would do if she resisted too much. Lebray reported that he had done this twice before. Lebray reported that during the first incident Gagnon was very aggressive and forceful with her.

5. Gagnon was charged in Whatcom County Juvenile Court, cause number 08-8-00421-8, with Rape in the Second Degree. On November 24, 2008, Gagnon entered a plea pursuant to North Carolina v. Alford and In Re Barr, to a reduced charge of unlawful imprisonment. The Defendant was represented by counsel and the Juvenile Court for Whatcom County used a specific colloquy and clearly accepted the Declaration of Probable Cause on file, which detailed the facts sufficient for the allegation of Rape in the Second, as the factual basis for Gagnon's plea. The Order on Adjudication included a manifest injustice sentence of 65 weeks to 65 weeks in the custody of JRA. The Court also ordered a two year no contact order protecting Raven Lebray.

6. In the present case, the Declaration of Prosecutor Supporting Probable Cause indicates that the factual allegations are as follows: On November 28, 2010, the alleged victim T.A.M. indicated that she was with the Defendant, Christine Gagnon, and others at the home of Amanda Tribble. The Defendant had asked to leave his backpack in T.A.M.'s apartment downstairs. Later in the

evening, T.A.M. returned to her apartment and placed on her nightgown to go to bed. The Defendant knocked on her door and asked for his backpack. T.A.M. told him to stay at the door and the Defendant entered the apartment and attempted to kiss her. T.A.M. indicated she pushed him away and told him to stop. The Defendant told her “just let it happen,” then grabbed her by the throat and pushed her against the wall. T.A.M. had difficulty breathing, and the Defendant again attempted to kiss her and bit her on the shoulder. He then pulled up her gown and ripped her underwear off. He then placed his penis into her vagina and vaginally raped her and inserted his finger into her anus.

7. The allegations in the present case are substantially similar to the factual basis relied upon in the prior Whatcom County case in that in both cases, the Defendant met the alleged victim in a doorway, began attempting to kiss the alleged victim and when met with resistance, he forcibly vaginally penetrated the alleged victim with his penis.

8. The Whatcom County act of sexual misconduct occurred on August 4, 2008, and the Defendant was sentenced to 65 weeks in JRA custody on November 24, 2008. The current allegations occurred on November 28, 2010. Given the fact that the Defendant was in JRA custody, there was not a significant amount of time free in the community between the prior case and the current allegations.

9. Raven Lebray indicated that the acts which occurred in Whatcom County occurred on three separate occasions.

10. Due to the closeness in time, there were no significant intervening circumstances between the Whatcom County acts and the current allegations.

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## CONCLUSIONS OF LAW

Admissibility of evidence of other bad acts is governed by ER 404(b), which reads: evidence of other crimes, wrongs or acts...may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. In 2008, the Washington Legislature enacted RCW 10.58.090, which states, "in a criminal action in which the defendant is accused with a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." In RCW 10.58.090(6), the legislature set out specific factors for the court to look at when determining if evidence of prior sexual misconduct should be admitted pursuant to ER 403. The statute specifies that the court shall consider:

- a. The similarity of the prior acts to the acts charged;
- b. The closeness in time of the prior acts to the act charged;
- c. The frequency of the prior acts;
- d. The presence or lack of intervening circumstances;
- e. The necessity of the evidence beyond the testimonies already offered at trial;
- f. Whether the prior act was a criminal conviction;
- g. Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence; and
- h. Other facts and circumstances.

The allegations in this case are substantially similar to the prior acts which were charged in the Whatcom

County cause number. In both cases, the Defendant met the alleged victim in a doorway, attempted to kiss the alleged victim, and when met with resistance forcibly vaginally penetrated the alleged victim with his penis. The Defendant was sentenced based on his plea pursuant to North Carolina v. Alford and In Re Barr to 65 to 65 weeks and a two year no contact order with the victim of the Whatcom County case. The present allegations were committed just two years following the sentencing hearing in Whatcom County. The current allegations are very close in time to the prior acts sought to be admitted. This is especially true given that the Defendant spent a significant portion of the interim period in the custody of JRA. The statement of probable cause relied upon as a factual basis for the defendant's plea in the Whatcom County case indicated that the Defendant had committed acts of forcible intercourse with Raven Lebray on three occasions. The frequency and similarity of the prior acts to the current allegations weigh in favor of admissibility of the prior acts. The prior acts resulted in a criminal conviction pursuant to North Carolina v. Alford and In Re Barr to a reduced charge of Unlawful Imprisonment. The facts relied upon were facts sufficient to show the Defendant had committed Rape in the Second Degree by forcible compulsion.

The similarity between the prior acts and the current allegations make the prior acts highly probative in showing the defendant's lustful disposition and credibility of the allegations in the present case. The probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury and will not cause undue delay, a waste of time or be a needless presentation of cumulative evidence. At hearing on this matter, the State requested a limiting instruction similar to that which was given in State v. Sherner, 153 Wn.App. 621 (Div. 1, 2009). Such an instruction will further minimize any danger of undue prejudice caused by the admission of the Whatcom County acts in this case.

Based on all the factors that the court is to consider when balancing prior acts of sexual misconduct under ER

403 and RCW 10.58.090, the court finds that evidence of the prior What County acts is admissible in this case because the probative value substantially outweighs the prejudicial effect of its admission.

Under ER 404(b), the court must engage in a three-part analysis. The Court must determine the purpose for which the evidence is to be offered; determine the relevance of the evidence, and lastly balance on the record the probative value of the evidence against its prejudicial effect. State v. Dennison, 115 Wn.2d 609 (1990). Here the State seeks admission of the prior acts to show a common scheme or plan utilized by the Defendant. To admit evidence of a common scheme or plan, the court need only find that the prior acts showed a pattern or plan with marked similarities to the facts of the case before it. State v. DeVincentis, 150 Wash.2d (2003). Here, the Defendant noted in the Combined Omnibus Application that the defense is indicating an alibi. Where the alleged victim specifically indicated that the defendant was the person who raped her, this puts whether the crime occurred at issue in the case at bar. Therefore, the existence of a design to fulfill sexual compulsions evidenced by the defendant's past acts is highly probative. In this case, the facts of the prior Whatcom case are substantially similar to the current allegations. As discussed above, the probative value of the prior acts substantially outweighs the risk of prejudice. As such, evidence of the prior Whatcom County acts is admissible pursuant to ER 404(b) to show the Defendant's common scheme or plan to fulfill sexual compulsions.

**THEREFORE, IT IS HEREBY ORDERED:**

The Defendant's prior act of rape is admissible at trial in this matter pursuant to RCW 10.58.090 to show any fact in issue and pursuant to Evidence Rule 404(b) to show the Defendant's common scheme or plan to fulfill sexual compulsions.

[CP 78-81].

Trial to a jury commenced on June 7, the Honorable Carol Murphy presiding. The parties agreed to the following “STIPULATION RE RCW 10.58.090 EVIDENCE,” which was read to the jury. [RP 114-15, 138-39].

The Defendant, Christian L. Gagnon, has previously been found guilty in Whatcom County Cause Number 08-8-00421-8 of the crime of unlawful imprisonment. The factual basis for that charge was as follows: On August 4, 2008, Whatcom County Deputies contacted R.L., who reported that the defendant had raped her. The Deputy noted that R.L. was visibly upset and crying. R.L. reported that on August 3, 2008, at approximately 2200 hours, she had been at home with the defendant. They had been hanging out and listening to music together. R.L. went to ready herself for bed and had completely disrobed before making one last trip to the bathroom. When R.L. left the bathroom, she stopped at the Defendant’s closed door to remind him he needed to get up in the morning. The defendant then opened the door and proceeded to give R.L. a hug. The defendant then tried to kiss R.L., at which time she attempted to push him away and said, “no stop.” The defendant then forcefully threw R.L. onto his bed, threw her legs up and penetrated her vagina with his penis. R.L. reported that she told him to stop but was afraid of what he would do if she resisted too much. R.L. reported that this had happened twice in the past.<sup>1</sup>

[CP 67].

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<sup>1</sup> As noted by the trial court, the stipulation was the result of a “prior order of this court,” and “by no means” did Gagnon stipulate to the admissibility of the statement but only to its form. [RP 138-39].

Neither exceptions nor objections were taken to the jury instructions. [RP 335].<sup>2</sup> The jury found Gagnon guilty as charged, he was sentenced within his standard range and timely notice of this appeal followed. [CP 102, 125, 128, 137].

02. Substantive Facts

According to T.A.M., on November 28, 2010, she was with Gagnon and several friends at Amanda Tribble's apartment in Olympia, which is located in the same complex as T.A.M.'s. [RP 3-4]. Upon arrival, T.A.M. said she agreed to store Gagnon's backpack in her apartment because it was leaking whipped cream as a result of a practical joke played on Gagnon. [RP 5, 34-35, 97].

The group spent several hours in Tribble's apartment playing video games, drinking and smoking marijuana. [RP 5]. Around 9:00 p.m., according to T.A.M., who did not participate in the drinking or smoking, she decided to go to her apartment, where she went to bed, only to be wakened by a knock on the door. [RP 5, 9, 17]. It was a "pretty drunk" and "pretty high" Gagnon asking for his backpack before entering the apartment, shutting and locking the door and attempting to kiss her. [RP 9, 18-19]. When she declined his advances, a struggle ensued in which

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<sup>2</sup> Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled JURY TRIAL, Volumes I-V.

Gagnon lifted T.A.M.'s nightgown, ripped off her underwear, vaginally raped her with his penis and put two fingers in her anus. [RP 9, 12, 21]. As a result of the encounter, T.A.M. suffered bruising to her neck and shoulder. [RP 40-41].

When later confronted by Tribble, Gagnon told her "he didn't remember anything, he blacked out [RP 99]," a statement Gagnon denied making. [RP 264]. In the first part of December, Gagnon was seen in the lobby of a youth center in Olympia. [RP 305].

When contacted by police, Gagnon denied he had raped T.A.M., explaining he had left Tribble's apartment with three other people—"Cyrus," "Frizz" and "Walker"—around 9:00 that evening before attempting to catch a bus 15 minutes later. [RP 121]. According to Detective Evers, Gagnon said he had left the Olympia area because there were accusation he had raped T.A.M., a statement Gagnon denied making. [RP 270-72, 292].

According to Gagnon's mother and two of his friends, he was in Bellingham at a card tournament on November 28, 2010, the day of the alleged incident. [RP 204-06, 218-19, 227-28]. Michael Russell, one of the two friends, denied he'd ever told the police he was mistaken about when he had seen Gagnon. [RP 227-28, 295-96].

Gagnon denied T.A.M.'s allegations, explaining he'd been at Tribble's apartment for Thanksgiving dinner on November 25, several days before the alleged incident. [RP 249, 265, 273]. On that date, he left his backpack on her porch due to the incident with the whipped cream. [RP 251, 266-67, 273]. He left around 9:00 in the evening and eventually made his way to Bellingham, arriving on Saturday, November 27, where he stayed until the following January 27. [RP 260, 268]. After listening to a 911 tape of a call made on December 1, 2010, at 7:35 in the evening from downtown Olympia by a person identified as Gagnon [RP 319, 324-26, 328-29], he admitted that "(i)t's possible that I was here in Olympia on December 1<sup>st</sup>, but I do not believe I made that phone call." [RP 332].

D. ARGUMENT

01. EVIDENCE OF GAGNON'S PRIOR SEXUAL MISCONDUCT WAS IMPROPERLY ADMITTED UNDER RCW 10.58.090 AND ER 404(b).

As previously indicated, prior to trial, over objection, the trial court ruled that evidence of Gagnon's prior sexual misconduct was admissible under RCW 10.58.090 and, alternatively, under ER 404(b) to demonstrate the existence of a common scheme or plan. [CP 81].

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01.1 RCW 10.58.090 Violates the Separation of Powers Doctrine

The Washington Supreme Court recently struck down RCW 10.58.090, holding, in sum, that it is “an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.” State v. Gresham, \_\_\_ P.3d \_\_\_, 2012 WL 19664, at \*11 (Wash. 2012).

01.2 The Evidence of Prior Sexual Misconduct by Gagnon Was Not Admissible for the Purpose of Demonstrating a Common Scheme or Plan Under 404(b)

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). When determining the admissibility of “prior bad act” evidence, the trial court must always begin with the presumption that the evidence is inadmissible. State ex rel. Carol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Given the extraordinary prejudicial effect of “prior bad act” evidence involving sexual misconduct,

any doubt about whether such evidence should be admitted, should be resolved in favor of exclusion of the evidence. See State v. Myers, 49 Wn. App. 243, 742 P.2d 180 (1987).

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Evidence of prior crimes, wrongs or acts may be admissible to show a common scheme or plan utilized by the defendant, which was the basis for the admission of the evidence in this case. [CP 81]. Prior misconduct evidence is admissible to prove a common scheme or plan “where several crimes constitute constituent parts of a plan in which each crime is but a piece of a larger plan” or where “an individual devises a plan and uses it repeatedly to perpetuate separate but very similar crimes.” State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). This case involves the second category because the evidence was offered to show that Gagnon had developed a plan and repeatedly put it into action. Id. at 861. To be admissible as such, however, evidence of the prior misconduct and the charged offense must demonstrate “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which” the two are simply “individual manifestations.” Id.

at 860. That a defendant merely engaged in a prior sex crime is insufficient to prove a common scheme or plan. Mere “similarity in results” is not enough. Id. at 862-63. More is required: The prior act and the charged crime must be markedly and substantially similar. State v. DeVincentis, 150 Wn.2d at 19-21.

Here, there was not a “markedly and substantial” similarity between Gagnon’s prior sexual abuse of his mother and his alleged rape of T.A.M. other than the sexual act itself, which followed Gagnon’s rejected advances, apparently after meeting each victim in a doorway, albeit one leading into Gagnon’s bedroom in Bellingham and the other into T.A.M.’s apartment in Olympia, further separated by two-plus years. T.A.M. was an acquaintance, not the familial relationship of a mother. There was no evidence that Gagnon was under the influence of alcohol or drugs during his encounter with his mother, while T.A.M. asserted he was “pretty drunk” and “pretty high.” In the one case, Gagnon was at home with his mother; in the other, he was said to have unlawfully entered T.A.M.’s apartment. To justify the admission of the evidence at issue as a common scheme or plan resulting from a plan devised by Gagnon that he used repeatedly to perpetuate separate but very similar crimes is senseless. The admission of the evidence as such was an abuse of discretion.

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01.3 Admission of Gagnon's Prior Sexual Misconduct Was Not Harmless Error

In Gresham, the court determined that the admission of evidence of Gresham's prior misconduct under RCW 10.58.090 is analyzed under the "standard for nonconstitutional error." State v. Gresham, WL 19664, at \*12. "When the support of RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b)." Id. The erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). In this context, harmless error occurs when the evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The admission of the evidence here at issue under either RCW 10.58.090 or ER 404(b) was not harmless. The prejudicial effect of such evidence is recognized to be very great in sexual abuse cases where the question of guilt necessarily turns on the credibility of the defendant's testimony. See State v. Dawkins, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993). Since Gagnon denied the allegations made by T.A.M., the prejudice is self-evident. As in Gresham, there were no eyewitnesses to

the alleged rape of T.A.M. Absent the erroneously admitted evidence, the State's case centered on T.A.M.'s accusation that Gagnon had raped her, testimony that he had the opportunity to do so, evidence of bruising to her neck and shoulder, and the investigating officer's testimony. No medical or physical evidence was presented to corroborate T.A.M.'s testimony that she had been raped. In the end, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the introduction of the evidence at issue having a practical and identifiable consequence on the jury's determination of this issue is substantial. And while the evidence, as in Gresham, was by no means insufficient for a jury to convict Gagnon, there is a reasonable probability that absent the highly prejudicial evidence of Gagnon's prior sexual misconduct, the jury's verdict would have been materially affected. The introduction of the prior sexual misconduct was not of minor significance, with the result that this court cannot say that the admission of the evidence of Gagnon's prior sexual misconduct was harmless error.

02. GAGNON WAS PREJUDICED BY HIS  
COUNSEL'S FAILURE TO REQUEST  
A ER 404(b) LIMITING INSTRUCTION  
FOR THE PRIOR SEXUAL MISCONDUCT  
EVIDENCE.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the

United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance. i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to

review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

An accused is entitled to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose for the admission of the evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). Moreover, a limiting instruction must be provided if evidence of other crimes, wrongs or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). At its minimum, an adequate 404(b) limiting instruction must inform the jury of the purpose for which the evidence was admitted and that the evidence may not be used to conclude that the defendant is of a particular character and has acted in conformity with that character. State v. Gresham, WL 19664, at \*7.

Given that trial counsel failed to request an instruction directing the jurors to consider the prior sexual misconduct evidence only for the purpose of establishing a common scheme or plan, both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly request such an instruction, especially since the following instruction given by the

court did not limit the scope of the use of the prior sexual misconduct evidence for the sole purpose of establishing a common scheme or plan.

Evidence has been admitted in this case regarding the defendant's commission of a previous sex offense. The defendant is not on trial for any act, conduct, or offense not charged in this case.

Evidence of a prior sex offense on its own is not sufficient to prove the defendant guilty of the crime charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crime charged.

[CP 93; Court's Instruction 5]. In this case, there was simply no legitimate reason not to propose a ER 404(b) limiting instruction given the prejudicial nature of the prior sexual misconduct evidence, which could easily be construed to demonstrate Gagnon's propensity for sexual misconduct.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, admission of the prior sexual misconduct evidence was prejudicial, and even more so absent a limiting instruction prohibiting the jurors from considering the evidence for whatever purpose they wished, especially where the logical relevancy of the evidence is to show propensity to commit similar acts, see State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001), with the result that the error cannot be deemed harmless

Counsel's failure to request a 404(b) limiting instruction undermines confidence in the outcome of Gagnon's conviction, which this court should reverse.

03. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF GAGNON'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Gagnon's conviction, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

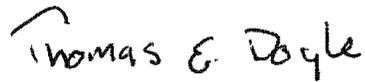
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E. CONCLUSION

Based on the above, Gagnon respectfully requests this court to reverse his conviction for rape in the second degree.

DATED this 22<sup>nd</sup> day of February 2012.

Handwritten signature of Thomas E. Doyle in black ink.

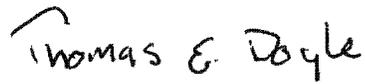
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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 22<sup>nd</sup> day of February 2012.



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# DOYLE LAW OFFICE

**February 22, 2012 - 2:41 PM**

## Transmittal Letter

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