

FILED

MAY 09 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

NO.299597

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY GENE ROBINSON,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

1. The court erred by allowing evidence of appellant's two prior convictions for rape under ER 404(b) and RCW 10.58.090
2. The court erred by when it entered Findings of Fact 20,22.
3. The court erred when it entered Conclusions of Law, 7 and 8.
4. The limiting instruction given by the court misstated the law.
5. The appellant was denied a fair trial due to cumulative errors.
6. The record does not support the finding that appellant has the ability to meet, now or in the future, the order to pay financial obligations imposed by the court.

RESPONSE TO ASSIGNMENT OF ERROR.

1. The court properly allowed the admission of the prior bad acts under ER 404(b)
2. The Findings entered were proper.
3. The Conclusions of Law were supported by the facts.
4. The instruction was proper and was proposed by appellant himself.
5. There was no cumulative error.
6. The record does not support the finding that the appellant can pay his financial obligations now or in the future and should be remanded to address this error.

II. STATEMENT OF THE CASE

The first victim SS to testify stated that the attack had occurred at night, that he husband had left for work, that she was watching TV at the time she was initially attacked, that the intruder had a knife; that he said

“be quiet” over and over, she indicated she had never met the person before; she stated that he was not hard, did not have a hard on and that he took her purse. (RP 487-89)

The second rape victim TL testified that her attack occurred at night; that the male who lived there was gone; that her step sister was dating Robinson; she stated she was watching TV on the couch in living room when she was initially attacked; that her children were in the home; she was wearing sleeping attire when attacked; awoke to someone touching her; the attacker stated on more than one occasion that her kids in house so be quiet; the attacker wore a stocking on his face; and his penis did not get hard; after that rape he took the phone and he left. (RP 509-22)

The Victim

At night, she was watching TV on the couch, boyfriend had left the home, knew her but did not “know” her, mask over his face, semi hard dick, repeated the phrase I have a knife, took her cell phone. (RP 283-94, 294-326) She had had several glasses of wine earlier in the day, and then later when she was trying to get to sleep she took some Ambien. (RP 304-5)

Evidence technician Amber Ross indicated that the rear sliding glass door was slightly open and that the lock mechanism was engaged. (RP 409-10)

When first encountered by Det. Janis he described her demeanor as, “very nervous, scared, coming down from just the fear of the incident.” (RP 579)

After the defendant’s DNA was found to be a match for that discovered on the victim he was arrested and taken into custody. At that time he was interviewed by Det. Janis. (RP 587) Robinson was questioned about the past rapes and he indicated that they were actually burglaries which had turned into rapes, where he had “taken advantage of the moment.” (RP 598) He soon changed that and indicated that in fact one of the victims had been “leading him on.” That in effect it was an act that was consensual that he in took too far. (RP 602) Clearly a “consent” or forcible compulsion issue as was the case in the current rape. He also indicated that this victim was older than he was. (RP 603) He also stated that his girlfriend at the time was “Heather Gilstrap” clearly not the person who later testified she was Robinson’s girlfriend or friend at the time of the rapes. (RP 604) Robinson confirmed that he owned and operated his own vehicle, he never mentioned that during the time period of the rape this third party had been driving him around, especially to the house of the

victim. (RP 606-07) Robinson was asked specifically by Det. Janis to tell him what he knew about the victim. He continuously denied any knowledge of her except that he knew she was a woman and that she lived there. He never once stated he had known her or sold her drugs or had consensual sex with her. (RP 614-18) About the only thing that he did state was that he knew that the female neighbor, the victim, was older than he and at time saw her and some guy out on her deck. (RP 617-18) The bedroom that had been occupied by Robinson had a view of the rear of the victim's residence, specifically a sliding door that was off the deck. (RP 586)

He testified that he went to the victims house twice in July in order to collect money for a previous drug sale. He testified that the victim had told him to come over after the Fourth of July. He indicated that on the first trip in July he and the victim got into a little argument about this money. This was important to him because he was using drugs at the time. On this specific occasion he was taken there by Ms. Skeels who at the time was not his girlfriend but at the time of trial she was his girlfriend. His stated that Skeels drove his car.

On the second occasion, the night of the rape. He was once again driven by Ms. Skeels who on this occasion was driving her mother's car. He stated that when he arrived there he had entered the victim's home

during the “consensual” entry, the night of the rape, through the rear sliding door. (RP 678-9) He stated once again that he discussed the debt owed and it was at that time that the victim initiated the sex. After the sex he once again attempted to discuss the debt owed. He stated that was when the victim got “madder” and she was “real hostile” “cussing me out and everything.” He testified at this time he told the victim “I don’t need this.” He testified that his ride, was his brother and “I think I called but I didn’t get an answer because I know I left walking.” (RP 679-81) It was coincidentally after this night that he never went back again and that he “just wrote off the money.”

He claimed that the reason he had told the detective that he did not know the victim was that he believed that he was being arrested for the drugs and that the victim had turned him in. He justified the map that was drawn and the verbiage on the map because he was “pissed off at the time... because she’s got me in here for this and I never did this to her.” (RP 683) He testified that he had been having sex with the victim from the summer of 2007 until the time of the rape and that this almost always occurred in the evening. (RP 690-2) He testified that he had sex with the victim ten or twelve times.

On cross examination Robinson stated the times that he went to the victim’s home were mostly in the evening, after nine or ten o’clock. (RP

687-88) He testified that the only times Ms. Skeels took him to the victims home was in June and July.

On cross examination his story changed from he called his brother to he thinks that he tried to call “Leilani” (Ms. Skeels) but nobody answered so he just walked. (RP 701) The defendant stated on cross examination when asked if he had discussed Ms. Skeels testimony with her “Yeah, we talked about it back and forth.”

III. ARGUMENT

1. The court did not err when it ruled that the two prior rapes committed by Appellant were admissible. The Court based the admission of these acts under both RCW 10.58 and ER 404(b).

There is no doubt that RCW 10.58.090 was declared unconstitutional in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207, (2012); “In sum, RCW 10.58.090 is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b) regarding a procedural matter.” (Gresham at 433)

... “Only in those rare cases where a legislative enactment irreconcilably conflicts with a court rule and the rule is procedural in nature will we invalidate the enactment. This is one such circumstance. Because RCW 10.58.090 irreconcilably conflicts with ER 404(b), we hold that the statute violates the separation of powers doctrine and declare it unconstitutional.” (Gresham at 434)

This case obviously must be reviewed in context of State v. Gresham, supra. Because the court declared RCW 10.05.090 unconstitutional in Gresham this court would will need to set aside the analysis of the trial court pertaining to that statute.

It is equally clear that cases must be review on the basis of the facts presented. There are numerous areas of the record which would support the use of the analysis in Gresham which was applied to the Scherner portion of that consolidated case, however there is no means to impart to this court the totality of the facts in the context they were presented without this court fully can completely reviewing the testimony presented.

This court must read the report of proceedings which pertain to the charged offenses in totality. In so doing this court will realize the nature and extent of testimony and evidence presented and the absurdity of the defendant's "defense." The court should then read the portions of the record were the previous victims testify. In this manner this court will quickly come to the conclusion that the facts and evidence presented were in totality overwhelming.

The trial court took great pains to analyze this ruling with regard to the admission of the prior rapes under ER 404(b) and therefore as stated in Gresham at 419-20;

Issues of constitutional and statutory interpretation are questions of law, and we review questions of law de novo. Optimer Int'l, Inc. v. RP Bellevue, LLC, 170 Wn.2d 768, 771, 246 P.3d 785 (2011). Similarly, "[i]nterpretation of an evidentiary rule is a question of law, which we review de novo." State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Provided the trial court has interpreted the rule correctly, we review the trial court's determination to admit or exclude evidence for an abuse of discretion. *Id.*

B. Alternative Admissibility of Scherner's Prior Sex Offenses

For Scherner, the admissibility of evidence of his prior sex offenses under the Washington Rules of Evidence is dispositive. We may affirm the trial court on any correct ground. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). Even absent RCW 10.58.090, the trial court ruled that evidence of Scherner's prior sex offenses was admissible for the proper purpose of showing a common scheme or plan. Scherner argues that the evidence of prior sex offenses is inadmissible under ER 404(b) and that the absence of a limiting instruction is reversible error. We find that the trial court did not abuse its discretion in admitting the evidence. We further hold that, while the trial court erred in refusing to give an appropriate limiting instruction upon Scherner's request, that error was harmless in the context of the case.

In this case it is noteworthy that the trial court initially ruled that it would not allow these prior bad acts. (CP 33-34) That State request that the court reconsidered this ruling and after reconsideration the court indicated it would allow admission of the prior rapes. The court indicated that one factor that weighed heavily in its consideration was in changing

the ruling was the fact that the defendant was now going to argue a defense, “consent” the court further indicated that these prior acts were admissible to prove prior scheme or plan.

The trial court entered Findings of Fact and Conclusions of Law RE: 10.58.090 and ER 404(b). (CP 170-74) These findings and conclusions are attached in full in Appendix ‘A’. These findings note that the court took into consideration all of the information supplied to it. This court can review the record and see that the trial attorneys briefed this issue extensively. (CP 7, 8-13, 14-32, 36-39, 40-46) The trial court had before it at the time it made its determination to allow the use of this information the vast majority of the cases not cited by appellant. The trial court had reviewed approximately forty pages of briefing from both sides.

It is the rare case where the reviewing court can find a set of findings and conclusions which accurately track the standard set by the courts of review prior to this type of information being admitted. Here the findings of the court are found both in lengthy discussion between the court and the parties as well as the initial written decision and the subsequent reconsideration after which the lengthy findings and conclusions were entered. In these written and oral rulings the court set forth the specific basis for a ruling such and this and in this instance the court set forth the basis with regard to each of the two prior victims which

allowed this testimony to be used, as well as discussing the time frame question which must be addressed.

In addition, even where a trial court's written findings are incomplete or inadequate, this court need only look to the trial court's oral findings to aid in review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).

Robinson contends that the evidence of prior bad acts was highly prejudicial. Robinson argues that the admission of evidence of the other rapes in trial was error. ER 404(b) prohibits using evidence of other acts to prove the character of a person in order to show that he acted in conformity with that character. State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

The trial court may admit evidence of a common scheme or plan to prove that the conduct actually occurred. State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Robinson cites Lough and suggests that the evidence of the prior bad acts must, in effect, show plans to perpetrate separate but very similar crimes. He argues that the prior crimes are “far less substantial and marked.” The holding in Lough has evolved into something more than requiring the former acts be in essence identical. State v. Kennealy, 151 Wn.App. 861, 887, 214 P.3d 200 (2009). Evidence of a common scheme or plan is admissible when it shows that a

person committed "markedly similar acts of misconduct against similar victims under similar circumstances." Lough, 125 Wn.2d at 856 (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 867 P.2d 757, 27 Cal.Rptr.2d 646 (1994)). Proof of such a plan is admissible if (1) the State can show the prior acts by a preponderance of the evidence, (2) the evidence shows a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial. *Id.* at 852. See also State v. Williams, 156 Wn.App. 482, 490, 234 P.3d 1174 (Div. 3 2010)

Williams goes on to state:

The trial court concluded that the evidence was relevant and appropriate since Mr. Williams claimed that his current victims consented to sexual intercourse. Report of Proceedings (RP) at 57. We agree. The evidence was relevant to the element of forcible compulsion. *Id.*; RCW 9A.44.040; see State v. Saltarelli, 98 Wash.2d 358, 368, 655 P.2d 697 (1982) (evidence of prior attempted rape admitted to prove defendant used force and the victim did not consent). The court concluded that the 1995 rape conviction showed a common scheme involving similar victims (women of a similar age, involved with drugs) and a similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness during the rape). The trial court also noted that the current rapes occurred within days of each other and only 14 months after Mr. Williams was released from prison for the 1995 rape conviction.

Finally, the trial court balanced the probative value of the evidence against its likelihood of prejudice. Vy Thang, 145 Wash.2d at 642, 41 P.3d 1159. (Williams at 491-92)

Robinson contends that the evidence here is clearly more prejudicial than probative. The court heard from counsel before ruling that the evidence would not be admitted and then as the case progressed and there was a motion to reconsider while at about the same time Robinson declared his intent to use the “consent” defense. The court subsequently addressed this issue in the written conclusions of law, which as indicated above are explicit and which address the issue both under the RCW and ER 404(b). The basis is sound. (CP 170-74)

The court, weighed the probative value of the additional evidence against its potential for prejudice on the record on more than one occasion. The initial review resulted in the first ruling of the court denying the State the ability to use these prior convictions. (RP 20-42) Robinson’s defense was the present charge was a consensual act, so his credibility was an important issue for the jury. The court determined that “8. The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by any potential for undue delay, waste of time or needless presentation of cumulative evidence.” (CP 174)

Ultimately, all evidence is prejudicial to one side or the other. That is why it is introduced. Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Whether evidence is unduly prejudicial is a decision not subject to mathematical certainty, varies from case to case, and is, for that reason alone, properly addressed to the sound discretion of the judge actually trying the case. Again, the court articulated tenable grounds to do what it did and there is, then, no abuse of discretion.

The last line in those findings and conclusions is the most important “3. The proffered evidence is admissible pursuant to RCW 10.58.090 **and ER 404(b)**. (CP 174) (Emphasis mine.)

The trial court undertook the very kind of candid weighing and balancing that counsel and their clients should expect a trial judge to do when faced with these discretionary decisions. The test is not whether this court would have made the same decision. This court is not charged with the responsibility of trying this case in the first instance. The job of an appellate court is to review for errors, here abuse of discretion, which may have resulted in insurmountable prejudice. State v. Williams, 156 Wn.App. 482, 500, 234 P.3d 1174, review denied, 170 Wn.2d 1011 (2010). The potential for prejudice that Robinson suggests is always present with ER 404(b) evidence of this type. See State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984) (“Careful consideration and weighing of

both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.").

The acts which were allowed in State v. Williams, 156 Wn.App. 482, 234 P.3d 1174 (Div. 3 2010) were from an incident in 1994, the crime which was the basis for appellate review was committed in 2007; a portion of the time separating the two crimes was a period when Williams was in prison for rape and Williams had only been out of prison for 14 months at the time of the rape which was reviewed by this court. The set of facts are very similar to the facts in Robinson's case.

The trial court in this case made extensive findings and in fact its action in reconsidering the request by the State to use the prior rapes sets forth an extensive record of what the court considered and the basis for the eventual ruling to admit the prior acts. "We review the trial court's interpretation of a rule of evidence de novo. State v. DeVincentis, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). But this court will review the court's discretionary decision to admit or exclude evidence for abuse of discretion. State v. Vy Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002); State v. Scherner, 153 Wash.App. 621, 656, 225 P.3d 248 (2009), review granted, No. 84150-1 (Wash. June 1, 2010).

The Supreme Court in Gresham provides a road map for cases where the evidence admitted is analyzed under ER 404(b). The two

consolidated cases set forth in one opinion the “two sides of the coin” in this type of analysis. There can be little doubt that Robinson’s case is far more akin to the Scherner fact pattern than Grasham.

Purely for the sake of argument even if this court were to declare the admission of the two prior acts was error this court would then use the test set forth by the court in Gresham “When the support of RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b). It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. Smith, 106 Wn.2d at 780. The question, then, is whether, ““within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”” *Id.* (quoting Cunningham, 93 Wn.2d at 831)”. Gresham at 433.

Here the testimony of the victim was damning. Her testimony was unshaken on cross-examination and was supported by the facts at the scene as well as the 911 phone call the testimony of the next door neighbor who was Robinson’s own sister, the DNA and one of the most important, the demeanor of the victim and the physical trauma to her vagina. The victim ran to the defendant’s sister’s house in hysterics. The defense attempts to qualify this not as a “consent” defense but a “forcible

compulsion” defense, obviously in an attempt to justify or account for the actual tears found in the vaginal walls of the victim.

The defendant denied knowing the victim until there was found within his personal possessions in his jail cell a map of the victim’s home and a letter proposing that a relative of his burglarize the victims home and then do harm to the victim. It was only after those documents were found that Robinson changed his story to he knew the victim, had known her for an extended period of time and has not only sold her drugs but had had consensual sex with her on numerous occasions.

The story by the defendant that he knew the victim due to selling her drugs, a story which was supposed to be corroborated by his girlfriend who on three of the 30-40 times he went to the victim’s home just happened to drive him there on the night of the rape. The problem with that story was the girlfriend stated he told her and that she knew the defendant was selling the victim marijuana, the defendant said methamphetamine, there was absolutely nothing found that would indicate drug use except one old “bong.”

Further, the victims boyfriend testified that he was there most nights during the period defendant was supposedly at victims house 30-40 times selling her drugs and having not forced consensual sex with the victim. Robinson’s girlfriend also states that she always waited

somewhere and picked up the defendant after his trips to the victim's house, however the defendant testified that he walked away from the victim's home on the night of the rape. Amazingly he never heard any sirens in the area as he "walked" away from the scene of this rape. There is also the damning evidence of the DNA. This is, in the context of the "consent" defense less important than a case where the defendant stands by the proposition that he either did not know the victim or that he did not have sex with the victim. But it clearly supports the victim's story.

The defendant by his attorney's own statements was not really asserting a "consent" defense but one with regard to the "forcible compulsion" one can only speculate that was done in an attempt to refute the nature of the medical examination which revealed there was actual trauma to the vagina of the victim. Trauma not found with non-forced consensual sex "I object to the finding that this was a consent case. This was a forcible compulsion case." (RP 878-79)

The admission of the testimony of the prior acts was analyzed by the court and State v. Gresham upheld the use of this type of prior bad act information when analyzed as the trial court did in this case.

The Robinson gives no reason for the actions of the victim in falsely accusing him except his story about the fact that she owed him \$100.00. So apparently this victim subjected herself to the societal

embarrassment of the public admission that someone had forced her to perform oral sex on him then forced sexual intercourse as well as the rape examination and endless questioning by defense counsel in a courtroom open to the public, in front of a jury of strangers so that she would not have to pay back this alleged \$100.00 drug debt.

In order to admit ER 404(b) evidence, the court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect it may have on the finder of fact. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). The trial court did the proper analysis. This court need not overturn the actions of that court.

The court did identify the purpose for which the evidence was to be admitted, *i.e.*, to give the jury the whole picture, and apparently determined the evidence was materially relevant for that purpose. *See State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995). Upon inquiry by the State, the court also concluded the probative value outweighed the prejudice.

2. Limiting Instruction.

Appellant states that he proposed a limiting instruction “similar” to that given by the court. The fact is the limiting instruction proposed by appellant is word for word identical to the instruction given by the court.

Defendants proposed instruction;

INSTRUCTION NO.

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior convictions and conduct of the defendant and may be considered by you only for the purpose of proving a common scheme, plan, or forcible compulsion. You shall not consider it for any other purpose. Specifically, you shall not consider the evidence as proof of character in order to show the defendant acted in conformity therewith. Any discussion of the evidence during your deliberations must be consistent with this limitation. (CP 59)

Court’s instruction given to the jury;

INSTRUCTION NO. 23

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior convictions and conduct of the defendant and may be considered by you only for the purpose of proving a common scheme, plan, or forcible compulsion. You shall not consider it for any other purpose. Specifically, you shall not consider the evidence as proof of character in order to show the defendant acted in conformity therewith. Any discussion of the evidence during your deliberations must be consistent with this limitation. (CP 149)

Even if the instruction was “clearly erroneous” the fact remains

Robinson proposed this instruction State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999);

Unhappily for Studd, Cook, McLoyd and Bennett, however, the fact that a clearly erroneous jury instruction was given is not the

end of the story. For the first three of these defendants, that is so because we have also held that "[a] party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). Henderson also involved erroneous WPIC instructions proposed by a defendant and later complained of, and we held there that "even if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." Henderson, 114 Wn.2d at 870 (emphasis added). Henderson is directly on point. There can be no doubt that this is a strict rule, but we have rejected the opportunity to adopt a more flexible approach. See Henderson, 114 Wn.2d at 872

The argument will come that the only reason Robinson proposed this instruction was the earlier error of the court in allowing the information about the prior rapes to be admitted. The State has presented more than sufficient facts from the record of this trial to refute that backdoor attempt to justify the allegation that Robinson should not be held to account for his own proposed instruction.

Further it is the position of the State that this instruction is not err. It properly instructed the jury. The trial court also gave a specific instruction with regard to the limited use of the evidence that the defendant had committed a prior sex offense. This instruction, 22, was

also proposed by the defendant and has not been challenged here. It states in total:

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

Evidence of prior sex offenses on its own is not sufficient to prove the defendant guilty of the crimes 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 crimes charged. (CP 148)

The jury is presumed to have followed the court's instruction. State v. Cerny, 78 Wn.2d 845, 480 P.2d 199 (1971); The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983). These two instructions addressed the use of the properly admitted evidence. The fact that they were proposed by the appellant and give as requested are the final analysis this court need make.

3. Cumulative Error.

Robinson contends reversal of his convictions is required because of prejudicial cumulative error. One of the additional factors Robinson alleges is that the State's case with regard to forcible compulsion and burglary were "weak." The claim that the State's proof of the "forcible compulsion and burglary elements was weak" is without basis. Robinson

minimizes his acts, stating that after he broke into the victim's home with a knife, threatened her constantly with that knife, then orally and vaginally raped her he the "took" her to the shower as if it was some friendly gesture. First the victim is assaulted with a knife then raped then forced to remove the evidence of the crime and somehow that is not forcible compulsion.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified on other grounds, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994). But when no prejudicial error is shown to have occurred, cumulative error could not have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

The victim testified she did not allow anyone to enter her residence, that Robinson had never been there and she certainly did not agree to be raped. The story told by the defendant on direct and cross examination was unbelievable. His story is that he was in the home as many as forty times and yet the living in boyfriend never saw him.

The forcible compulsion was proven by the testimony by the victim regarding the knife displayed by Robinson and evidenced by the

tears to the vaginal walls of the victim alone prove forcible compulsion.

The jury is tasked with deciding who is credible and that is what they did.

State v. Alvarez, 45 Wn. App. 407, 413-14, 726 P.2d 43 (1986):

However, it has never been the province of this court to judge witness credibility; that responsibility lies with the jury which alone had the opportunity to view the demeanors of those testifying. Our review of the evidence is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). As indicated, we find the evidence sufficient to support the verdict.
(Emphasis in the original)

"Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." (CP 131)

Q And how was it that you came to wake up?

A A man had grabbed my wrist and jerked me up off my couch.

Q Did you hear any kind of sound prior to this happening?

A No.

Q All right. And you say a man had jerked you up off of your couch?

A Yes.

Q How did you feel when that happened?

A I was terrified.

Q What happened after you were jerked up off of your

couch?
A It took me a few minutes to start thinking.
Q All right. Did he say anything to you when he jerked
you
off the couch?
A I have a knife.
Q Did you see a knife at that point?
A Yes.
(RP 285)
...
Q Okay. All right. Go ahead and sit down and I'll take
care of the mike. Now, did he say anything to you when
he's taking you from the back room through the office to
the bedroom?
A I have a knife.
Q Did he say it more than one time?
A Over and over and over.
(RP 288)

Because no prejudicial error occurred here, the cumulative error doctrine is inapplicable.

There has never been an error free trial; however the errors alleged by Robinson are have not supported by the record. State v. Odom, 8 Wn. App. 180, 188, 504 P.2d 1186 (1973) “[a] defendant charged with a crime is constitutionally entitled to a fair trial, but not necessarily to a perfect trial. Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968).”

The standard for reversal due to “cumulative error” is set out in State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000):

Finally, Greiff argues that he is entitled to a new trial because “[a] series of errors, each of

which is harmless, may have a cumulative effect that is prejudicial." Pet. for Review at 19. He asserts that "[a]ssuming, arguendo, that the effect of each of the previously discussed errors was harmless, their cumulative effect was not." Pet. for Review at 19.

We do not believe the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Here, we are not dealing with the accumulation of several errors. Rather, we are confronted with two errors that had little or no effect on the outcome at trial. We are satisfied, therefore, that the cumulative effect of these insignificant errors did not deprive Greiff of a fair trial.

The evidence that was presented at trial was overwhelming.

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-47 (2008):

In evaluating whether the error is harmless, this court applies the "overwhelming untainted evidence" test. State v. Davis, 154 Wash.2d 291, 305, 111 P.3d 844 (2005) (quoting State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002)), aff'd on other grounds by 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* 2 Evidence that is merely cumulative of overwhelming untainted evidence is harmless. State v. Nist, 77 Wash.2d 227, 236, 461 P.2d 322 (1969); see also *Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L.REV. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.").

4. Legal Financial Obligations.

This has become a standard "go to" issue in recent appeals. The State recently address this issue in several other appeals. The appellant has correctly set forth the section of the Judgment and Sentence for which there is no record. Appellant is correct that the trial court must address this section of the Judgment and Sentence on the record and determine if Robinson does in fact have the ability to pay for his legal financial obligations. It is the position of the State that this should be done on

remand. Appellant sets forth three areas of the Judgment and Sentence which have become the three standard areas raised on appeal, financial ability, costs of incarceration and costs of medical care. Robinson alleges that these sections should be stricken.

Two of those sections, incarceration and medical, have no costs associated with them. Appellant was not ordered to pay costs related to medical cost or for the cost of incarceration and there is no indication in the record that there were costs either incurred or that any party requested that those costs be covered by appellant. These two areas do not need to be “stricken” by this court. There were no actual costs assessed as can be seen in the amended judgment and sentence (CP 52-58) this issue is moot, In re Marriage of T, 68 Wn. App. 329, 336, 842 P.2d 1010 (1993);

The question remains, however, whether the underlying issue is moot. An issue is moot if a court can no longer provide effective relief and if the issue presented is purely academic. Yacobellis v. Bellingham, 55 Wn. App. 706, 709, 780 P.2d 272 (1989), review denied, 114 Wn.2d 1002 (1990). While appellate courts normally will not decide a moot issue, the court may consider the issue if it is one of substantial public importance and is capable of evading review. DeFunis v. Odegaard, 84 Wn.2d 617, 627-28, 529 P.2d 438 (1974).

See also, In re Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986)

“As a general rule, this court will dismiss an appeal if it presents moot

issues. Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).”

The allegation regarding the ability of Robinson to pay now or in the future should be remanded to the trial court to allow the determination to be made with regard to the ability to pay. If it is determined that Robinson does not have the ability to pay these obligations now or in the future they should be stricken. It in fact the court is able to determine that Robinson has now or will have in the future the ability to pay then there needs to be a record made of that ability and thereafter these costs and assessments may be left in the Judgment and Sentence.

Division II of this court in State v. Bertrand, 165 Wn.App. 393, 405-6, 267 P.3d 511 (Wash.App. Div. 2 2011) determined regarding this issue the following;

Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether "the trial court judge took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs under the clearly erroneous standard. Baldwin, 63 Wash.App. at 312, 818 P.2d 1116, 837 P.2d 646. The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding number

2.5 that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

We next address whether Bertrand's challenge to the imposition of LFOs is ripe for our review. Baldwin holds that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." Baldwin, 63 Wash.App. at 310, 818 P.2d 1116, 837 P.2d 646 (citing State v. Curry, 62 Wash.App. 676, 680, 814 P.2d 1252 (1991)) (emphasis added). The Baldwin court further noted:

The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time. Baldwin, 63 Wash.App. at 310-11, 818 P.2d 1116, 837 P.2d 646 (emphasis added) (footnote omitted).

Although the trial court ordered Bertrand to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding 2.5 forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

We affirm Bertrand's enhanced sentence and the trial court's imposition of LFOs. We reverse the trial court's finding that Bertrand has the present or future ability to pay LFOs and remand to the trial court to strike finding number 2.5 from the judgment and sentence.

[16]

^[16] We further note that, after the trial court on remand strikes its finding that Bertrand has the present or future ability to pay her LFOs, before the

State can collect LFOs from Bertrand, there must be a determination that she has the ability to pay these LFOs, taking into account her resources and the nature of the financial burden on her. See Baldwin, 63 Wash.App. at 312, 818 P.2d 1116, 837 P.2d 646; RCW 9.94A.753; former RCW 9.94A.760 (2008); former RCW 10.01.160 (2008); RCW 10.46.190. (Emphasis mine, some footnotes omitted.)

This court has on more than one occasion addressed similar issues.

On those occasions this court rather than merely striking the finding of future ability to pay and leaving it for another day, has remanded the matter to the trial court to allow the court to make the determination regarding ability to pay.

Remand with an order to the trial court that it shall address this issue on the record is a far better use of the scarce resources of the agencies and departments involved. In footnote 16, in Bertrand, supra, Division II left this for later determination. This court need not leave this pending.

Taking no action other than striking the unsupported findings would force the parties or a party to attempt to enforce the assessed costs at some later date by a mechanism that is not set forth in Bertrand.

There will be the need to hold some type of hearing to determine whether the defendant/appellant has the ability at that time and in the future to pay the costs. Bertrand clearly allows the costs and assessments

to remain in the Judgment and Sentence the only thing which was removed was the actual finding of the present of future ability to pay those obligations because the trial court had not inquired on the record or made some statement indicating inquiry was made of the defendant regarding his ability to pay. It could be as simple as the court determining that because he has the potential to get a paying job in prison that this income could be used to pay some or eventually all of the assessed costs.

It would seem a great waste to leave this determination to some future hearing which will have to be initiated by some department of agency of the State or the defendant. All the while interest shall be accruing on the outstanding balance. To allow this question to go undecided, a question which can easily be answered with a short hearing in the trial court would be an enormous waste of scarce resources.

This court should remand this appeal to resolve this issue. If the policy and practice of Division II is adopted the fact is there is a probability that appellant can and will try to appeal the future act of the trial court when the determination is made regarding ability to pay.

State v. Raines, 83 Wn. App. 312, 922 P.2d 100 (1996)
(superseded by statute on other grounds, Laws of 1999, ch 196, § 5 as recognized in State v. Jones, 118 Wash.App. 199, 76 P.3d 258 (2003)),
indicates this court can consider an allegation such this there the court

ruled the appeal was not moot because the actions of the trial court could “affect future sentencing decisions should Raines reoffend. Id at 315. While this court does have the ability to address an allegation which is technically moot this would not appear to be necessary in this case.

V. CONCLUSION

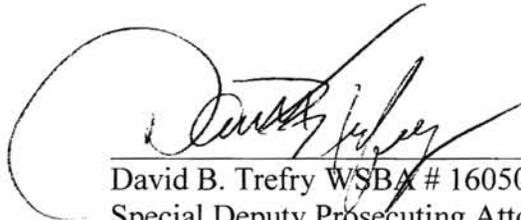
Based on the foregoing facts and authorities, this court should remand this matter to the trial court for clarification with regard to Robinson’s ability to pay is financial obligations. The other matters should be dismissed.

Quoting from Williams: The trial judge's conclusion that the testimony of the prior rape was not unduly prejudicial is supported by this record. The trial court based its ruling on ER 404(b). But its findings easily support admission of the evidence under RCW 10.58.090 also. The court found that the prior bad acts were very similar to the acts charged, the current acts occurred only around a year (48 months) after Mr. Williams (Robinson) was released from custody, and the prior conviction was necessary to help rebut the defense of consent. The trial judge did not abuse his discretion in admitting MS's (SS and TLF's) testimony under either ER 404(b) or RCW 10.58.090. (Williams at 492)

The allegation that the limiting instruction was improper is invalid because the instruction given was the exact instruction requested by Robinson at trial.

Because there was no other error other than the failure of the court to determine the defendant's ability to pay his financial obligations, there is no and can be no "cumulative" error.

Respectfully submitted this 9th day of May 2012

A handwritten signature in black ink, appearing to read "David B. Trefry", is written over a horizontal line. The signature is stylized with a large loop on the left side.

David B. Trefry WSBA # 16050
Special Deputy Prosecuting Attorney
Yakima County Prosecutors Office.
P.O. Box 4846, Spokane, WA 99220
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APPENDIX A

FILED

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EX OFFICIO CLERK
SUPERIOR COURT
YAKIMA, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

NO. 09-1-00982-7

vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: RCW 10.58.090 AND ER 404(B)

RANDY GENE ROBINSON
DOB: 4/6/1970

Defendant.

This matter having come on regularly for hearing before the Honorable James Lust, Judge of the above-entitled Court; the Plaintiff State of Washington appearing by and through Patricia D. Powers, Deputy Prosecuting Attorney, and the Defendant appearing personally and with his attorney, Paul Kelley; the Court having reviewed the record and files herein, and having granted the State's Motion for Reconsideration of the Court's denial of the State's Motion to Admit Evidence Pursuant to RCW 10.58.090 and ER 404(b), and having considered the Plaintiff's offer of proof as well as the argument and authority provided by counsel, does now, therefore make and enter the following:

I.
FINDINGS OF FACT

1. The State gave requisite notice of intent to offer evidence pursuant to RCW 10.58.090 and ER 404(b).
2. The State provided offers of proof as to the anticipated testimony of SS and TLF.

ORIGINAL

3. The Defendant elected to proceed with a consent defense in this proceeding.

As to SS:

4. SS was the victim of Rape 1 by the Defendant on or about August 5, 1991.

5. SS was asleep during the night when the Defendant unlawfully entered through a bathroom window and committed an act of sexual intercourse by forcible compulsion.

6. The Defendant was armed with a knife which he threatened the victim with.

7. SS's date of birth is September 3, 1961 and she was twenty-nine years old. The Defendant's date of birth is April 6, 1970 and he was approximately ten years younger than the victim.

As to similarity of the prior acts to the acts charged:

8. The rape of SS is similar to the allegations of rape of the current victim, in that SS was asleep when the Defendant unlawfully entered her home and committed acts of sexual intercourse by forcible compulsion.

9. The rape of SS is similar to the allegations of rape of the current victim, in that there was a significant age difference between the victim and the Defendant.

As to TLF:

10. TLF was the victim of Rape 1 by the Defendant, occurring on or about September 1, 1991.

11. TLF was asleep during the night when the Defendant unlawfully entered her home and committed an act of sexual intercourse by forcible compulsion.

12. The Defendant had a nylon stocking over his head, covering his face.

13. TLF's date of birth is March 12, 1960 and she was thirty one years old at the time of the rape. The Defendant's date of birth is April 6, 1970 and he was approximately eleven years younger than the victim.

As to similarity of the prior acts to the acts charged:

14. The rape of TLF is similar to the allegations of rape of the current victim, in that TLF was asleep when the Defendant unlawfully entered her home and committed acts of sexual intercourse by forcible compulsion.

15. The rape of TLF is similar to the allegations of rape of the current victim, in that the Defendant had a nylon stocking covering his head and face.

16. The rape of TLF is similar to the allegations of rape of the current victim, in that there was a significant age difference of between the victim and the Defendant.

As to the closeness in time of the prior acts to the acts charged:

17. The Defendant was incarcerated in prison until approximately 2005, based upon the Judgments and Sentences entered by the Court for prior rapes in Yakima County cause number 91-1-01354-9 and 92-1-01707-1.

As to frequency of the prior acts:

18. The defendant committed the first two rapes within less than one month . He was out of prison for approximately 48 months until the rape in the instant matter.

As to the presence or lack of intervening circumstances:

19. Incarceration was an intervening circumstance between the first two rapes and the rape before the Court.

As to the necessity of the evidence beyond the testimonies offered at trial:

20. In light of the Defendant's consent defense, prior acts are necessary to establish forcible compulsion, rebut consent defense and establish common scheme or plan.

As to whether the prior acts were criminal convictions:

21. The Defendant was convicted of both prior rapes.

As to whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,

22. The probative value of the testimony of prior victims as to factors presented in the offer of proof substantially outweighs any prejudice based upon the Defendant's claim of consent to the current rape.

Based upon the foregoing FINDINGS OF FACT, the Court now makes and enters the following

II.

CONCLUSIONS OF LAW

1. The Defendant was convicted of two prior rapes, under Yakima County cause numbers 91-1-01354-9 and 92-1-01707-1 and establishing the rapes of TLF and SS.
2. The acts involving both SS and TLF are clearly similar to the acts charged involving the victim in the current matter.
3. These rapes occurred close in time to each other.
4. The imprisonment of the Defendant removed him from the community for a period of years.
5. The Defendant's acts were on-going and occurred on multiple occasions.
6. Incarceration was an intervening circumstance between the first two rapes and the third rape.

7. This evidence is essential to establish forcible compulsion and rebut consent defense as well as to establish common scheme or plan.
8. The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by any potential for undue delay, waste of time or needless presentation of cumulative evidence.

Based upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW IT IS ORDERED:

1. SS may testify as to her rape, committed by the Defendant
2. TLF may testify as to her rape, committed by the Defendant.
3. The proffered evidence is admissible pursuant to RCW 10.58.090 and ER 404(b)

DATED: June 2, 2011


HONORABLE JAMES LUST, JUDGE

Presented by:


PATRICIA D. POWERS
Deputy Prosecuting Attorney
Washington State Bar Number 6825

Approved as to form, copy received:


PAUL KELLEY
Attorney for Defendant
Washington State Bar No. 23068

*Objections
Noted*

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FILED

MAY 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

The State of Washington,
Respondent,

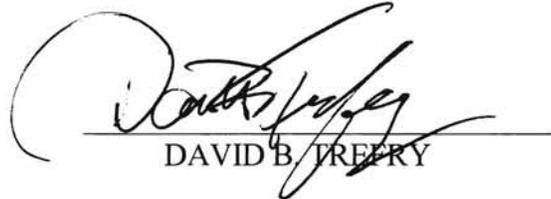
NO. 29959-7-III
DECLARATION OF SERVICE

RANDY GENE ROBINSON,
Appellant

I, David B. Trefry state that on May 9, 2012, I emailed, by agreement of the parties a copy of the Respondent's Breift, to Mrs. Susan Gasch, Gasch Law Office , gachlaw@msn.com and mailed by first class mail to Randy Gene Robinson (#952090) Washington State Penitentiary 1313 North 13th Avenue Walla Walla WA 99362

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2012 at Spokane, Washington.



DAVID B. TREFRY

1

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