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NO. 70768-0-1

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

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STATE OF WASHINGTON

Respondent

v.

TIMOTHY A. LUDWIG,

Appellant

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BRIEF OF RESPONDENT

---

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## **I. ISSUES**

1. Is the propriety of a limiting instruction is an issue of manifest constitutional error that may be raised for the first time on appeal?

2. Did the limiting instruction prejudice the defendant?

3. Is the defendant entitled to a new trial on the basis of ineffective assistance of counsel because defense counsel did not object to the limiting instruction proposed by the State?

4. Should the case be remanded to the trial court to amend the judgment and sentence to impose a combined incarceration and community custody term that does not exceed the statutory maximum?

## **II. STATEMENT OF THE CASE**

Timothy Ludwig, the defendant, is S.'s, biological father. S. was born June 14, 1994. After she was born S. moved every few years, from Washington, to Florida, to Texas, to Alaska, and then back to Washington. At 16 she moved to Snohomish Washington with her father, her step-mother, and her step-sister, L. She lived there with her family, including the defendant, from June 2009 to May 2012. 2 RP 51-58, 76.

When S. was 13 the family lived in Vancouver, Washington. One night while S. took a shower the defendant walked in the bathroom, opened the shower curtain and watched her shower. He then took the soap and began washing her entire body, including her private parts. S. was uncomfortable and asked the defendant why he did that. The defendant told her that it was normal and that it was alright because she was his daughter. 2 RP 59-60.

After that the defendant regularly got in the shower with S. The defendant had S. wash him, including his penis and testicles. The defendant got an erection and ejaculated while S. washed him. When she was done the defendant washed S., including her genitalia. The defendant never showered with S. unless he was alone in the house with her. 2 RP 62-63.

The defendant continued to have sexual contact with S. in the shower when they moved to Snohomish when S. was 16. The first time it happened S. was finishing up washing her hair and was about to get out of the shower when the defendant got in the shower with her. He told her to stay. The defendant directed S. to wash his back and then the rest of his body. When she protested the defendant told S. that there was nothing to be ashamed of because he was her father and there was nothing wrong with it.

The defendant then had S. "wash" his penis, effectively masturbating him while he got an erection. The defendant had S. masturbate him at least one time per week while they lived in the Snohomish house. 2 RP 63, 66-68, 71.

On one occasion when the defendant was in the shower with S. in the Snohomish house the defendant reached down and rubbed his finger between S.'s vaginal lips. The defendant hurt S. so she moved away quickly before he inserted his finger fully into her vaginal vault. On one other occasion the defendant touched S.'s breast and clitoris while she masturbated him. 2 RP 70-71, 104.

The defendant also had sexual contact with S. in the living room and in the defendant's bedroom. On several occasions the defendant had S. use a pink rubber device with a hole in one end to assist in masturbating him to the point of ejaculation. The first time the defendant was in his bedroom when he asked S. to do something for him. She agreed, not knowing what he meant. The defendant pulled the device out, and instructed her on how to use it. Thereafter the defendant kept the device on a nightstand by his bed. 2 RP 68, 72-74.

Occasionally the defendant asked S. to suck on his penis. She always refused to do so. Sometimes the defendant would plead with her. Other times he became angry and would hit her. 2 RP 69.

The defendant used other methods to “discipline” his children as well. On one occasion when the family lived in Alaska S. and her step siblings got into trouble. S.’s step-mother was not home. At dinner time the defendant directed S. and her step siblings L. and D. to strip naked and sit in the living room while they ate their dinner while the defendant stood over them and watched. 2 RP 76.

The defendant also had sexual contact with L. When the family lived in Alaska L. was between the ages of 11 and 13. L.’s mother worked nights. The defendant had L. sleep with him in his bed almost every night. He would touch her breasts and vagina over her clothing. The defendant also watched L. while she showered, usually once or twice a week. When L. objected the defendant told her that he was her dad and that he had “a right” to do that. 2 RP 113-116.

On one occasion while they were still in Alaska the defendant, L. and D. were on a driving trip. L. was about 12 or 13

at the time. During the trip they played a game where they wrote a time on the outside of their hand, and a dare on the inside of the hand. If one of the players looked at the time, that player had to perform the dare the other player had recorded on his hand. The defendant bribed L. into looking at the time on her hand. The “dare” the defendant wrote on his hand was to pee in L.’s mouth. When L. lost the game the defendant stopped, directed her out of the car and behind a tree, and had her kneel while performing fellatio on him. 2 RP 118-119.

The last time the defendant had sexual contact with S. was in May 2012. On that night the defendant had S. ejaculate him in his bedroom. By that time S. was so anxious about what would happen when she returned home from school that she began experiencing stomach pain. One of S.’s friends encouraged S. to talk to a counselor at school, and walked S. to the office to do so. Once at the office S. reported to a school counselor and a police officer the sexual abuse she experienced at the defendant’s hands. 2 RP 77-81, 139-140, 226-228.

The police conducted an investigation that included serving a search warrant at the defendant’s home. There police found the pink rubber device in the defendant’s bedroom where S. described

the defendant had kept it. DNA testing revealed evidence of both the defendant and S.'s DNA on the device. Police spoke with the defendant who admitted using the device, but denied sexual contact with S. The defendant said there was no reason S. would have touched it, and agreed that it had not been moved from where he kept it. He could not explain why S. would say that he had sexually molested her. 2 RP 72-74, 149-152, 173-178, 182-183, 246-254.

The defendant was tried on a third amended information charging him with one count of incest first degree and three counts of incest second degree for acts committed against S. between June 2009 and May 3, 2012. 1 CP 60-61. A jury found the defendant guilty of all four counts. 1 CP 7, 49-52.

### **III. ARGUMENT**

#### **A. WHETHER AN INSTRUCTION PROPERLY LIMITS THE CONSIDERATION OF EVIDENCE DOES NOT INVOLVE AN ISSUE OF MANIFEST CONSTITUTIONAL ERROR THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.**

“The general rule is appellate courts will not consider issues raised for the first time on appeal.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy for this position is to encourage efficient use of judicial resources. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “The appellate courts will not

sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Id. , quoting, State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

The defendant challenges instruction number 9 which addressed how the jury should consider evidence "of the defendant's commission of another offense or offenses of sexual misconduct..." 1 CP 49, BOA at 7-12. As he acknowledges the defense did not object to that instruction at trial. BOA at 12.

An exception to the general rule that a court will not consider an issue that has not been preserved for review exists when the issue is a "manifest error affecting a constitutional right." RAP 2.5(a). The defendant must demonstrate (1) that the error is "manifest" and (2) that the error is truly of constitutional dimension. O'Hara, 167 Wn.2d at 98. The court does not presume the alleged error is of constitutional magnitude. Id. To demonstrate the error is manifest the defendant must make a plausible showing that the claimed error "had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935.

The defendant does not even attempt to show why this issue should be considered pursuant to RAP 2.5(a)(3). This Court should

refuse to review the propriety of the instruction given because any alleged error is neither manifest nor constitutional.

In O'Hara the Court discussed instructional errors that did involve constitutional questions and those that did not. The Court had previously found instructional errors met the manifest constitutional error standard where the instruction directed a verdict, shifted the burden of proof to the defendant, failed to define the "beyond a reasonable doubt standard", failed to require a unanimous verdict, or omitted an element of the crime charged. O'Hara, 167 Wn.2d at 100-101. The court noted that each of these errors obviously affected a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant fair trial through a complete verdict. Id. at 103.

In contrast instructional errors that did not meet this standard included failure to instruct on a lesser included offense and failure to define individual terms. Id. In those cases the error did not fall within the scope of RAP 2.5(a) because there were possible justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion. Id.

Here the alleged instructional error does not raise a constitutional question. ER 404(b) defines one improper purpose

for “other crimes, wrongs, or acts” evidence and an undefined number of proper purposes for that evidence. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Under that rule it is improper to admit evidence of other crimes, wrongs, or acts to prove a person’s character and to show that person acted in conformity with that character on a particular occasion. Id. at 420. In other words evidence may not be introduced as circumstantial evidence that the defendant is a “criminal type” in order to prove that he committed the charged offense on a specific occasion. 5 Karl B. Tegland, Washington Practice, Evidence Law and Practice, §410.10.

Instruction number 9, when read as a whole, does not instruct the jury that it may consider evidence of the defendant’s prior sexual misconduct as evidence for the one improper purposes identified in ER 404(b). The first sentence that allows jurors to consider the evidence “for any matter to which it is relevant” is modified by the second sentence. The second sentence specifically precludes jurors from considering the evidence as sufficient to prove he committed the charged offense. Like those instructions that have been found not to constitute manifest constitutional error, the jury could still consider the evidence for any

one of the undefined number of proper purposes that evidence may be admitted under ER 404(b). For that reason, any alleged error is also not “manifest.”

Additionally, recent authority supports the conclusion that the issue here is does not meet the manifest constitutional error standard. The Supreme Court has previously stated that whether the trial court should have given a limiting instruction when ER 404(b) evidence was introduced is not an issue of constitutional magnitude. State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). The Court nonetheless addressed the issue because RAP 2.5(a) does not prohibit it from considering an issue that had not been raised in the trial court, and the Court of Appeals had considered the issue. Id. Notably the Court of Appeals did not conduct an analysis under RAP 2.5(a) before considering the issue. State v. Russell, 154 Wn. App. 775, 225 P.3d 478 (2010), reversed, 171 Wn.2d 118.

If the error of constitutional magnitude standard is not met when no limiting instruction was given then an allegedly erroneous limiting instruction should similarly not meet that standard. The defendant argues that the erroneous instruction does not prohibit the jury from considering the evidence for an improper purpose.

The risk that a jury may consider other acts evidence for an improper purpose is at least as possible where the court did not give a limiting instruction because there the jury is given no direction on how to consider that evidence. Here where the challenged instruction does give the jury some direction on how it should not use the evidence, the defendant's challenge should likewise not be considered manifest constitutional error.

**B. IF THE COURT CONSIDERS THE ISSUE, THE DEFENDANT HAS NOT SHOWN THAT HE WAS PREJUDICED BY THE COURT'S INSTRUCTION ON OTHER OFFENSE EVIDENCE.**

The instruction given was not the standard limiting instruction provided in WPIC 5.30. If the court does review the issue and conclude the instruction given was incorrect, any error in giving the instruction was harmless.

Failure to give a correct limiting instruction is subject to a harmless error analysis. Gresham, 173 Wn.2d at 425. The error is harmless "" unless within reasonable probabilities had the error not occurred the outcome of the trial would have been materially affected."" Id. quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139(1980)). If the instruction was error, it was harmless for three reasons.

First, there is only one improper purpose for which evidence of other crimes, wrongs, or acts may not be used; to establish the defendant's character, and to prove that he acted in conformity with that character on a particular occasion. Gresham, 173 Wn.2d at 421. It is permissible to show the defendant's plan or lustful disposition. ER 404(b), State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 11 (2003). While the instruction here did not limit consideration of the evidence to lustful disposition or common scheme or plan, it did state that evidence of the uncharged sexual misconduct could not be used to conclude the defendant was guilty of the charged offenses. The instruction therefore did preclude jurors for considering the evidence for the one purpose it may not be used for.

Second, the prosecutor argued to the jury that the evidence could not be used for an improper propensity evidence. Instead he argued the jury should use the evidence for a proper purpose. The prosecutor argued:

You heard [L.] say she had been groomed in the same way years before [S.]. And the instruction with respect to I do not want you to consider that, because that happened with [L.] doesn't mean he's guilty, what it means is it shows that the defendant in his conduct with [L.] had a design. He had a design to molest and sexually assault [S.]. And the similarities that you

heard in the testimony, the showering, the being made to watch the defendant masturbate, those are similar things years apart that corroborate what that woman told you on the witness stand.

3RP 293.

Third, had the jury been given an instruction consistent with WPIC 5.30, it is not likely that the outcome would have been different. The State offered evidence of uncharged instances of sexual contact with S. for the purpose of showing lustful disposition. It offered evidence of sexual contact with L. to show common scheme or plan to groom his daughters for sexual contact, lack of mistake or accident, and motive. 3 CP – (Sub 41, pages 11-15); 1 RP 32-37. The court admitted the evidence to show common scheme or plan and lustful disposition. 1 RP 41-42. Thus a limiting instruction different from the one given might have read:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's commission of another offense or offenses of sexual misconduct and may be considered by you only for the purpose of lustful disposition or common scheme or plan. You may not consider it for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation.

The defendant does not argue on appeal that the court erred when it admitted the evidence. The jury would still have heard detailed testimony from both S. and L. recounting multiple

instances where the defendant exposed the girls to nudity and engaged the girls in progressively more intimate sexual contact while assuring each girl that contact was normal between a father and daughter. Had jurors been told that they were to limit consideration of the uncharged acts of sexual contact only for the purpose of lustful disposition or common scheme or plan, they would still likely have found the defendant guilty of the charge.

Assuming for the sake of argument that the instruction was erroneous, the outcome of the trial was not materially affected by it. Should the Court conclude the error should be reviewed despite the defendant's failure to preserve the issue, it should nonetheless conclude the error was harmless, and affirm the defendant's convictions.

### **C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

The defense did not object to any of the instructions given by the court, including the limiting instruction number 9. 3 RP 277. The defendant contends his attorney rendered ineffective assistance of counsel when he did not object to the limiting instruction.

A defendant in a criminal case has a Sixth Amendment right to effective assistance of counsel. In re Stenson, 142 Wn.2d 710, 757, 16 P.3d 1 (2001). To demonstrate ineffective assistance of counsel the petitioner must show that (1) defense counsel's performance was deficient, i.e. it fell below an objective standard of reasonableness based on a consideration of all of the circumstances and (2) the petitioner suffered prejudice due to counsel's deficient performance, i.e. there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that both prongs of the inquiry have been met to establish that he is entitled to relief on an ineffective assistance of counsel claim. Id. at 697.

The Court strongly presumes that counsel rendered adequate assistance, and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. Whether counsel acted reasonably is evaluated in from counsel's

perspective at the time of the alleged error and in light of all the circumstances. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). The Court's review is highly deferential when judging counsel's representation because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) quoting Strickland at 689.

The defendant argues counsel's performance was deficient because the instruction was based on a statute that had been invalidated before trial. Counsel performs deficiently when he fails to research or apply relevant case law that exists at the time of trial. State v. Kylo, 166 Wn.2d 856, 868-869, 215 P.3d 177 (2009). In Kylo the defense to a second degree assault charge was self-defense. Defense counsel proposed and the court gave an instruction that a person is entitled to act on appearances if that person believes in good faith that he is in actual danger of great bodily harm. Id. at 860. Prior to trial several cases had been

published which held “great bodily harm” should not be used an act on appearance self-defense instruction. Id. at 867-68.

Here the defendant argues his trial attorney performed deficiently because before trial the Court decided Gresham. Gresham held RCW 10.58.090 violated the separation of powers doctrine because it expressly permitted evidence of prior acts of sexual misconduct for a purpose that ER 404(b) expressly prohibited. Gresham, 173 Wn.2d at 428-429. In a companion case the court gave an instruction nearly identical to instruction 9 in this case. State v. Scherner, 153 Wn. App. 621, 639, 225 P.3d 248 (2009), affirmed, Gresham, 173 Wn.2d 405. Scherner had not assigned error to this instruction. Scherner, 153 Wn. App. at 640. The Supreme Court did not discuss the propriety of this instruction. Instead it held that once a defendant has requested an ER 404(b) limiting instruction, even if the instruction proposed is incorrect, the trial court has an obligation to give a correct limiting instruction. Gresham, 173 Wn.2d at 425.

Unlike the instruction at issue in Kyllo defense counsel’s research would not have revealed that the instruction given by the court here was obviously wrong. This Court specifically referenced this instruction when it rejected the claim that the statute relieved

the proponent of the evidence from the requirement that the evidence not be used for an improper purpose. Scherner 153 Wn. App. at 639. That alone might suggest to defense counsel that the instruction was adequate.

Counsel did not perform deficiently when he did not object to the instruction because as discussed above the instruction, when read as a whole, did limit the purpose for which evidence of other sexual misconduct could be considered. The instruction specifically stated “evidence of a prior offense or offenses on its own is not sufficient to prove the defendant guilty of any crime charged in the “Amended Information” and “the defendant is not on trial for any act, conduct, or offense not charged in the Amended Information.” 1 CP 49.

Nor was the defendant prejudiced because counsel did not object to the instruction. The defendant must show that there is a reasonable probability that the results would have been different, but for counsel’s decision not to object to instruction number 9. He argues that had counsel objected (1) the court would have given an appropriate instruction and (2) the jury would likely have reached a different result absent an inference that the defendant “was of a character to commit sexual offenses.” BOA at 14.

As discussed above in section B, even if the jury was given an instruction consistent with the standard limiting instruction the outcome would not likely be different. The evidence was detailed and compelling. Portions of L.'s testimony corroborated S.'s testimony, in particular the description of the defendant punishing the children by making them sit naked while eating dinner and the defendant's assurances that the sexual contact was normal between father and daughter. The instruction prohibited jurors from convicting the defendant on the charged offenses simply because they found the uncharged offenses had been committed. The prosecutor did not argue that jurors should use the evidence for an improper purpose, but instead specifically argued that it should be considered for a proper purpose. Under these circumstances it is not reasonably likely that the results would have been different had counsel objected to the instruction as given by the court.

**D. THE COURT SHOULD REMAND THE CASE TO THE TRIAL COURT TO CORRECT THE JUDGMENT AND SENTENCE.**

The defendant was convicted of First Degree Incest, a class B felony, and three counts of Second Degree Incest, class C felonies. 1 CP 7, 9; RCW 9A.64.020(1)(b),(2)(b). The statutory maximum for count I was 120 months and counts II-IV was 60

months. RCW 9A.20.020(1)(b),(c). He was sentenced to 102 months confinement on count I and 60 months on each count II-IV. In addition to confinement the defendant was sentenced to 36 months community custody on each count. 1 CP 10-11. The total combined sentence exceeded the statutory maximum for each sentence.

Under RCW 9.94A.701(9) the term of community custody must be reduced by the court whenever the standard range term of confinement combined with the term of community custody exceeds the standard range. The judgment and sentence included the direction that “the combined term of community custody and confinement shall not exceed the statutory maximum” 1 CP 11. The Supreme Court has held that notation is not adequate to comply with the law for sentencing occurring after the date RCW 9.94A.701(9) was enacted in 2009. State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). The case should be remanded to the trial court to reduce the term of community custody so that the total sentence does not exceed the statutory maximum for each count.

#### **IV. CONCLUSION**

The defendant has failed to preserve a challenge to the instruction limiting other crimes, wrong, or acts evidence. He is not

entitled to a new trial on the basis that counsel provided ineffective assistance when counsel did not object to the instruction given by the court. The judgment and sentence incorrectly includes a combined term of incarceration and community custody that exceeds the standard range for each sentence. The conviction should be affirmed, and the case remanded to the trial court to correct the judgment and sentence.

Respectfully submitted on February 18, 2014.

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