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Court of Appeals
Division I
State of Washington

NO. 73340-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTIN BURTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

PHILIP SANCHEZ
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Has Burton established a claim of ineffective assistance of counsel where his attorney correctly proposed a limiting instruction related to an uncharged assault against a woman other than the victim where the information about that assault had been placed before the jury?

2. Was Burton's counsel deficient in performance when he strategically decided not to oppose evidence of numerous acts of misconduct because he could use the evidence to his advantage, and in thus not offering a limiting instruction related to that other misconduct evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Martin Burton was charged with assault in the second degree and harassment after choking and threatening to kill his girlfriend, R.W. CP 1-2. At trial, lesser included offenses of assault were offered by Burton and given to the jury for consideration. RP 33-34. Burton was ultimately convicted of second degree assault and harassment as charged. CP 32, 35.

Burton was sentenced to 45 months of confinement and 18 months of community custody. CP 74-78. Burton now seeks to appeal his convictions.

2. SUBSTANTIVE FACTS.

Burton and R.W. had been together for nearly four years but had ended their relationship. Still, they continued to spend time together as they were both homeless and living in Seattle. 4RP 127-34.¹ One day while they were hanging out together in Seattle, Burton demanded R.W. buy him a soda pop. 4RP 142. When she refused, Burton choked her and slammed her head. Id. He then vaginally raped R.W. with his fingers. 4RP 141, 144. Burton told R.W., "You fucking bitch. I want my - - soda pop. I'm thirsty." 4RP 146.

Later, R.W. and Burton began walking to a nearby grocery store. 4RP 147. R.W. tried to run away, but Burton grabbed her hair and throat before slamming her into the ground. 4RP 148. Burton continued to berate R.W. saying, "Bitch, get me my soda pop. Get me my soda pop." Id. Upon entering the store, Burton told R.W. "Bitch, if I go to jail, when I get out I'm going to kill you." 4RP 150. R.W. believed Burton's threat because the night before,

¹ The report of proceedings is referenced as follows: 1RP - 11/10/14; 2RP - 12/17/14; 3RP - 3/10-11/14; 4RP - 3/16-10/15; 5RP - 4/3/15.

R.W. had been raped, choked and beaten by Burton. 2RP 40.

Furthermore, R.W. knew Burton had assaulted her friend Virginia by slamming her on her head in an alley.² 2RP 36; 4RP 114-18.

Before grabbing a soda for Burton, R.W. asked a store employee to call police. 4RP 150-51. Seattle Police Officers Heric and Johnson arrived at the store shortly after receiving a report of a man threatening to kill a woman. 4RP 217. Officer Heric noticed Burton yelling at R.W. with an elevated voice. 4R 105. R.W. had fresh blood on her face, scrapes, cuts and swollen eyes from crying. 4RP 105, 108. Officer Johnson also observed facial bruising. 4RP 218. Burton was agitated, frustrated and interjected when officers attempted to speak to R.W. 4RP 106.

Officers separated the pair and asked R.W. what had happened. 4RP 219. R.W.'s lower lip quivered as she looked at Burton while speaking. Id. R.W. reported that she had been with Burton walking nearby at "like 16 and Roxbury." 4RP 221. Burton asked for soda pop and started hitting, choking, and pushing her. Id. He threatened to kill her if she said anything. 4RP 222. R.W. was treated by medics shortly after speaking to Johnson.

² R.W. later testified, outside the presence of the jury, that Burton had attempted to rape Virginia. 4RP 114-16.

4RP 78-96, 224. Burton was arrested by Heric and taken into custody. 4RP 108.

3. FACTS REGARDING ER 404(b) EVIDENCE.

a. Trial Court's Ruling On The Admissibility Of ER 404(b) Evidence.

During pre-trial motions, the State contended that evidence of Burton's prior sexual and physical abuse of R.W., including her knowledge of Virginia's assault, was relevant to establish whether R.W. reasonably feared that Burton would carry out his threat to kill her pursuant. The State relied on three cases to support its argument: Magers,³ Ragin,⁴ and Barragan.⁵ CP 99-100; 2RP 33-34.

Recognizing that the State was entitled to admit some but not all of the prior misconduct evidence, Burton's counsel did not object to the admissibility of the rape or physical abuse, but counsel did object to the admissibility of the assault involving Virginia.

Defense counsel stated:

Mr. Palmer: See, here's where I think the court can focus sort of a laser light about whether or not this plays into her fear at the time of the offense. She said nothing about this to anybody on the

³ State v. Magers, 164 Wn.2d 174, 181-94, 189 P.3d 126 (2008).

⁴ State v. Ragin, 94 Wn. App. 407, 412, 972 P.2d 519 (1999).

⁵ State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000).

night of the incident. She talked about this during the interview that we had with her in the jail. She didn't say anything to fire personnel, she didn't say anything to the police, she didn't say anything to the QFC people. Multiple people talked to R.W. that night and it's - - her fear is directly related to her being punched and choked by the defendant, but she says nothing about this incident playing a role in her fear on the night of the incident. So I think that's the analysis. It's not probative enough, it's highly prejudicial, it's a different woman, different incident. I would ask the Court not to admit it based on the prejudicial value substantially outweighing the prejudicial effect.

3RP 37, 43.

The trial court determined that the acts alleged between R.W. and Burton were relevant to R.W.'s state of mind and reasonable fear of Burton's threats. Later, after testimony from R.W. outside the presence of the jury, the trial court found R.W.'s knowledge that Virginia had been "roughed up" by Burton was probative of R.W.'s fear.⁶ 4RP 121.

⁶ During pre-trial motions, the trial court reserved ruling on the admissibility of R.W.'s knowledge that Virginia had been assaulted until testimony from R.W. was presented. 2RP 41. In addition to Virginia's assault, R.W. testified that Virginia had been raped by a man named "Archie" and that Burton had attempted to do the same to Virginia. The trial court excluded Virginia's rape. 4RP 122. The prosecutor was apparently leading the witness in attempt to ensure that her testimony would not stray from the assault to the attempted rape.

b. Trial Testimony Of ER 404(b) Evidence.

Following the trial court's ruling, the State attempted to lead

R.W. by asking:

Ms. Maryman: Do you know a woman named Virginia?
R.W.: My street auntie.
Ms. Maryman: And what do you call her?
R.W.: My street aunt - - well, she wasn't really - -
I met her on the street, but she's one of my
street aunties.
Ms. Maryman: So she's not your real aunt, right?
R.W.: No.
Ms. Maryman: Okay. But she's someone that is close to
you?
R.W.: Yes.
Ms. Maryman: And one of those adopted family members
that you were referring to?
R.W.: Yes.
Ms. Maryman: And, Ms. R.W., you spent some time in the
jail, correct?
R.W.: Correct.
Ms. Maryman: Was there a time you and your street auntie
Virginia were in jail together at the RJC?
R.W.: Yes.
**Ms. Maryman: Did she tell you about anything that the
defendant had done to her recently that
would cause her injury?**
R.W.: I asked her if she had seen my fiancé, or
my ex now, but my fiancé at the time,
Martin Anthony Burton, and she said, "He's
in jail." He was in jail because I was -
Mr. Palmer: Objection.
R.W.: -- I was writing to him -
The Court: Sustained. Counsel, ask a directed
question. Ask a direct question.
Ms. Maryman: Okay. So -
R.W.: I was writing letters to him and -
The Court: Hold on.
Ms. Maryman: Wait a second, Ms. R.W.

R.W.: He wasn't answering my letter. I don't – you know what? I can't deal with this.

Ms. Maryman: It's okay. Just take it easy, okay?

R.W.: This is really frustrating. I also have a court hearing I have to go to, and I'm in custody. I'm, just – this is too much for me.

Ms. Maryman: I know it's overwhelming.

R.W.: I'm not – I've never been through this before.

Ms. Maryman: Let's –

R.W.: And I'm in a lot of pain, my arm, my shoulder. My shoulder is sprained and bruised.

Ms. Maryman: So I want to move to August, okay?

R.W.: I'm in a lot of pain.

Ms. Maryman: So now we're going to move to August. The night before the QFC incident, did anything happen with the defendant?

4RP 136-38. The State aborted its attempt to elicit further testimony related to Virginia when R.W. became nonresponsive, frustrated and overwhelmed. 4RP 138. Virginia's assault was not mentioned again on direct or cross-examination.

c. Other Misconduct Evidence And Non-Responsive Answers.

On direct examination and without objection from Burton's counsel, R.W. offered testimony that she saw Burton before he went to "DOC." 4RP 132. R.W. also testified that Burton was violent when he would "smoke crack" and "drink." 4RP 136.

Burton's counsel objected, the trial court sustained and counsel did not request a curative instruction.⁷

On cross-examination, counsel for Burton received non-responsive answers that Burton was "violent" because of his "drug addiction." 4RP 155-59. Burton's counsel did not object. Shortly thereafter, Burton's counsel explored Burton's alleged history of abusive behavior:

Mr. Palmer: My next question to you is, that in your answers, at least in the first part of the testimony, you testified, "I never knew him to be violent." And when you said him, you were talking about Tony?

R.W.: Yeah.

Mr. Palmer: Do you remember saying that?

R.W.: Yah, until he hit me, smack. He went like this, bong. Until then.

Mr. Palmer: And then the Prosecutor asked you about after that incident, "Did he ever hit you again," and you said no?

R.W.: I said not until after a while. That's what I said.

Mr. Palmer: Okay.

R.W.: So write that down correctly.

Mr. Palmer: Ok. Well, I did, actually.

R.W.: Well, just keep it in here, too.

Mr. Palmer: And I want to ask you about that. And then the Prosecutor –

R.W.: Keep it in your memory, too. Not on that paper. Please, and thank you.

⁷ Burton asserts the trial court "sustained several defense objections." Br. of App. 7. However, upon closer review of the proceedings, objections based on relevance and hearsay were sustained in regards to testimony other than misconduct evidence. 4RP 140, 154.

Mr. Palmer: And then the Prosecutor asked you if anybody had ever seen him doing those things. And you said in public, was it that you said? In public –

R.W.: **And he beats people – he’s told – I’ve had to take Mr. Burton’s hands off three men, because he almost choked them to death, in the community.**

Mr. Palmer: I would ask the Court to direct the witness –

R.W.: Well, you asked me, didn’t you?

The Court: Well, yeah. Overruled, counsel, go – ask your next question.

Mr. Palmer: Okay.

R.W.: And other people.

The Court: Okay. Hold on. Let him ask the next question.

Mr. Palmer: Ms. R.W., the next question is with regard to you staying with him...

4RP 160-61. Counsel did not object or seek a curative Instruction.

Later, when asked about details of her own rape, R.W. referred to Burton as a “rapist.”

Mr. Palmer: And you also testified that during the time that he had his finger in your vagina that he had –

R.W. **He’s a rapist, okay. He’s a violent man. I don’t want to have nothing to do with him. Your honor, I’m serious.**

The Court: Okay.

R.W.: Just like one of his family members, his son, is the same way.

The Court: All right. Counsel, ask your next question.

Mr. Palmer: Did he have his neck – his hands on your neck when he had his finger in your vagina?

4RP 164-67, 169-70. Again, counsel did not object to this testimony or seek a curative Instruction.

C. ARGUMENT

1. BURTON CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Burton contends that his trial counsel was constitutionally ineffective in the way he handled limiting instructions to the jury. He argues that counsel (1) should never have asked for a limiting instruction about Burton's alleged assault on Virginia because the jury never heard testimony of such an assault, (2) failed to ask that the instruction limit consideration of other misconduct evidence, and (3) did not ask that the instruction explicitly say that "the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Br. of App. at 11-12. Burton's claims should be rejected. First, from the prosecutor's question posed to R.W., the jury could have inferred that Burton had assaulted Virginia, therefore counsel was correct to propose a limiting instruction as to the assault. Second, misconduct evidence later elicited by Burton's counsel was used by counsel in a strategic manner to support the defendant's theory that R.W. was simply not credible, so it would undercut this strategy to ask the jury to disregard that testimony. Finally, defense counsel's instruction properly instructed the jury to

limit its consideration of ER 404(b) evidence. Because Burton cannot show his counsel was deficient, his claim of ineffective assistance of counsel cannot be established.

Defendants in a criminal case have a constitutional right to effective assistance of counsel. U.S. CONST. amend. VI; Wash. CONST. art. I, § 22. To prevail on an ineffective assistance claim, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness" and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." State v. Humphries, 181 Wn.2d 708, 719-20, 336 P.3d 1121 (2014) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct 2052, 80 L. Ed. 2d 674 (1984)).

A defendant must show that an attorney's acts or omissions were outside the wide range of professionally competent assistance. Strickland, 466 U.S. at 690-94. Deficient performance is found where it falls below an objective standard of reasonableness. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Failure to make a showing of deficient performance defeats an ineffective assistance of counsel claim. State v. Humphries, 170

Wn. App. 777, 797, 285 P.3d 917 (2012), aff'd in part and rev'd in part on other grounds, 181 Wn.3d 708, 336, P.3d 1121 (2014).

a. Counsel Properly Proposed An Instruction Limiting The Jury's Consideration Of The Assault On Virginia.

Here, although R.W. did not formally complete her testimony that Burton assaulted Virginia, it was nonetheless clearly suggested to the jury [Virginia] during R.W.'s direct examination. While attempting to elicit permitted ER 404(b) testimony, the State inquired "Did she tell you about anything that the Defendant had done to her recently that would cause her injury?" 4RP 137. Without further testimony about Virginia, the assault the jury was left to speculate and reasonably conclude that Burton had assaulted another woman. There was no motion that the jury should disregard the implication in the question. This question clearly suggests that Burton recently assaulted and injured Virginia, so the assault the jury would have reasonably concluded that Burton had assaulted another woman.

To address this, and likely fearing that the bell could be unrung, Burton's counsel offered a limiting instruction tailored only to Virginia's assault. The jury was instructed:

I am allowing evidence that [R.W.] knew of Defendant's prior assault against a person named Virginia. You may consider this evidence only for the limited purpose of considering whether R.W. knew about this assault prior to August 11, 2014 and whether or not the State has proved that her fear that the Defendant would carry out his threat to kill her, was reasonable. You must not consider this evidence for any other purpose.

CP 51. During closing remarks, Burton's counsel argued:

Mr. Palmer: ...So the fact that Mr. Burton was known by R.W. to have assaulted somebody else, you're not going to hold that against him in deciding whether or not he's guilty of this crime of assault or this crime of felony harassment except to the extent in deciding whether or not she considered [sic] that did give rise to a reasonable fear on her part that she'd be killed. Now, let me say something about that. We heard very little about the context in which she heard that Martin had done this to another person. We don't know whether she – well, she wasn't there. She said that Virginia told her that. We don't know whether or not he threatened to kill Virginia. We don't know, in fact, whether or not he did kill Virginia. So I would submit to you, ladies and gentlemen, that the lack of context and follow up to that doesn't provide a reasonable basis for being afraid that Martin would kill her. But the fact is, we would submit, that he didn't anything like that.

4RP 288-89.⁸

Clearly, it is reasonable Burton's counsel would seek to limit the jury's speculation regarding Burton's assault on Virginia. By

⁸ The State did not mention Virginia or her assault in closing argument or rebuttal. 4RP 295-303.

proposing the tailored instruction, it was made clear for the jury that R.W. knew Burton had assaulted Virginia at the time she was threatened by Burton and that fact was for no other purpose than establishing whether the State established R.W.'s fear was reasonable.

Burton's claim that the jury could have also concluded that he "possibly threatened to kill someone before, so he must have done it again" is clearly unsupported where the only fact even arguably before the jury was that Burton had assaulted Virginia. Br. of App. at 13. The instruction properly informed the jury to consider Virginia's assault for only a limited purpose. A jury is presumed to follow the instructions of the court. State v. Yates, 161 Wn.2d 714, 787, 168 P.3d 359 (2007). Burton fails to establish that his counsel's actions were deficient or outside the range of professional competence.

- b. Counsel Used Evidence Of Other Misconduct Evidence To His Advantage; It Would Have Been Self-Defeating To Ask The Jury To Disregard That Evidence.

Burton also claims his counsel's instruction did not limit the jury's consideration of other misconduct evidence elicited at trial. Representation is not deficient if trial counsel's conduct can be

characterized as legitimate trial strategy or tactics. State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005). When a limiting instruction is not requested, courts have applied a presumption that the omission was a tactical decision to avoid reemphasizing prejudicial information. Humphries, 181 Wn.2d at 719-20.

Counsel for Burton requested curative instructions only when R.W. testified that she felt scared for her family, and when Officer Johnson testified R.W. appeared “to take him [Burton] serious.” 4RP 154, 167. During cross-examination, defense counsel elicited testimony and non-responsive answers from R.W. that Burton was abusive, a “rapist” and had assaulted others. 4RP 165-71, 194-96. During R.W.’s testimony counsel made, but withdrew, a motion for mistrial, evidently because Burton’s counsel decided that the testimony could be used to Burton’s advantage.

Mr. Palmer: Your Honor, I withdraw the request. We were thinking of a motion for mistrial, but we’re not proceeding with that kind of motion.

The Court: All right. Okay. All right. And I take it that you’ve talked to your client about potential issues of that? And just so – I think I understand why you would do that, but just for the appellate record, so nobody would second guess –

Mr. Palmer: So let me make the record clear.

The Court: Right. Okay.

Mr. Palmer: **I did speak with Mr. Burton about, strategically, that we had enough basis to**

move for a mistrial based on several things that the alleged victim said on cross-examination; specifically referring to his being in jail in other cases and multiple other assaults compounding with what she said about him assaulting other people in the community. I couldn't count the number of times she was also nonresponsive to my questions and tried to volunteer information that was prejudicial in character and in nature about Mr. Burton. I would usually move for a mistrial. I asked the Court already to give the jury a curative instruction regarding the issues in this case, and to disregard what she was saying. What I would do in this instance is ask the Judge to again give the curative instruction to disregard anything the witness may have said that was either nonresponsive to my questioning or not relevant to the facts that are at issue in this trial.

The Court: Okay. But just for the purpose of appellate review on any alleged ineffective assistance of counsel, you've had a chance to talk to your client, and so for strategic reasons you are deciding not to bring that motion for mistrial; is that correct?

Mr. Palmer: That's correct. My client wants me to go forward.

The Court: Okay. Thank you. Counsel, anything else on that issue?

Mr. Palmer: No. Thank you.

4RP 173-74. Moments later, the trial court inquired as to counsel's request for a curative instruction.

The Court: Okay. All right. Well, let's – I think we're on hold then until she gets down here. So we're going to resume on the – oh, I guess one other

issue, counsel. I guess you've asked for a curative instruction, and I guess I don't know what that would look like at this point. Certain [sic] of her testimony was responsive. Certain [sic] of it wasn't. And I'm not sure how I -- what I do at this particular point.

Mr. Palmer: I'll withdraw that request.

The Court: All right.

Mr. Palmer: If it becomes apparent that she keeps talking about inadmissible things, then I may ask for another curative instruction.

The Court: Right. I think what you need to do is ask me for a curative instruction as it comes up.

Mr. Palmer: Right.

4RP 179-80. No further objections or curative instructions were requested during the remainder of R.W.'s testimony.

Then in closing remarks, counsel argued to the jury:

Mr. Palmer: The Defense, at this point has to tell you, in all candor, that something happened on August 11, 2014. Hiding from that, hiding from the fact that Mr. Burton was seen by multiple witnesses yelling at [R.W.], that [R.W.] herself was angry about something, that anger you saw on the stand when she talked about the woman that Mr. Burton was messing with. But the truth of what happened, like [R.W.]'s lies, like Martin Burton's life, is shrouded in the chaos and the anger of her jumbled story where she alternates in telling that story from a weepy whisper, and then to misplaced anger and aggression at me for simply asking her how hard and how many times she was choked.

4RP 285. Counsel also contended R.W. attempted to talk about "irrelevant stuff" and that Burton's threats were a figment of R.W.'s imagination. 4RP 284-89, 292.

While Burton claims his counsel neglected to limit other misconduct evidence, clearly Burton's trial lawyer decided that the best defense was to turn this testimony against R.W. and argue that she was angry with Burton and concocted a series of "scattered" claims to get even. 4RP 284-89. In other words, the record unequivocally shows that trial counsel saw strategic value in using R.W.'s claims of misconduct to discredit her testimony. That is why counsel withdrew his motion for mistrial and to forgo a curative instruction. From the record presented it is clear Burton elected to proceed in spite of R.W.'s nonresponsive testimony after discussing with his attorney the strategy with counsel.

Because the record suggests Burton and counsel strategically used R.W.'s testimony to assist in their defense, he cannot establish that the limiting instruction should have been given. After all, if the jury were instructed to disregard the testimony, counsel could not have used the testimony to argue that R.W. was confused and/or vengeful.

c. The Court's Limiting Instruction Served Its Purpose.

Lastly, Burton relies on State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), for his contention that counsel's instruction insufficiently advised the jury of the limitations on its consideration of ER 404(b) evidence. His reliance is misplaced.

Jury instructions are reviewed de novo to ensure that they accurately state the applicable law, do not mislead the jury, and allow the parties to argue their theories of the case. Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851 (2012).

Evidence Rule 404(b) prohibits the use of evidence of prior acts "to prove the character of a person in order to show action in conformity therewith."⁹ Evidence Rule 105 states that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon

⁹ ER 404(b) states: "Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”

A limiting instruction for ER 404(b) evidence “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.” State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989). The failure to give a proper ER 404(b) limiting instruction is harmless unless there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. Gresham, 173 Wn.2d at 425.

Burton argues that counsel’s instruction did not include specific language that “the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.” Id. at 423-24. The court in Gresham, however, was not ruling on the precise wording required in a limiting instruction; rather, it was reviewing the trial court’s failure to give *any* limiting instruction at all after the defendant proposed an inadequate instruction. 173 Wn.2d at 424.

The language which Burton emphasizes, the Gresham court was describing the information that the defendant’s proposed

instruction had lacked,¹⁰ and was not attempting to set forth exact wording that must be used. The Gresham court cited State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), for support. Likewise in Lough, the wording of the limiting instruction was not at issue on appeal. Instead, the court in Lough had merely described the limiting instruction the trial court had given in that particular case¹¹ in holding that the evidence was properly admitted under ER 404(b) and that there was no evidence in the record that the evidence had been used for an improper purpose. 125 Wn.2d at 864.

In light of the issues before the court in Gresham and Lough, Gresham cannot be viewed as establishing the categorical rule that Burton claims. The fact that the instruction in Lough, which did contain the explicit prohibition which Burton's claims was missing here, was cited favorably in Gresham does not mean that an instruction not including that language is reversible error.

¹⁰ The defendant's proposed instruction in Gresham "would have informed the jury that evidence admitted to demonstrate a common scheme or plan could not be considered 'as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegation.'" Gresham, 173 Wn.2d at 424.

¹¹ The Lough limiting instruction "told the jury that the evidence of the uncharged allegations could not be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and could only be considered to determine whether or not it proved a common scheme or plan." Lough, 125 Wn.2d at 864.

Furthermore, WPIC 5.30, which limits the purposes for which evidence could be properly considered, states:

Certain evidence has been admitted in this case for only a limited purpose. This [*evidence consists of _____ and*] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Here, defense counsel's instruction specifically stated Virginia's assault was only admitted to determine "whether or not the State has proved that her fear that the Defendant would carry out his threat to kill her, was reasonable. You must not consider this evidence for any other purpose." Defense counsel's instruction was in conformity with the standard WPIC and Burton cannot show his counsel's performance was deficient.

Burton's failure to establish deficient performance is fatal to His claim of ineffective assistance of counsel. Humphries, 170 Wn. App. at 797.

Moreover, as to this claim, it is clear that Burton cannot show prejudice. The jury was told to consider the evidence of the Virginia assault for a limited purpose, defense counsel argued consistent with the instruction, and the prosecutor never argued that such evidence should be considered for an improper purpose. Since

that piece of evidence played such a minor role in the case, and since there is no reason to believe that the jury considered that evidence for an improper purpose, even if counsel should have further refined the jury instruction, the nature of the instruction did not change the result of this case.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Burton's convictions.

DATED this 21 day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
PHILIP SANCHEZ, WSBA #41242
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jared B. Steed, containing a copy of the Brief of Respondent, in STATE V. MARTIN BURTON, Cause No. 73340-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington

12-21-15
Date