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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KAMERON ALEXANDER ROSENGREN, Appellant.	No. 49289-0-II UNPUBLISHED OPINION

Worswick, J. — Kameron Rosengren appeals his convictions for two counts of second degree child molestation. Rosengren argues that his trial counsel was ineffective for failing to request a limiting instruction on prior bad act evidence. We agree. Consequently, we reverse Rosengren's convictions and remand for a new trial.[1]

FACTS

I. BACKGROUND

Larissa Fia lived in her mother's home with her thirteen-year-old daughter JF-P, her three-year-old son BC, and three other children. In early 2015, Fia began dating Rosengren's older brother, Joshua Davis. At that time, JF-P considered Rosengren to be her friend.

In January and February of 2015, Fia and her children would often spend the night in a motel with Rosengren and Davis. In the motel, Fia and Davis would share a bed, and JF-P,

[1] Rosengren also argues that his counsel was ineffective for failing to properly authenticate impeachment evidence of the victim's Facebook post and that the trial court erred by excluding the testimony of a witness and by denying his motion for a new trial based on juror misconduct. We do not address these claims.

Rosengren, and sometimes BC would all share another bed. On February 18, while Rosengren and JF-P were in bed, Rosengren placed his hand on her breasts under her clothing.

Later that month, the group again stayed in a motel together. JF-P and Rosengren again shared a bed. Rosengren touched JF-P's vagina over her clothing. JF-P did not disclose these incidents to anyone at that time.

One day in late February after JF-P returned home from school, Fia called J.F-P and informed her that Rosengren had beaten BC and that BC was in the hospital. The next day, JF-P spoke with her school counselor about the alleged abuse to BC.

Officer Jennifer Kolb, the officer investigating BC's abuse, spoke to JF-P. Officer Kolb told JF-P that BC had bruising, scratches, and a burn mark on his body. Officer Kolb also told JF-P that Fia, Davis, and Rosengren were all suspected in BC's abuse and that Rosengren had been arrested for allegedly abusing BC.

During the interview, JF-P informed Officer Kolb that she did not think Rosengren "would do something like that." Report of Proceedings (RP) (April 12, 2016) at 114. JF-P told Officer Kolb that she and Rosengren were close friends but that they were not in a relationship. JF-P did not disclose that Rosengren had sexually assaulted her. After JF-P's interview with Officer Kolb, Fia told JF-P that Rosengren had confessed to beating BC. JF-P also read an article online regarding the abuse to BC, learning that BC suffered bruises and cigarette burns on his body.

Soon thereafter, Officer Kolb conducted a recorded interview with JF-P. During the recorded interview, JF-P told Officer Kolb that Rosengren had touched her sexually on two occasions. JF-P told Officer Kolb that jail was not good enough for Rosengren and Davis.

The State charged Rosengren with two counts of second degree child molestation.

II. TRIAL

The matter proceeded to a jury trial. On the first day of trial, the court heard motions in limine. The State moved to exclude potential witnesses from the courtroom. Rosengren agreed, and the court granted the motion.

The State also moved to exclude any reference to Rosengren's alleged assault on BC, expressing concerns about "a future potential appeal" should the evidence be admitted. RP (April 11, 2016) at 27. The State argued that any evidence of Rosengren's involvement in B.C.'s abuse should be "sanitized" to preclude reference to the charges or outcome of the abuse investigation. RP (April 11, 2016) at 27. Defense counsel argued that he wanted to use evidence of allegations against Rosengren concerning BC's abuse to show JF-P's motivation to fabricate the molestation allegations. Defense counsel argued that the jury needed to be informed of the context within which JF-P made her decision to disclose the molestation. Counsel further said that the jury needed to hear that JF-P told Officer Kolb that Rosengren needed to "pay" for assaulting BC. RP (April 11, 2016) at 29. Defense counsel stated that evidence of JF-P's motivation to lie about the molestation was the "entire case and the entire defense." RP (April 11, 2016) at 28.

The trial court ruled that it would allow the evidence of BC's abuse to be admitted at trial, stating:

> THE COURT: . . . And so I am going to deny the State's request to exclude testimony at the defense request to basically open the door about this other investigation, which then as I understand it is the defense acknowledgement that details about the other investigation and outcome will come in. And so you're not objecting, [defense counsel], to the potential prejudice to your client of the other investigation [of abuse] and the other outcome.
> [DEFENSE COUNSEL]: That's correct.
> THE COURT: All right. So based upon that, with that understanding, also [defense counsel] indicating that he doesn't intend to create a side show but intends to offer

> evidence, direct evidence that suggests a potential motive for the instant case, the court will allow that evidence.

RP (April 11, 2016) at 32-33.

Officer Kolb, Fia, and JF-P all testified at trial. Officer Kolb testified that Rosengren had not confessed to abusing BC and also testified that she did not tell JF-P that Rosengren had confessed to abusing BC. Officer Kolb explained that she told JF-P that Rosengren was a suspect and had been arrested for allegedly abusing BC.

JF-P testified that she did not tell Officer Kolb about Rosengren touching her during the first interview because at that time, she still considered Rosengren to be her best friend. JF-P said that she did not believe her mother when Fia told her that Rosengren had abused BC, but that her beliefs changed when Officer Kolb informed her that her mother, Davis, and Rosengren were all involved in abusing BC. She changed her mind about disclosing the molestation because she realized it was wrong and because the molestation was on her mind "all the time." (April 12, 2016) at 172.

JF-P also testified that at the time of her second interview with Officer Kolb she was angry about what happened to BC. She believed that Rosengren had burned and beaten BC and that she had never been so mad in her life. She told Officer Kolb that prison was not good enough for Rosengren and that he deserved something worse than prison for hurting BC.

JF-P also admitted that she made a comment to Officer Kolb about her disclosure of the molestation being "revenge" on Rosengren. RP (April 12, 2016) at 174. JF-P explained that she was not going to report the molestation, but the abuse to BC was one reason why she decided to come forward about the molestation, and that she initially came forward with her disclosure of the molestation to get Rosengren in more trouble. She further explained that if Rosengren had

not abused BC, she never would have disclosed the molestation. When asked during cross-examination if she was "out for people that had abused her brother," JF-P answered, "Yes." RP (April 12, 2016) at 227.

On cross-examination, JF-P testified that she did not recall Officer Kolb telling her that Rosengren had confessed to abusing BC, but rather that Officer Kolb told her that her mother, Rosengren, and Davis were all involved in BC's abuse. JF-P testified that she believed that Rosengren had committed the abuse.

JF-P also denied that she stated that she wished Rosengren would die or that she was "getting ready for a death." RP (April 12, 2016) at 210-11. JF-P denied that she had communicated to anyone, either electronically or in person, that she was planning or getting ready for a death.

The jury found Rosengren guilty as charged. Rosengren appeals his convictions.

ANALYSIS

Rosengren argues that defense counsel was ineffective for failing to request a limiting instruction regarding the prejudicial testimony that he had abused BC severely enough to hospitalize him. We agree.

A. *Legal Principles*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). We review ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To show that he received ineffective assistance of counsel, a defendant must show, based on the record established at trial, that (1) defense counsel's conduct was deficient and (2) that the

deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A defense counsel's performance is deficient if it falls below an objective standard of reasonableness and was not based on a legitimate, strategic, or tactical decision. *State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005).

To show prejudice, a defendant must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *Reichenbach*, 153 Wn.2d at 130.

B. *Failure To Request Limiting Instruction*

Rosengren argues that his trial counsel was ineffective by failing to request a limiting instruction directing jurors to consider evidence of Rosengren's abuse of B.C. for the sole purpose of whether the abuse motivated JF-P to falsely accuse Rosengren of molestation. Rosengren recognizes that his counsel properly took the "bold but logical" step of seeking admission of damaging evidence, however, Rosengren asserts that his trial counsel's failure to request a limiting instruction of that damaging evidence was deficient performance. Br. of App. at 18. Rosengren argues that without the instruction, the jury was free to consider the evidence for whatever purpose they wished, including that Rosengren was a violent person, capable of molesting JF-P.

Under ER 105, the trial court has a duty to issue a limiting instruction only upon request for such an instruction. *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). Appellate courts can presume

counsel did not request a limiting instruction to avoid reemphasizing damaging evidence. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

We also presume that a jury will follow the instructions provided to it. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). The corollary to this presumption is that where evidence could be relevant for multiple purposes, a jury cannot be expected to limit its consideration of that evidence to a proper purpose without an appropriate instruction to that effect. *State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016). In the absence of a limiting instruction, the jury is permitted to consider evidence for any purpose. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

In considering whether Rosengren's counsel's performance was deficient, we note that the jury heard JF-P testify that B.C. was hospitalized, suffering from bruises, scratches, and cigarette burns. JF-P and Officer Kolb both testified that Rosengren was suspected of abusing B.C.

Defense counsel should have been aware of the need for a limiting instruction for such prejudicial evidence. Rather than request an instruction, defense counsel confirmed to the trial court that he understood the inherent risk of prejudice that the evidence carried with it. Defense counsel's failure to request a limiting instruction allowed the jury to consider the evidence for any purpose, including for Rosengren's propensity to commit crimes against children.

While defense counsel clearly articulated the tactical strategy of presenting the prejudicial evidence to the jury, there is no conceivable tactical strategy to allow the jury unfettered use of this highly prejudicial information. If defense counsel had requested the limiting instruction, the court would have granted the request. Under ER 105, "the trial court has

a duty to issue a limiting instruction only upon request for such an instruction." *Russell*, 171 Wn.2d at 123 (emphasis omitted).

We recognize that counsel's failure to request a limiting instruction *can* be a tactical decision to prevent the reemphasis of prejudicial evidence to the jury. *Yarbrough*, 151 Wn. App. at 90. However, here, there was no need to avoid reemphasizing the prior bad acts to the jury because the evidence of abuse of B.C. was Rosengren's "entire case and the entire defense." RP (April 11, 2016) at 28. This is not a case where defense counsel sought to refrain from mentioning the prior bad act evidence to protect the jury from hearing the evidence again. A limiting instruction would not have unduly emphasized the highly prejudicial evidence; it would have reigned in the jury's consideration of such evidence. Rosengren's counsel's failure to request a limiting instruction was deficient performance.

In considering the prejudice prong of his ineffective assistance of counsel claim, Rosengren must establish that there is a reasonable probability that the outcome of his trial would have differed. We think it did.

This case involved a credibility contest between JF-P and Rosengren. The only evidence at trial was JF-P's testimony that the molestation occurred. Without the limiting instruction, the jury was presumably free to use the evidence of Rosengren's abuse of BC for any purpose, including considering the evidence for the purpose of Rosengren's propensity to commit crimes against children. Had the jury been instructed to consider the abuse evidence for the sole purpose of whether it motivated JF-P to fabricate the molestation, there is a reasonable probability that the jury would have found Rosengren not guilty. *See Kalebaugh*, 183 Wn.2d at 586. Thus, Rosengren has met his burden to show that the outcome of the proceeding would have been different had his counsel requested a limiting instruction.

Accordingly, because Rosengren's defense counsel acted deficiently and because Rosengren was prejudiced by the deficient performance, we hold that Rosengren's counsel was ineffective.[2] We reverse Rosengren's conviction and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Melnick, J.

[2] Both parties argue that whether a defense counsel performs ineffectively when failing to request a limiting instruction of prejudicial evidence that the defendant sought to admit at trial is an issue of first impression in this state. The State argues that Rosengren's assertion that his defense counsel was ineffective for failing to request a limiting instruction on prejudicial evidence that defense itself sought to admit improperly expands the ineffective assistance of counsel doctrine. The State argues that adopting Rosengren's view would require defense counsel to request a limiting instruction every time that it sought to use evidence that was prejudicial to the defense at trial. We disagree with both contentions.

A review of an ineffective assistance of counsel claim is a fact-specific inquiry. *State v. Chetty*, 167 Wn. App. 432, 440, 272 P.3d 918 (2012). This court's decision that Rosengren's counsel acted deficiently does not expand the doctrine of ineffective assistance of counsel and does not mandate that defense counsel must request a limiting instruction in every case where prejudicial evidence is admitted.