IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28567-7-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JEFFREY ALAN EHART,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Jeffrey Ehart challenges the trial court's decision to admit "grooming" evidence at trial, contending that the court did not balance the probative and prejudicial value of the evidence on the record. Because there is a sufficient record to understand the court's balancing decision, we affirm the convictions for third degree rape.

FACTS

Mr. Ehart was charged with third degree child molestation and two counts of third degree rape of T.E. The State alleged that he had groomed T.E. by giving her gifts and watching pornography together. Eventually the conduct escalated to molestation and

intercourse. These events occurred between the time T.E. was 15 and 18, ending when she moved away.

The State sought to admit, pursuant to ER 404(b), evidence that Mr. Ehart had similarly groomed A.E. A.E. explained to the court that when she was between seven and thirteen, Mr. Ehart had given her gifts and had her sit on his lap while watching pornography. That behavior subsequently also led to molestation and intercourse, and ended when A.E. moved away. In both instances, Mr. Ehart told the girls that he was watching pornography in order to report bad things to the government. The incidents described by A.E. had led to a conviction for possession of child pornography.

The trial court found that the purpose of the evidence was to establish a common pattern, scheme, or design. The court did not allow the State to admit evidence of the pornography conviction or to permit A.E. to testify about pornography. The court did allow the rest of her testimony. There was no express weighing on the record of the prejudicial impact of A.E.'s testimony against the probative value of the evidence.

The molestation count was dismissed during trial. The jury convicted Mr. Ehart of the two third degree rape charges. The trial court imposed standard range sentences. Mr. Ehart then appealed to this court.

ANALYSIS

The sole issue raised by counsel concerns the trial court's ER 404(b) ruling concerning A.E.'s testimony. Mr. Ehart also filed a pro se Statement of Additional Grounds (SAG) that we will briefly address as a separate issue.

ER 404(b). Mr. Ehart argues that the trial court failed to expressly address the prejudice aspect of its ruling on the record. We conclude that there is a sufficient record to permit review of this issue.

The purpose of ER 404(b) is to prohibit the admission of evidence that suggests that the defendant is a "criminal type" and thus likely guilty of committing the crime with which he is charged. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). When ER 404(b) evidence is admitted, the trial court is required to state its reasoning on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984).

In order to admit evidence of other bad acts under ER 404(b), the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the "misconduct" actually occurred. *Lough*, 125 Wn.2d at 853. A trial court may conduct a hearing to take testimony, but is not required to do so. *State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether

the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. The court may then admit the evidence subject to a limiting instruction telling the jury the proper uses of the evidence. *Id.* at 864.

Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Relying on *Jackson*, Mr. Ehart argues that the trial court erred in the final aspect of the ER 404(b) test—the weighing of probative value versus prejudicial effect—by not articulating those two interests on the record. This argument overly expands *Jackson*. There the trial court had not identified the reason for which the prior bad acts evidence was being admitted before the jury. 102 Wn.2d at 694. The court determined that the ER 404(b) analysis must be stated on the record, concluding:

> Unless the trial court identifies the purpose for which it believes the evidence is relevant, it is difficult for that court (or the reviewing court) to determine whether the probative value of the evidence outweighs its prejudicial effect.

Id.

While *Jackson* confirms that the trial court must articulate its balancing on the record, it did not hold that the failure to perform solely that aspect of the ER 404(b) analysis constituted error. Rather, as the quoted passage above indicates, it was the failure to articulate the purpose for admitting the evidence that led to the inability to weigh prejudice versus probative value. Unlike *Jackson*, here the trial court did articulate why it was admitting the evidence—to show common scheme or plan. In this regard, the case is similar to *State v. Powell*, 126 Wn.2d 244, 264-265, 893 P.2d 615 (1995). There the trial court did not expressly state its entire balancing on the record, but there was sufficient evidence in the record to reflect what the trial court was doing. The Washington Supreme Court was thus able to uphold the trial court's ER 404(b) ruling. *Id*.

The record here reflects that the court did carefully consider, *i.e.*, *balance*, the prejudicial aspects of A.E.'s proposed testimony and then limited that testimony to its most probative elements—the gifts and the developing sexual relationship—while eliminating all references to pornography (and the pornography conviction) which could be prejudicial. It excluded the pornography element even though it paralleled T.E.'s own experience. In other words, this record allows a reviewing court to see the balancing that took place, even though it was not fully articulated in the courtroom.

There was no abuse of discretion. The trial court carefully considered the ER 404(b) evidence and permitted only the most probative portions of A.E.'s testimony. It excluded other probative portions that were more prejudicial than probative. These were very tenable bases for ruling as it did. The balancing is reflected in the court's outcome and careful excision of some of the evidence.

There was no error.

Statement of Additional Grounds. The pro se statement of additional grounds (SAG) takes issue with trial counsel's performance, attacks the judge and prosecutor, and questions the absence of transcripts of some pretrial hearings. Finding the record and argument insufficient to consider the other matters, RAP 10.10(c), we will address only the ineffective assistance argument.

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674,

104 S. Ct. 2052 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-692.

The SAG complains about various aspects of trial counsel's performance, including pretrial preparation and the cross-examination of witnesses. The latter argument can be quickly answered. Even lame or ineffectual cross-examination does not establish ineffective assistance of counsel. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

Our review of the record answers the other challenge. Trial counsel performed well. The defense theory of the case was to challenge the credibility of the witnesses who had been in contact with each other. The defendant's mother testified and discounted the State's case, pointing out that there was no corroboration for T.E.'s testimony. Counsel was properly prepared for trial and adequately presented the defense. The totality of the record shows that counsel performed to the standards of the profession. He was not ineffective.

The SAG is without merit.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.