IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GILBERTO RODRIGO VARGAS, Appellant.	)	No. 65157-9-I DIVISION ONE UNPUBLISHED OPINION FILED: May 16, 2011

Appelwick, J. — Vargas was convicted of second degree child molestation. At trial, the court admitted ER 404(b) evidence of Vargas's prior acts involving the victims, to show his lustful disposition towards them. Vargas's attorney did not request a limiting instruction on this evidence. He argues that the trial court erred by failing to give such a limiting instruction, sua sponte. He also argues that his attorney's failure to request the instruction constituted ineffective assistance of counsel. There is no affirmative duty for a court to give a limiting instruction sua sponte, and Vargas's counsel did not provide deficient representation. We affirm.

FACTS

Gilberto Vargas had a loving, familial relationship with his two young cousins, R.G.-S. and A.V.-S. The two girls were born on December 8, 1995, and July 5, 1997, respectively. They thought of Vargas as their favorite uncle, often spending weekends at his home with him and his family or going with him on outings to the park or the YMCA. Vargas's family consisted of his longtime domestic partner Arcelia Rodriguez, Rodriguez' three adult children, and the couple's young daughter S.V.

The events that led to Vargas's conviction began on June 19, 2009, which was the last day of school for R.G.-S. and A.V.-S. The girls' mother had arranged for them to stay with Vargas for a week. That day, Vargas took the two girls and S.V. to the Children's Museum. While at the museum, the girls got wet playing in the rain. R.G.-S. testified that Vargas had the girls take their wet clothes off on the car ride home, and sit in their underwear.

Later that night, the three girls fell asleep watching movies on the living room floor. R.G.-S. testified that the next morning, June 20, 2009, Vargas came downstairs and lay down beside her. He put her left leg between his legs and then rubbed her buttocks and vagina, also commenting that she shaves. He tried to touch her breasts but was prevented by her bra. Then, after hearing a noise, Vargas stopped and went back upstairs. R.G.-S. stated that while Vargas was beside her, she lay still and pretended to be asleep. She also testified to seeing Vargas come back downstairs several minutes later and lay down beside A.V.-S. Then, when S.V. woke up, Vargas quickly moved up to the couch and

turned on the television.

A.V.-S. gave similar testimony to her sister, claiming that Vargas lay down beside her and touched her buttocks, vagina, and breasts. She could not recall the events with much detail.

Vargas was charged with child molestation in the second degree involving R.G.-S. and child molestation in the first degree involving A.V.-S. A jury convicted him of the count involving R.G.-S. and acquitted him of the count involving A.V.-S.

Pretrial, the State moved to allow the girls to testify about several of Vargas's prior uncharged acts, including occasions where he had inappropriately touched the girls' breasts and an instance where he looked at A.V.-S.'s vagina. The State argued in its motion in limine that these uncharged incidents should be admitted to prove Vargas's lustful disposition towards the girls. Defense counsel objected. After a hearing and the State's offer of proof, the trial court found that these prior acts occurred by a preponderance of the evidence. Accordingly, at trial, R.G.-S. was allowed to testify that on numerous occasions, Vargas would make a comment about her bra being messed up and then touch her breasts and adjust the bra. A.V.-S. also testified at trial about an instance where Vargas shaved her legs. He pulled out the front of her underwear, looked inside, told her she'd have to shave there too, but that he was not going to do that for her. Defense counsel did not request that a limiting instruction be given to the jury regarding this ER 404(b) evidence.

Vargas appeals.

DISCUSSION

I. No Affirmative Duty for the Trial Court to Give a Limiting Instruction

Vargas assigns error to the trial court's failure to give a limiting instruction to the jury, after admitting evidence of Vargas's prior acts under ER 404(b). He argues that while his attorney did not request such a limiting instruction, the trial court should nevertheless have given one sua sponte. In State v. Russell, the Washington Supreme Court has expressly considered and rejected this argument, holding that "[a] trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction." No. 84307-4, slip op. at 7 (Wash. Feb. 24, 2011). As the Supreme Court points out, ER 105 provides, "'When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.'" Id. at 5. Where no request was made, there is nothing either in ER 105 or in Washington case law that creates an affirmative duty for a trial court to give a limiting instruction. Id.

II. Ineffective Assistance of Counsel

Vargas next argues that his attorney's failure to request a limiting instruction on the ER 404(b) evidence constituted ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that he was prejudiced as a result. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either one of the two prongs, the

court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Deficient representation occurs when counsel's conduct falls below an objective standard of reasonableness based on a consideration of all the circumstances. McFarland, 127 Wn.2d at 334-35. There is a strong presumption of effective representation and the defendant bears the burden of showing the absence of legitimate strategic or tactical reasons for the challenged conduct. Id. at 335. Vargas argues that there was no legitimate tactical reason not to propose a proper limiting instruction. But, Washington courts have long held that a failure to request a limiting instruction can be a tactical decision. See, e.g., State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993); State v. Barragan, 102 Wn. App. 754, 762, p P.3d 942 (2000).

Vargas argues that there was no tactical reason for his attorney's conduct, pointing in particular to a declaration from his trial counsel, which she submitted in support of a motion for a new trial. His counsel stated: "I do not have a reason or explanation as to why I did not ask for a limiting instruction. I simply did not think of asking for a limiting instruction." But, counsel's statement does not change our analysis. We look not to what was in counsel's mind at the time of trial, but to the objective reasonableness of the representation and to the existence of any legitimate strategic or tactical reasons for counsel's conduct. McFarland, 127 Wn.2d at 334-36.

Here, the record shows a legitimate strategic reason for defense counsel

to not request a limiting instruction. At trial, Vargas's theory of the case was that the girls fabricated all of their testimony about being sexually touched, both on the morning of June 20, 2009, and on the prior instances at issue. During closing argument, Vargas's counsel challenged the girls' credibility and argued that the prior acts they alleged never occurred. In accordance with this general theory, there could be a logical tactical benefit to avoiding a jury instruction. As the State points out, a limiting instruction in accordance with the Washington Pattern Jury Instructions would have read approximately as follows:

> Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of incidents in which the defendant touched R.G.-S. and A.V.-S.'s breasts, and in which the defendant viewed A.V.-S.'s vagina during a shaving lesson. It] may be considered by you only for the purpose of [the defendant's lustful disposition toward R.G.-S. and A.V.-S.] You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed. 2008). This instruction limits how the jury may consider the ER 404(b) evidence, but it also implicitly affirms the truthfulness of the alleged acts. This instruction would have amounted to a tacit admission that Vargas actually committed those acts, and it would have required the jury to consider those acts as though they happened. Vargas's counsel could reasonably have concluded that it would be stronger to deny the alleged prior acts altogether, particularly in light of Vargas's theory at trial that the girls' testimony was not credible.

Because there is a legitimate tactical reason for not requesting the limiting instruction, Vargas has not overcome the strong presumption of effective

assistance. Vargas has failed to satisfy the first prong of deficient performance, so we need not address the prejudice prong and his claim of ineffective assistance of counsel fails.

We affirm.

Appelwick, J.

WE CONCUR:

Schindler, J. Becker, J.