

No. 46355-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PAULO BOTELLO-GARCIA,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was the information insufficient because it failed to contain all the essential elements and critical facts necessary to adequately inform Botello Garcia of the crimes charged?
- B. Did the trial court erroneously admit improper 404(b) evidence of a subsequent sexual assault that occurred in California?
- C. Did the trial court erroneously impose a jail fee without properly considering Botello Garcia's present ability to pay?

II. STATEMENT OF THE CASE

G.R. was born on January 14, 1997 and lives in Centralia, Washington with her mom, E.S., and her brother E.B.¹ RP² 33-34. E.S. married Botello Garcia in April 2001. RP 422. G.R. called Botello Garcia dad. RP 36. G.R. moved to Centralia from California in the third grade. RP 35. Prior to January 2011 G.R. lived with E.S., Botello Garcia and J.S. in Centralia. RP 35. Botello Garcia was deployed overseas from 2006 until 2008. RP 422-23. G.R.'s relationship with Botello Garcia was normal until he returned from being deployed. RP 85. Botello Garcia was in charge of discipline for the family and was more strict with G.R. than her brothers. RP

¹ The State will refer to the victim, her mother and brothers by their initials to protect the victim's privacy.

² The trial proceedings, with the exception of voir dire, are contained in seven volumes of sequentially paginated transcripts. The State will refer to these as RP. The State will refer to the motion hearings that occurred on 7/27/12 and 2/27/14 that are contained in one continually paginated volume as MRP.

37. Botello Garcia was very controlling of G.R. and did not respect her privacy. RP 38, 425. G.R. was forced to leave her bedroom door open, was not allowed to have friends over and Botello Garcia listened in when G.R. used the phone. RP 37-38, 425.

G.R.'s behavior changed when she was in fifth grade. RP 53, 361-63, 426. Starting in the fifth grade Botello Garcia began touching G.R. in ways that made her uncomfortable. RP 39. One day G.R. was in her room, playing, no one was home except G.R. and Botello Garcia. RP 40. Botello Garcia came into G.R.'s room and played with her for a bit, then Botello Garcia put his hand on her leg and kissed her for the first time, but it was not on her lips, it was on her cheek and he was rubbing her back. RP 40. Botello Garcia's actions made G.R. confused and uncomfortable. RP 41. The second incident happened less than a month later, in G.R.'s bedroom, while she was hanging out watching television. RP 41-42. Botello Garcia touched G.R.'s breast under her shirt but over her bra, which G.R. described as a groping touch. RP 41-42. Botello Garcia also touched G.R.'s stomach and back under her clothing. RP 42. Botello Garcia made G.R. promise to not tell anyone. RP 42. G.R. was confused and did not tell anyone. RP 42.

G.R. could not remember how many times the sexual contact occurred when she was 11 but it continued after her 12th birthday, which was January 14, 2009. RP 43. As G.R. grew older the touching became progressively worse. RP 43. G.R. continued to remain silent about the abuse. RP 43. Botello Garcia came into G.R.'s bedroom and grabbed her hand, told her to come here, G.R. resisted and Botello Garcia would force G.R.'s hands down his pants to touch his penis. RP 45. Her hand touched the skin of Botello Garcia's penis, which was soft at the time. RP 46. The next time was also in G.R.'s bedroom. RP 46.

Botello Garcia would use the sexual abuse as leverage against her. RP 47. If G.R. wanted to go over to a friend's house Botello Garcia would tell her, "Okay, you want to go out, you have to listen to me" and then would make G.R. touch his penis. RP 47. G.R. would tell Botello Garcia she had to use the bathroom because she did not feel well and would stay in the bathroom until her mom came home. RP 48. This was happening about twice a month. RP 49.

Botello Garcia would put his fingers on G.R.'s vagina and she would start crying. RP 50. Botello Garcia would say "'You don't need to cry. I'm not doing anything to you.'" RP 50. According to

G.R., "He told me I was acting like a baby and that I needed to grow up and then he left the bedroom." RP 51.

Botello Garcia twice had G.R. touch his penis with her mouth when she was in sixth grade RP 55. Botello Garcia asked G.R. to "suck his dick," and she said no. RP 56. Botello Garcia grabbed G.R. and asked, "why?" RP 56. When G.R. told him no he forced her, took down his shorts, grabbed the back of her head and forced his penis into her mouth. RP 57. Botello Garcia started moving her head back and forth, his penis was hard, and she felt she had no choice. RP 57. G.R. started choking, crying and stopped. RP 58. Botello Garcia said to G.R., "You promise you won't tell your mom.?" RP 58. The second incident was similar, but Botello Garcia stopped because he heard someone dropping off G.R.'s brother, J.S. RP 59.

Botello Garcia began asking G.R. to have sex with him. RP 61. G.R. could not remember when this started occurring. RP 61. "I just remember that he told me that why am I going to trust some other guy when I could trust him because I know that he loves me." RP 61. G.R. would tell Botello Garcia no. RP 61. Botello Garcia told G.R. if she had sex with him he would buy her a BMW when she turned 16 and she could have anything she wanted. RP 63.

G.R. took a trip to California with Botello Garcia the summer of 2011, which was after Botello Garcia and E.S. were separated. RP 64-65, 112, 421. G.R. wanted to go to California for her cousin's birthday. RP 64, 113-14, 430. G.R. was close with Botello Garcia's nieces. RP 64. G.R. stayed with Botello Garcia's sister while she was in California. RP 65. While in California Botello Garcia attempted to rape G.R. in the trailer G.R. had been staying in. RP 67-71, 121. G.R. said the incident hurt and when it was over Botello Garcia told her to stop crying, that she was not a little girl. RP 121-22.

G.R. put her feelings down in a journal. RP 76. G.R. hid her journal, but her mom found it when she was cleaning out G.R.'s room. RP 77, 432. Prior to finding the journal E.S. had no idea about the sexual abuse. RP 432. E.S. confronted G.R. about the journal. RP 77, 434. G.R. told her mom not to worry about it and ripped the page out of the journal and flushed it down the toilet. RP 78. G.R. felt ashamed, scared, embarrassed and guilty. RP 78-79. E.S. did not report the sexual abuse to law enforcement because G.R. did not want anybody to know. RP 434-35. Ultimately the journal was turned over to the police, but without the pages she

flushed down the toilet. RP 80. The critical page was later recovered by a crime laboratory. Ex. 6.

Law enforcement became involved after G.R. told a teacher about the abuse and the teacher, who was a mandatory reporter, informed law enforcement. RP 391-92, 157. Centralia Police Department Detective Doug Lee spoke to G.R.. RP 158. G.R. was scared and quiet, her lips quivered, tears ran down G.R.'s face and she trembled and shook as she spoke with police. RP 159-60. Later, police had G.R. call Botello Garcia in an attempt to get him to admit that he had sexually abused her. RP 163, 308-13. After the phone call G.R. was sobbing hysterically in her mother's lap. RP 163.

G.R. was examined by a nurse practitioner at Providence St. Peter Hospital's sexual assault clinic. RP 227, 238-39. Lisa Wahl, the nurse practitioner gave the following recitation of G.R.'s description of the abuse, which occurred for approximately a three year time period starting when G.R. was about nine years of age:

What would happen in her home would be he would -- he, being the defendant, would tell her that if she wanted to have favors then she would have to perform a sexual act or if she wanted to go someplace or if she was getting in trouble for something it was all tethered to some sort of a sexual act.

And as this went on, he essentially tried to sodomize her. He wanted to put his penis in her mouth. He offered her a car when she turned 15 if she would have sex with him. He put her hand down his pants, her hand was on his penis and she masturbated him to ejaculation. He fondled and sucked on her breasts, causing a hickey on her left breast. He did this multiple times off and on throughout a period. One time it stopped when she went to counseling, her mom wanted her to go to counseling. And he asked – he told her that when she's in the counseling if they asked about what he was doing to her that she was not to say anything.

RP 244-45.

On April 9, 2012 the State charged Botello Garcia with six counts of Child Molestation in the First Degree, alleging the aggravating factor of domestic violence. CP 124-30. The State filed a notice of intent to seek an exceptional sentence based on aggravating factors. Supp. CP Notice of Aggravating Factors.³ Botello Garcia's trial counsel filed a motion for a bill of particulars on July 19, 2012. CP 1-2. The State responded to the motion on July 24, 2012. CP 3-7. The State also filed an amended information on July 24, 2012 in an attempt to avoid a bill of particulars. Supp. CP Amended Information. The trial court held a hearing and required the State to file a bill of particulars or amend the information again to include the necessary information regarding

³ The State will be filing a supplemental designation of Clerk's papers and will cite to the documents as Supp. CP and note what the document is.

what conduct it was alleging in each of the counts. MRP 2-17. The State filed its bill of particulars on August 2, 2012. CP 9. The State amended the information three more times after the bill of particulars was filed. CP 30-36; Supp. CP Amended Information (4/12/13), Third Amended Information (1/10/14). The Second Amended Information charged Counts I-VI: Child Molestation in the First Degree, Counts VII-VIII: Rape of a Child in the Second Degree and Count IX: Rape of a Child in the Third Degree. Supp. CP Amended Information (4/12/13). The Third Amended Information changed the charges to Count I: Child Molestation in the First Degree, Counts II-III: Child Molestation in the Second Degree, Counts IV-V: Rape of a Child in the Second Degree. Supp. CP Third Amended Information (1/10/14). The Fourth Amended Information contained the same charges as the Third Amended Information. CP 30-36.

Prior to start of trial there was a motion to exclude evidence pursuant to ER 404(b). RP 14-20. The trial court ruled in the State's favor, finding the evidence of a rape, or attempted rape that occurred in California would be admissible under the res gestae exception. RP 15-20. Botello Garcia testified at his trial. RP 587-645. Botello Garcia testified that he loved G.R. like a daughter. RP

594. Botello Garcia said he would not get home from work until 7:00 p.m. and he was never alone with G.R.. RP 598-99, 632. According to Botello Garcia, E.S. always arrived home at or before 3:30 p.m. and was therefore always home when Botello Garcia arrived home. RP 604. Botello Garcia denied inappropriately touching G.R. and denied having any sexual contact with G.R.. RP 606, 617.

Leslie Botello Esparza⁴ is Botello Garcia's niece and testified that G.R. did not like Botello Garcia because he was too strict. RP 502, 505-06. According to Leslie, G.R. did not seem afraid of Botello Garcia or other boys. RP 507. Kimberly Chavez, another one of Botello Garcia's nieces, also testified. RP 525-26. Kimberly has known G.R. her entire life and considers her a cousin. RP 527. Kimberly saw G.R. the summer of 2011. RP 533. G.R. never told Kimberly she was being abused. RP 531. According to Kimberly, G.R. did not like how restrictive Botello Garcia was. RP 532. Kimberly also testified that G.R. was outgoing and did not have any problems interacting with boys. RP 537. Odalis Chavez is Kimberly's older sister. RP 554. G.R. never told Odalis that Botello Garcia was abusing her. RP 559. Odalis also described G.R. as

⁴ The State will refer to family member by their first names to avoid confusion as many share last names, no disrespect intended.

outgoing and stated G.R. did not have problems interacting with boys. RP 567. Odalis testified that Botello Garcia was your typical strict Hispanic parent. RP 562.

Botello Garcia was found guilty of two counts of Child Molestation in the Second Degree, two counts of Rape of a Child in the Second Degree and not guilty of one count of Child Molestation in the First Degree. RP 865-66; CP 66-70. The jury also returned special verdicts finding domestic violence, abuse of trust and a prolonged period of ongoing abuse. RP 866-69; CP 75-90. Botello Garcia was sentenced to an exceptional 116 months on Counts II and III and 244 months minimum to life on Counts IV and V. CP 102-19. Counts IV and V were to run consecutive to counts II and III. CP 106. Botello Garcia timely appeals his convictions. CP 120-21.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT AS IT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES.

Botello Garcia argues that the Fourth Amended Information was constitutionally insufficient (and that he thus received

inadequate notice of the charge) because the information did not contain critical facts and therefore did not provide adequate notice and did not protect against double jeopardy. Appellant's Brief 20. This claim is without merit because the information contained all of the essential elements of the charged offense.

1. Standard Of Review.

This court reviews challenges regarding the sufficiency of a charging documents de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The correct standard of review is determined by when the sufficiency challenge is made. *City of Bothell v. Kaiser*, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). A charging document challenged for the first time on appeal is "liberally construed in favor of validity." *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

2. Liberally Construed, The Fourth Amended Information Contained All The Essential Elements Of The Crimes Charged.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. *State v. Phillips*, 98

Wn. App. 936, 939, 991 P.2d 1195 (2000), *citing Kjorsvik*, 117 Wn.2d at 101–02. A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (citations and quotations omitted). The primary reasons for the essential elements rule is it requires the State to give notice of the nature of the crime the defendant is accused of committing and it allows a defendant to adequately prepare his or her case. *Zillyette*, 178 Wn.2d at 158-59 (citations and quotations omitted).

When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). If a defendant challenges the sufficiency of the information “at or before trial,” the court is to construe the information strictly. *Phillips*, 98 Wn. App. at 940, *quoting State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). Under this strict construction standard, if a defendant challenges the sufficiency of

the information before the State rests and the information omits an essential element of the crime, the court must dismiss the case “without prejudice to the State's ability to re-file the charges.” *Phillips*, 98 Wn. App. at 940, *quoting Ralph*, 85 Wn. App. at 86.

If, however, a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the court is to construe the information liberally in favor of validity. *Phillips*, 98 Wn. App. at 942–43. As this Court has noted, these differing standards illustrate the balance between giving defendants sufficient notice to prepare a defense and “discouraging defendants' ‘sandbagging,’ the potential practice of remaining silent in the face of a constitutionally defective charging document (in lieu of a timely challenge or request for a bill of particulars, which could result in the State's amending the information to cure the defect such that the trial could proceed).” *State v. Killiona-Garramone*, 166 Wn. App. 16, 23 n.7, 267 P.3d 426 (2011), *citing Kjorsvik*, 117 Wn.2d at 103; *Phillips*, 98 Wn. App. at 940 (*citing* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 442 n. 36 (1984)).

In the present case, Botello Garcia did not challenge the sufficiency of the fourth amended information below. See RP. Botello Garcia requested a bill of particulars, which was provided for the amended information filed on July 24, 2012. MRP 2-17. CP 1-7, 8; Supp. CP Amended Information. The amended information contained six counts of Child Molestation in the First Degree. Supp. CP Amended Information. The fourth amended information, for which Botello Garcia was tried on, only contained one count of Child Molestation in the First Degree, the remaining counts were all new and different from the time of the filing of the amended information. CP 30-36. There is nothing in the record that indicates Botello Garcia did any further requests for a bill of particulars, other than his trial counsel stating that he had hoped it would be viewed as an ongoing request. RP 19; See RP; See CP.

Therefore, Botello Garcia has raised the sufficiency of the charging document for the first time on appeal. Because Botello Garcia did not object to the fourth amended information's sufficiency below, this Court is to apply the liberal standard set forth in *Kjorsvik* and construe the information in favor of its validity. *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 942–43. Under this liberal standard of review, the court must decide

whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or vague language that he alleges caused a lack of notice. *Phillips*, 98 Wn. App. at 940, *citing Kjorsvik*, 117 Wn.2d at 105–06. Prejudice is not presumed and a defendant must make an actual showing of prejudice when the defendant had failed to object to the information below. *Kjorsvik*, 117 Wn.2d at 106-07; *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 940.

Botello Garcia argues to this Court that the fourth amended information, while containing the elements of the offense intended to be charged, it omits critical facts and therefore does not give adequate notice to the defendant nor does it provide protection against double jeopardy. Appellant’s Brief 20. Botello Garcia is incorrect. The fourth amended information contained enough critical facts to be sufficient. The fourth amended information contained the victim’s initials, G.R., her date of birth, 01/14/1997, and the date range that the alleged acts occurred. CP 30-36.

The fourth amended information was sufficient to apprise Botello Garcia of the charge. A charging document, however, is

constitutionally sufficient even if it is vague as to some other matter significant to the defense.⁵ *Holt*, 104 Wn.2d at 320. Washington courts distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). The State may correct a vague charging document with a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 686–87, 782 P.2d 552 (1989). As stated above, Botello Garcia failed to request a bill of particulars for the fourth amended information, thus, he waived any vagueness challenge. *Leach*, 113 Wn.2d at 687.

Finally, even if this Court were to assume for the sake of the argument that there was some deficiency with the information, Botello Garcia's claim must still fail because he cannot show prejudice. Botello Garcia cannot show any surprise or prejudice and his claim, therefore, must fail since a defendant who fails to challenge an information before trial must demonstrate prejudice in order to prevail on a challenge to an information raised for the first time on appeal.

⁵ The State is not admitting the charging document is vague, but for the sake of argument is explaining why vagueness is not a fatal flaw in an information.

B. BOTELLO GARCIA WAS NOT CONVICTED USING PROPENSITY EVIDENCE BECAUSE THE TRIAL COURT'S RULING ALLOWING G.R.'s TESTIMONY REGARDING THE SEXUAL ASSAULT IN CALIFORNIA WAS PROPER.

Botello Garcia argues that the trial court improperly allowed the jury to use propensity evidence to convict him, in violation of ER 404(b) and Botello Garcia's due process rights under the Fourteenth Amendment of the United States Constitution. Appellant's Brief 12. Botello Garcia asserts the trial court used the wrong legal standard because it admitted the evidence under two ER 404(b) exceptions which do not apply to his case. *Id.* 12-15. Botello Garcia also argues that even if the exception applied, the probative value of the evidence was outweighed by the prejudicial effect and finally that any error was not harmless. *Id.* 15-18

The trial court did not err in admitting G.R.'s testimony regarding the attempted rape in California. The court did the proper analysis, and if, arguendo the trial court erred the admission of the evidence was harmless.

1. Standard Of Review.

"[I]nterpretation of an evidentiary rule is a question of law" subject to de novo review. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Once it is determined the trial court correctly

interpreted the rule, a determination regarding the admissibility of evidence by the trial court are reviewed under an abuse of discretion standard. *Gresham*, 173 Wn.2d at 419; *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

If the trial court’s evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An 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 (citations omitted).

2. The Trial Court Properly Admitted G.R.’s Testimony Regarding The Attempted Rape That Occurred In California.

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it “governs the admissibility

of evidence of other crimes or misconduct for purposes other than proof of general character.” 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, § 404:6, at 184 (2013-2014). Evidence of other crimes or misconduct is not admissible to demonstrate a defendant’s propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

Prior to admitting ER 404(b) evidence a trial court must conduct a four part test. *Id.* at 81-82. 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 charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 81-82. The reviewing court defers to the trial court regarding the admission of evidence. *Powell*, 166 Wn.2d at 81. This deference acknowledges that the trial court is best suited to determine a piece of evidence’s prejudicial effect. *Id.*

The State sought to admit evidence that Botello Garcia had raped, or attempted to rape G.R. on a trip to California in 2010 or

2011. RP 15-19. The State argued the sexual abuse was a course of conduct that continued over a prolonged period of time and the incident in California occurred during a period when Botello Garcia was begging G.R. for penile vaginal intercourse. RP 19. Botello Garcia objected, arguing that the California incident occurred after the charged counts and could not be considered under the res gestae exception. RP 16-19. The trial judge in this case ruled that the evidence was admissible on the basis that the State indicated, that it was part of ongoing conduct and it was relevant. RP 20.

While the trial judge may have not used the magic words in his analysis of the evidence to be presented by the State, he did the required analysis. The State acknowledges the trial judge did not state the evidence was more probative than prejudicial, but that finding is inherent in his ruling, as he adopts the State's basis for the admission of the evidence. RP 17-20. The trial judge identified the purpose for which the evidence sought could be introduced. RP 20. There was no argument that the incident did not occur. RP 15-20. The evidence was relevant to show the entire criminal episode, that this abuse continued over a prolonged period of time. RP 20.

Evidence of misconduct or other crimes is admissible when it completes the crime story under the res gestae exception. *State v.*

Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) *citing State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). “Where another offense constitutes a “link in the chain” of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.” *Hughes*, 118 Wn. App at 725 (citations and internal quotations omitted). Even when a court does not fully articulate the balance of the probative value versus the prejudicial value of the evidence on the record the court’s record can provide adequate reasoning that satisfies this requirement. *Id.* (citations omitted).

In *Hughes* the State argued that the uncharged burglary and weapons charges were part of the same transaction as the charged crime and therefore admissible under the res gestae exception. *Id.*, footnote 8. *Hughes* argued that the evidence was prejudicial and irrelevant. The Court of Appeals noted that the record reflected that the trial court adopted the State’s argument, which was sufficient. *Id.*

In *Brown*, the trial court allowed testimony of Susan Schnell under the res gestae exception. *Brown*, 132 Wn.2d at 569-71. *Brown* had already murdered the victim in the case, Ms. Washa, in SeaTac, Washington on May 24, 1991 when he flew down to Palm

Springs, California, to spend time with Ms. Schnell on May 25, 1991. *Id.* 543-47. Brown had murdered Ms. Washa after he tortured and raped her. *Id.* 543-46. Brown slit Ms. Washa's throat and stabbed her several times. *Id.* at 546. Brown's time with Ms. Schnell started out consensual, until he became violent with her. *Id.* at 547. Brown slit Ms. Schnell's throat, then tied her up and raped her in a similar fashion as he had Ms. Washa. *Id.* at 547. Brown also attempted to rob Ms. Schnell similar to his robbery of Ms. Washa. *Id.* at 543-47. The Supreme Court held that the trial court did not abuse its discretion by allowing Ms. Schnell's testimony under a number of exceptions including *res gestae*. *Id.* at 573, 575. The Court held the testimony "qualified as *res gestae* evidence because it provided the jury with a more complete picture of the events surrounding the crimes committed against Ms. Holly C. Washa." *Id.*

If the trial court in *Brown* did not abuse its discretion when it admitted Ms. Schnell's testimony, this trial judge in Botello Garcia's case certainly did not abuse his discretion when he allowed G.R.'s testimony regarding the continuing sexual abuse inflicted upon her by Botello Garcia under the *res gestae* exception. G.R.'s testimony qualified as *res gestae* because it gave a more complete picture of the events surrounding Botello Garcia's sexual abuse of G.R.,

which included molestation, attempted rape and rape. Botello Garcia had been begging for penile vaginal penetration and he finally attempted it when he and G.R. were in California. RP 61-63, 67-71.

Botello Garcia also asserts that the trial court must give a limiting instruction and failing to do so was prejudicial and allowed the jury to convict based on propensity evidence. Appellant's Brief 11, 17-18. This is incorrect. A trial court is not generally required to give a limiting instruction upon the admission of 404(b) evidence unless one of the parties requests the limiting instruction. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.2d 604 (2011); RAP 2.5(a).⁶

⁶ Botello Garcia cites to *State v. Gunderson*, 181, Wn.2d 916, 923, 337 P.3d 1090 (2014) for premise that a trial court must give a limiting instruction if the evidence is admitted. *Gunderson* cites to *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). *Foxhoven* cites to *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

In *Lough* the Supreme Court was discussing that the trial court had given a limiting instruction. It states, "The trial court also repeatedly gave a limiting instruction to the jury, before each of the witnesses testifying to prior druggings and rapes and again in the instructions given to the jury by the court at the conclusion of the trial. In that limiting instruction, the judge told the jury that the evidence of the uncharged allegations could not be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and could only be considered to determine whether or not it proved a common scheme or plan. The record fails to support a contention that the ER 404(b) evidence was used by the jury for an improper purpose. The limiting instruction was given clearly and repeatedly and a jury is presumed to follow the trial court's instructions." *Lough*, 125 Wn.2d at 864. The dictum does not state that a trial court must give a limiting instruction, just that one was repeatedly given and we presume the jury follows the instruction.

Russell also calls attention to the Supreme Court's reliance on dictum in these cases. "Both *Russell* and the Court of Appeals relied on cases where the issue of reversible

Botello Garcia did not request a limiting instruction when the testimony was proffered nor did he request a limiting jury instruction at the close of evidence. RP 64-72, 748. Because neither the State nor Botello Garcia requested a limiting instruction the trial court was not required to give one. *Russell*, 171 Wn.2d at 124.

Also, contrary to Botello Garcia's assertion the danger of unfair prejudice stemming from the attempted rape testimony was not unduly high. Brief of Appellant. 15. Botello Garcia argues that the conduct in California could be seen as worse than any conduct that occurred from the charged crimes. *Id.* Perhaps Botello Garcia has forgot the incident where Botello Garcia forced G.R. to perform oral sex on him by shoving his penis in her mouth and grabbing the back of her head to move it back and forth. RP 57-58. This incident only stopped when G.R. choked and started crying. RP 58. The testimony regarding the incident in California was not more

error for failure to give a limiting instruction was not before the court. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007); *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995); *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989); *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982); *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950). Their reliance on the dictum in these cases is mistaken. As we have previously held, this court disavows any interpretation of our previous case law suggesting a trial court commits reversible error by failing to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction. " *Russell*, 171 Wn.2d. at 124.

prejudicial than probative. This Court should affirm Botello Garcia's conviction.

3. If The Trial Court Erred In Admitting The ER 404(b) Evidence, Botello Garcia Cannot Show Prejudice.

The State maintains the trial court did not err when it admitted the ER 404(b) evidence, *arguendo*, if the trial court did err, Botello Garcia does not make the requisite showing that he was prejudiced by the wrongfully admitted evidence. Botello Garcia must show that, within reasonable probabilities, he would not have been convicted of two counts of Child Molestation in the Second Degree and two counts of Rape of a Child in the Second Degree if the trial court had not admitted the erroneous ER 404(b) evidence. Botello Garcia cannot meet this burden.

First, Botello Garcia's argument that he was convicted of these crimes by the use of propensity evidence does not hold water. If the jury used the California incident as propensity evidence the jury would have convicted Botello Garcia of all five crimes charged by the State. The jury acquitted Botello Garcia on Count I: Child Molestation in the First Degree. RP 865; CP 66.

The overwhelming evidence proved Botello Garcia committed two counts of Rape of a Child in the Second Degree and two counts of Child Molestation in the Second Degree. Botello

Garcia forced his penis into G.R.'s mouth on two separate occasions. RP 55-59. G.R. testified that Botello Garcia touched her breast under her shirt but over her bra and it was a groping touch. RP 41-42. Botello Garcia knew he was doing something wrong because he made G.R. promise not to tell anyone. RP 42. After G.R.'s 12th birthday the touching became progressively worse. RP 43. G.R. testified that Botello Garcia would come into her bedroom and force her hands down his pants to touch his penis, which she described as soft at the time. RP 45-46. According to G.R., Botello Garcia used the inappropriate touching of his penis as leverage against her, or payment for her do things, such as go over to a friend's house. RP 47. G.R. also described how Botello Garcia began putting his fingers on her vagina and she would cry. RP 51.

This testimony alone is enough. Coupled with G.R.'s disclosures to Lisa Wahl, her recovered journal page which talked about her dad coming into her room at night and touching her, her disclosure to Israel Contreras Maldonado, the cutting that started in the fifth grade, and her demeanor when discussing the allegations with others corroborates G.R.'s testimony regarding the sexual assaults. RP 159-60, 164, 244-45, 322, 350-51, 361-62, 391, 426. Ex. 6. Botello Garcia cannot show he was prejudiced by the trial

court's alleged erroneous ER 404(b) ruling and his convictions should therefore be affirmed.

C. BOTELLO GARCIA CANNOT RAISE ISSUE WITH THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BECAUSE HE DID NOT RAISE IT IN THE TRIAL COURT AND THE ISSUE IS NOT RIPE.

Botello Garcia argues, for the first time on appeal, that the trial court impermissibly assessed a jail fee recoupment without proper findings of his ability to pay. Brief of Appellant 21-25. The alleged error is not a manifest constitutional error and therefore, Botello Garcia cannot raise this issue for the first time on appeal. The issue is also not ripe for review.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012).

2. Botello Garcia Did Not Object To The Imposition Of Attorney Fees Or The Jail Fee And Cannot Raise The Issue For The First Time On Appeal Because The Alleged Error Is Not A Manifest Constitutional Error.

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911,

917 n.3, 829 P.2d 166 (1992). “[F]ailure to object when the trial court imposed court costs under RCW 10.01.160 amounted to a waiver of the statutory (not constitutional) right to have formal findings entered as to [a defendant’s] financial circumstances.” *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d (1992) (citations omitted). A defendant’s failure to object at his sentencing hearing to the court’s finding that the defendant has the current or likely future ability to pay legal financial obligations can preclude appellate review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 880-83. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d

1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal). Botello Garcia's lengthy sentence alone is not enough to support the argument that he had the present inability to pay the jail fee. The only comment on Botello Garcia's financial status was in regards to retaining counsel on appeal. RP 882-83. His attorney stated, "Mr. Botello Garcia did have funds available to him. He hired Mr. Franzen and me. But after this date I don't believe he's going have any money." RP 882-83. The funds to hire an attorney is different than the current ability to pay a jail fee.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Botello Garcia is an error of constitutional magnitude, the error is not manifest because there is not a sufficient record for this Court to review the merits of the alleged error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

3. The Imposition Of Legal Financial Obligations Is Not Ripe For Review.

The determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a

defendant's ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, review denied 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). This Court has previously held that the issue is not ripe until the State seeks to collect payment or enforce the judgment. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Therefore, because there is no evidence in the record that the State has sought to collect or enforce the legal financial obligations portion of Botello Garcia's sentence, the issue is not ripe for review.

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V. CONCLUSION

The information was not deficient and adequately informed Botello Garcia of the charges pending against him. The trial court properly admitted evidence of Botello Garcia's sexual assault against G.R. in California under the res gestae exception. Botello Garcia cannot raise the issue regarding the imposition of a jail fee for the first time on appeal as it is not a manifest constitutional error. This Court should affirm Botello Garcia's convictions and sentence.

RESPECTFULLY submitted this 11th day of March, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



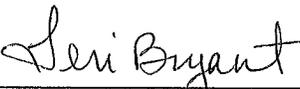
by: _____
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. PAULO BOTELLO-GARCIA, Appellant.	No. 46355-5-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 11, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi Backlund, attorney for appellant, at the following email address: backlundmistry@gmail.com.

DATED this 11th day of March, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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