

NO. 65157-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

---

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO VARGAS,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Larry E. McKeeman, Judge

---

---

BRIEF OF APPELLANT

2010 AUG -9 PM 4:17

CLERK OF COURT  
COURT OF APPEALS  
DIVISION ONE  
1000 4TH AVENUE  
SEATTLE, WA 98101

2

JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

|  | Page |
|--|------|
| A. <u>ASSIGNMENTS OF ERROR</u> .....   | 1    |
| <u>Issues Pertaining to Assignments of Error</u> .....   | 1    |
| B. <u>STATEMENT OF THE CASE</u> .....  | 1    |
| 1. <u>Procedural Facts</u> .....   | 1    |
| 2. <u>Substantive Facts</u> .....  | 2    |
| C. <u>ARGUMENT</u> .....   | 7    |
| 1. THE COURT ERRED IN FAILING TO GIVE A<br>LIMITING INSTRUCTION FOR THE ER 404(b)<br>EVIDENCE..... | 7    |
| 2. DEFENSE COUNSEL WAS INEFFECTIVE IN<br>FAILING TO REQUEST A PROPER LIMITING<br>INSTRUCTION.....  | 11   |
| D. <u>CONCLUSION</u> .....   | 14   |

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP,  
110 Wn. App. 412, 40 P.3d 1206 (2002) . . . . . 7

State v. Aho,  
137 Wn.2d 736, 975 P.2d 512 (1999) . . . . .12

State v. Bacotgarcia,  
59 Wn. App. 815, 801 P.2d 993 (1990) . . . . . 7, 11

State v. Barragan,  
102 Wn. App. 754, 9 P.3d 942 (2000) . . . . . 13

State v. Brown,  
113 Wn.2d 520, 782 P.2d 1013 (1989) . . . . .9

State v. Burkins,  
94 Wn. App. 677, 973 P.2d 15 (1999) . . . . . 8

State v. Donald,  
68 Wn. App. 543, 844 P.2d 447 (1993) . . . . . 8, 12

State v. Foxhoven,  
161 Wn.2d 168, 163 P.3d 786 (2007) . . . . .9

State v. Goebel,  
36 Wn.2d 367, 218 P.2d 300 (1950) . . . . .9

State v. Grisby,  
97 Wn.2d 493, 647 P.2d 6 (1982) . . . . .14

State v. Griswold,  
98 Wn. App. 817, 991 P.2d 657 (2000) abrogated on other grounds,  
State v. DeVincentis, 150 Wn.2d 11, 18 n.2, 21, 74 P.3d 119 (2003) . . . . 8

State v. Nichols,  
161 Wn.2d 1, 162 P.3d 1122 (2007) . . . . .11

State v. Ortega,  
134 Wn. App. 617, 142 P.3d 175 (2006) ..... 12

State v. Roswell,  
165 Wn.2d 186, 196 P.3d 705 (2008) .....13

State v. Russell,  
154 Wn. App. 775, 225 P.3d 478 (2010) ..... 8, 9, 10

State v. Saltarelli,  
98 Wn.2d 358, 655 P.2d 697 (1982) .....7, 8

State v. Thomas,  
109 Wn.2d 222, 743 P. 2d 816 (1987).....11, 12

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 105. ....12

ER 404(b) ..... 7, 8, 9, 10, 13

Strickland v. Washington,  
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) .....11

U.S. Const., amend. VI. .... 11

Wash. Const. art. I, § 22. ....11

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give a limiting instruction for evidence admitted under ER 404(b).
2. Appellant received ineffective assistance of counsel.
3. The court erred in denying appellant's motions for a new trial and for reconsideration. RP 721, 731.

Issues Pertaining to Assignments of Error

1. Over defense counsel's objection, the court admitted testimony by the complaining witnesses regarding other uncharged acts allegedly committed against them. Did the court commit reversible error in failing to fulfill its obligation to give a limiting instruction for evidence of prior misconduct admitted under ER 404(b), where such instruction was needed to prevent the jury from considering appellant's prior misconduct as evidence of his propensity to commit crime?

2. Was defense counsel ineffective in failing to request a proper limiting instruction to guide the jury's consideration of evidence of prior misconduct?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Gilberto Vargas with one count of first-degree child molestation and one count of

second-degree child molestation. CP 125. The jury found Vargas guilty of second-degree child molestation only. CP 75-76. The court denied Vargas' motion for a new trial based on the failure to give a limiting instruction regarding evidence admitted under ER 404(b). RP 721. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

Vargas was like a father to his cousin's two children, A.V.S. and R.G.S. RP 396-97, 427. The pair frequently spent weekends with Vargas' family, which included Vargas, his longtime domestic partner Arcelia, Arcelia's three adult children Carla, Eddie, and Charisma, as well as the couple's young daughter Stefanie. RP 331-32, 480-81, 587-88. This permitted A.V.S. and R.G.S. to spend time with their cousin Stefanie and gave their single mother a break. RP 221, 396. Vargas also frequently helped the girls' mother, bringing baby clothes for her other child, co-signing on a lease, and helping her move. RP 428-29. The girls considered him their favorite uncle. RP 156-57.

After the last day of school on June 19, 2009, A.V.S. and R.G.S. went to Vargas' home to spend a week with their cousin. RP 154-55. Vargas picked them up around 2 or 3 p.m. and took all three girls to a children's museum in Everett. RP 164, 274, 335, 399-400. While at the museum, the children got wet playing in the rain. RP 177-78. R.G.S.

testified Vargas made the girls take off their clothes, put them in the trunk, and ride home in their underwear so they would not get the car seats wet. RP 179-80. Neither A.V.S. nor Stefanie recalled this occurring. RP 291, 338.

The three girls fell asleep on the living room floor watching movies that night. RP 189, 292-93. The next morning, R.G.S. claimed, Vargas came downstairs and lay down next to her. RP 192. She testified he took her left leg and put it between his, and then rubbed her buttocks and vagina, commenting that she shaves. RP 193-95. She claimed he tried to touch her breasts, but was prevented by her bra. RP 195. She claimed Vargas then heard a noise and went back upstairs. RP 196. She claimed she said nothing, but lay there pretending to sleep. RP 197.

She testified Vargas came back after several minutes and lay next to A.V.S., where she could neither see nor hear what was happening, although in a prior statement she claimed to have heard Vargas say "Oh, yours isn't shaved." RP 199-201. According to R.G.S., when Stefanie woke up, Vargas quickly jumped onto the couch and began to watch television. RP 201. R.G.S. testified this occurred between 8:30 and 9:00 a.m. RP 237.

R.G.S. also testified Vargas previously made excuses, such as a bra being too tight, to touch her breasts, placing his hands briefly under her

clothes. RP 159-161. Since she thought of him as a father, she did not think anything of it at the time. RP 161.

A.V.S.'s testimony largely reflected that of her sister. She also mentioned previous touching of her bra and breasts. RP 283-84. She testified Vargas touched her buttocks and breasts during the last night she spent at his home, but could not place the time more specifically than that. RP 299. She could not remember who else was home, and testified she did not hear him say anything. RP 305. She guessed she was lying on her left side, but did not know. RP 305. She did not recall what happened next. RP 309.

A.V.S. also recalled a separate incident in which Vargas was shaving her legs, and he pulled out the front of her underpants, looked inside, and told her she'd have to shave there too, but he was not going to do it for her. RP 285-88. The jury acquitted Vargas of molesting A.V.S. CP 75.

Stefanie also recalled her father coming downstairs and lying with the girls that morning, at first next to R.G.S. and then next to A.V.S. RP 347. She testified her older step-sister Carla was also in the living room with them at the time. RP 344. Carla testified she watched television with Vargas upstairs, beginning at about 7:40 when she first awoke. RP 498. Mid-way through the show, she went downstairs to wake the girls. RP 502. After the show ended, she went upstairs and to her room, and then

downstairs again to wake the girls. RP 503. They were awake and starting to watch a movie, and Stefanie's mother Arcelia was downstairs doing laundry. RP 502-03.

R.G.S. denied any altercation with Stefanie that day, but Stefanie explained that her mother made her apologize after she rudely told R.G.S. and A.V.S. that the following day would be father's day, not uncle's day.<sup>1</sup> RP 109-10. Stefanie explained she wanted her father to herself for father's day, but her mother said she might have hurt the girls' feelings and made her apologize. RP 364-65. After this comment, R.G.S. and A.V.S. suddenly began talking about their (previously unmentioned) plans to go home for a father's day party with their grandfather the next day. RP 369. R.G.S. admitted she had previously said Stefanie was spoiled and that day Stefanie told them she was moving with her parents to a new house. RP 227.

Initially, R.G.S. told no one what had happened. She claimed she asked A.V.S. what happened to her, but did not tell A.V.S. about her own encounter. RP 205. She claimed she wanted to tell Stefanie's adult sister Carla, but could not find her. RP 247. By contrast, Carla and other family members testified Carla was the adult in charge most of the day while Vargas and Arcelia were out grocery shopping. RP 368, 507.

---

<sup>1</sup> R.G.S. and A.V.S. saw their father only occasionally and did not know where he lived. RP 227.

By her own admission, R.G.S. waited until late afternoon or evening before sending an instant message asking her mother to come pick them up. RP 208. R.G.S.'s mother testified it was about 8:30 p.m. RP 401. When her mother asked why the girls wanted to be picked up early, R.G.S. told her something bad had happened. RP 252. At the time, R.G.S. refused to tell her what was wrong because Stefanie was in the room. RP 407.

It was R.G.S.'s mother who first brought up the topic of molestation. RP 252. When R.G.S. said something bad happened, R.G.S.'s mother immediately asked R.G.S. if Vargas had raped or touched her. RP 252. The girls' mother frequently talked to them about the danger of pedophiles. RP 434-36. They also frequently watched television programs such as "CSI" that dealt with child molestation and kidnapping. RP 436-37. Their mother had also told them she was molested as a child by a family friend. RP 437.

R.G.S.'s mother called Vargas to make an excuse to pick the girls up early. RP 401. Vargas suggested she wait until morning since it was already so late. RP 426. Around 9 p.m., she called the girls on Stefanie's cell phone to tell them she was outside to pick them up. RP 403. She claimed both girls started bawling when they saw her and told her the whole story in the car. RP 403, 407. She took both girls to see a nurse who noted that R.G.S.'s vagina was shaved, but found no signs of trauma. RP 387.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE.

Over defense objection, the trial court admitted evidence of uncharged prior acts by Vargas against R.G.S. and A.V.S. under the “lustful disposition” exception to ER 404(b)’s ban on propensity evidence. RP 9, 107. Both girls testified he made excuses to touch their breasts, placing his hands under their clothing. RP 159-61, 283-84. Additionally, A.V.S. testified that Vargas shaved her legs and while doing so, pulled out her underwear, looked at her vagina, and told her she would need to shave there too, but he would not do it for her. RP 285-88. This evidence should not have been admitted without instructing the jury as to its limited purpose.

Regardless of admissibility, in no case may evidence of other bad acts “be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). “Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.” Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002 ).

The purpose of a limiting instruction is to prevent the jury from basing its verdict on the “once a criminal, always a criminal” reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362. A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). “Once the trial court strikes the balance in favor of admission and states tenable grounds, the court should give limiting instructions to direct the jury to disregard the propensity aspect of the evidence” and focus solely on its permissible evidentiary effect. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 18 n.2, 21, 74 P.3d 119 (2003).

While defense counsel did not request a limiting instruction, the court nonetheless erred in failing to give an instruction, sua sponte. State v.

Russell, 154 Wn. App. 775, 777, 225 P.3d 478 (2010), review granted, \_\_\_ Wn.2d \_\_\_ (July 6, 2010). Washington courts have long placed the duty on the trial court, independent of any request by the defense, to give a limiting instruction when evidence of prior bad acts is admitted under ER 404(b). See, e.g., State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989) (“[T]he trial court should explain to the jury the purpose for which the evidence is admitted and should give a cautionary instruction that the evidence is to be considered for no other purpose or purposes.”); State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (“[I]t should also be the court’s duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.”) The Supreme Court recently reiterated that “a limiting instruction *must be given* to the jury” if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added).

In Russell, Division Two of this Court reversed a conviction under circumstances nearly identical to the case at hand. 154 Wn. App. at 777. Russell was convicted of first-degree rape of a child. Id. Evidence of prior sexual abuse against the same child was admitted under ER 404(b) to show Russell’s “lustful disposition” toward the child. Russell, 154 Wn. App. at 781-82. Citing Foxhoven, among other authorities, this Court explained that when ER 404(b) evidence is admitted, a limiting instruction must be given.

Russell, 154 Wn. App. at 784. Russell did not request a limiting instruction, but the court concluded the issue was preserved for appeal because Russell objected to the evidence as overly prejudicial. Id. at 783. The court concluded the failure to give the instruction had particular impact because the prosecutor drew attention to the prior crimes in closing argument and because the jury was instructed it must consider all the evidence. Id. at 786. Despite Russell's failure to request it, the court held the trial court abused its discretion in failing to give a limiting instruction and reversed Russell's conviction. Id.

As in Russell, evidence of prior sexual misconduct against the same children was admitted to show lustful disposition in Vargas' case. RP 107. As in Russell, that evidence was specifically relied on during the State's closing argument. RP 650, 652. This Court should reach the same conclusion it did in Russell: admission of ER 404(b) evidence without a limiting instruction requires reversal.

The court erred in failing to fulfill its obligation to give a limiting instruction. The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of other misconduct against the same girls as evidence of Vargas' propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad

acts in this manner. Bacotgarcia, 59 Wn. App. at 822. Vargas' conviction should be reversed.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A PROPER LIMITING INSTRUCTION.

If this Court finds defense counsel waived the instructional error by failing to request the instruction, then counsel's failure constitutes ineffective assistance of counsel. Every criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been

different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Vargas' other criminal acts as evidence of his propensity to commit crime. There was no legitimate reason not to propose proper limiting instructions given the extremely prejudicial nature of evidence of prior sexual misconduct against the same victims. Allowing the jury to convict Vargas on the basis of bad character did nothing to advance his defense.

Vargas had the right to limiting instructions on this evidence. State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006); Donald, 68 Wn. App. 543; ER 105. Trial counsel submitted a declaration for purposes of the new trial motion that there was no tactical reason for the failure to request a limiting instruction. CP 50. She simply did not think of it. CP 50. Vargas was prejudiced by counsel's failing because the court noted on the record that if a limiting instruction had been requested, it would have been clear error not to give it. RP 719.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The “reemphasis” theory is inapplicable here. Evidence that Vargas committed other acts of sexual misconduct against the same girls in the past was not the type of evidence the jury could be expected to forget or naturally minimize. This evidence formed a central piece of the State’s case and the prosecutor emphasized it in closing argument. RP 650-51. This is not a case where a limiting instruction raised the specter of “reminding” the jury of briefly referenced evidence.

Defense counsel unsuccessfully objected to the evidence before trial under ER 404(b). RP 9. Having lost the battle to prevent jury from hearing this evidence, it was incumbent upon counsel to prevent the jury from using that evidence for an improper purpose.

Prejudice created by evidence of prior bad acts is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). “[J]urors are presumed to follow instructions.”

State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). To presume otherwise is to “inevitably conclude that a trial by jury is a farce.” Id. (citation omitted). In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to propose a proper limiting instruction.

D. CONCLUSION

Because the jury was permitted to consider evidence of past misconduct as evidence of a general propensity to commit crime, Vargas’ conviction should be reversed.

DATED this 9<sup>th</sup> day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT  
WSBA No. 38068  
Office ID No. 91051

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

|                     |   |                   |
|---------------------|---|-------------------|
| STATE OF WASHINGTON | ) |                   |
|                     | ) |                   |
| Respondent,         | ) |                   |
|                     | ) |                   |
| v.                  | ) | COA NO. 65157-9-I |
|                     | ) |                   |
| GILBERTO VARGAS,    | ) |                   |
|                     | ) |                   |
| Appellant.          | ) |                   |

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9<sup>TH</sup> DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] GILBERTO VARGAS  
DOC NO. 337678  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

FILED  
COURT OF APPEALS  
2010 AUG -9 PM 4:17

**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF AUGUST 2010.

x *Patrick Mayovsky*