COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. RANDY GENE ROBINSON, Appellant.	)))))))))	No. 29959-7-III ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION Dated December 11, 2012

THE COURT has considered appellant's motion for reconsideration of this court's decision of December 11, 2012, and having reviewed the records and files herein, is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby granted.

IT IS FURTHER ORDERED that the opinion shall be amended by replacing the first paragraph and footnote five on page 14 with the following:

> Conviction affirmed. Findings on ability to pay LFOs reversed. Remanded with instructions to strike paragraphs 2.7, 4.D.4, and 4.D.5 from the judgment and Sentence. fn 5

> 5 While we reverse the trial court's *findings* on Mr. Robinson's ability to pay LFOs, its *order* for him to pay LFOs remains in effect. *See Bertrand*, 165 Wn. App. at 405. However, the State cannot collect LFOs from Mr. Robinson unless and until there is a proper determination he has the ability to pay them, considering his financial resources and the nature of the burden LFOs would impose on him. *See id.* at 405 n.16; *Baldwin*, 63 Wn. App. at 312; former RCW 9.94A.760 (2005); former RCW 10.01.160(3) (2008); former RCW 70.48.130(4) (2007).

DATED:

PANEL: Jj. Brown, Korsmo, Siddoway

FOR THE COURT:

_____

KEVIN M. KORSMO
CHIEF JUDGE

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

STATE OF WASHINGTON,	)	No. 29959-7-III
Respondent,	)	
v.	)	
RANDY GENE ROBINSON,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Randy Gene Robinson appeals his first degree rape and first degree burglary with sexual motivation convictions. He mainly contends the trial court erred in allowing evidence of two prior rapes under ER 404(b) as relevant to dispute his consent defense. We hold the trial court did not err in its ER 404(b) ruling and conclude any error in giving the limiting instruction offered by Mr. Robinson was invited. The State concedes certain legal-financial-obligation (LFO) findings are unsupported in the record. Accordingly, we affirm Mr. Robinson's convictions and remand for reconsideration of the LFOs in a manner consistent with this opinion.

FACTS

On July 8, 2008, C.L.H. fell asleep on her couch. Early the next morning, Mr. Robinson entered C.L.H.'s residence,

wearing a face and head covering, and awoke her by pulling her off the couch at knife point. Mr. Robinson directed C.L.H. to the bedroom, where he forcibly performed oral sex on her, made her perform oral sex on him, and penetrated her vagina with his penis. Afterward, Mr. Robinson made C.L.H. take a shower to wash away evidence of the rape. Mr. Robinson left C.L.H.'s residence while she showered. C.L.H. was approximately 13 years older than Mr. Robinson at the time of this incident.

Following his May 13, 2009 arrest, the State charged Mr. Robinson with first degree rape and first degree burglary with sexual motivation. Mr. Robinson had earlier been twice convicted of first degree rapes committed on August 5, 1991 and September 1, 1991. Mr. Robinson committed the crimes disputed here about 36 months after his July 27, 2005 release from confinement. In the earlier of the two prior rapes, the victim was asleep in her residence at night when Mr. Robinson unlawfully entered through the bathroom window, threatened her with a knife, and committed sexual intercourse by forcible compulsion. The victim was approximately 10 years older than Mr. Robinson. In the later of the two prior rapes, the victim again was asleep in her residence when Mr. Robinson unlawfully entered, wearing nylon stockings covering his face and head, and committed sexual intercourse by forcible compulsion. The victim again was approximately 11 years older than Mr. Robinson.

On June 23, 2009, the State gave notice of its intent to have both prior rape victims

testify at trial regarding Mr. Robinson's prior rape convictions. Mr. Robinson moved to exclude the evidence, raising constitutional challenges to RCW 10.58.090[1] and contesting admissibility under ER 404(b).

The superior court initially ruled evidence of Mr. Robinson's prior rapes was inadmissible under ER 404(b), concluding the evidence was "more prejudicial than probative," generally reasoning the case could "stand on its own merits" considering the victim's "partial identification" and the DNA[2] evidence. Clerk's Papers (CP) at 33-34. However, Mr. Robinson later raised a consent defense. The State then moved for reconsideration, arguing evidence of Mr. Robinson's prior rapes had become necessary to show he followed a common scheme or plan, thereby rebutting his consent defense in proving the forcible compulsion element. For this argument, the State relied on this division's opinion in *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010). In the June 2011 findings of fact and conclusions of law, the trial court agreed with the State.

The trial court partly reasoned: "The probative value of the testimony of prior victims as to factors presented in the offer of proof substantially outweighs any prejudice based upon the Defendant's claim of consent to the current rape." CP at 173. The court

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[1] Our Supreme Court has since declared RCW 10.58.090 unconstitutional for violating the separation of powers doctrine because it irreconcilably conflicted with ER 404(b) on a procedural matter. *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). Our focus, like the parties, is exclusively on ER 404(b).

[2] Deoxyribonucleic acid.

explained its position change:

> Before, it was the Court's feeling that there was some ability on the part of the alleged victim to identify and there was DNA evidence that was going to be present. And I weighed that against the length of time and the fact that there was no issue of consent that was brought up at the time. Now I think that the factors . . . are substantially different.
>
> With consent being brought into this matter . . . , I think that the issue of the testimony of both of these prior witnesses becomes very relevant, and the probative value now, in the Court's opinion, outweighs the prejudicial effect that would take place.
>
> Certainly the evidence of the prior rapes is evidence of lack of consent and that is something, I think, the State should be entitled to bring in. The cautionary instruction . . . is something we can talk about later on down the line and work that out.

Report of Proceedings (RP) at 47-48.

Both prior rape victims testified at trial. Additionally, C.L.H. testified. A recording of the 911 telephone call was played. Investigators testified to observing physical abrasion and a tear in C.L.H.'s vagina, and finding Mr. Robinson's DNA in semen extracted from C.L.H.'s vagina. A correctional officer testified to finding in Mr. Robinson's jail cell a hand-drawn map of C.L.H.'s home and a letter soliciting the recipient to "hit house late at night." RP at 686. Finally, Mr. Robinson testified.

Mr. Robinson proposed, and the court gave as Instruction 23, a limiting instruction partly providing, "Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior convictions and conduct of the defendant and may be considered by you only for the purpose of proving a common scheme, plan, or

forcible compulsion." CP at 59. Mr. Robinson cited ER 404(b) and WPIC 5.30[3] as authority for this proposed instruction.

The jury found Mr. Robinson guilty as charged with corresponding affirmative deadly-weapon special verdicts for the two counts and an affirmative sexual-motivation special verdict for the burglary count. The court sentenced Mr. Robinson as a persistent offender to concurrent terms of life imprisonment without the possibility of release. The court found he generally had the present or likely future ability to pay LFOs, and specifically had the means to pay the costs of incarceration and medical care. The court then ordered Mr. Robinson to pay these costs "as assessed by the Clerk." CP at 198. The State concedes no record supports the standardized "Financial Ability" finding at CP 195 or the "Financial Obligations" ordered for "Costs of Incarceration" and the "Costs of Medical Care" at CP 198. Mr. Robinson appealed.

ANALYSIS

A. ER 404(b)

The issue is whether the superior court committed prejudicial error in admitting evidence of Mr. Robinson's two prior rapes under ER 404(b). Considering *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) that ruled RCW 10.58.090 unconstitutional, the parties agree the trial court's ruling can be justified, if at all, solely

[3] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed. 2008) (WPIC).

under ER 404(b). Mr. Robinson contends the prior rape evidence showed solely his propensity to commit the charged crimes. We disagree with Mr. Robinson.

We review de novo an interpretation of ER 404(b). *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the rule was interpreted correctly, we review a decision to admit or exclude evidence under ER 404(b) for abuse of discretion. *Id.* The rule provides,

> 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.

ER 404(b).

Admitting evidence of prior misconduct under this rule requires the trial court to "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Showing a common scheme or plan is a permissible purpose under the second prong of this test. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). There are two types of common plans: (a) "where several crimes constitute constituent parts of a

plan in which each crime is but a piece of the larger plan," and (b) "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). Mr. Robinson's case involves the second type of common plan because he allegedly devised a plan and put it into action against multiple victims on separate but very similar occasions. *See Gresham*, 173 Wn.2d at 422.

Demonstrating the second type of common plan requires more than "mere[] similarity in results" between the prior misconduct and the crime charged. *Lough*, 125 Wn.2d at 860. It requires "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan," that is, as "individual manifestations" of the same plan. *Id.* These common features must include "'markedly similar acts of misconduct against similar victims under similar circumstances.'" *DeVincentis*, 150 Wn.2d at 19 (quoting *Lough*, 125 Wn.2d at 856). But the similarities need not "show a unique method of committing the crime." *Id.* at 21.

Here, the superior court interpreted ER 404(b) correctly. Thus, our review is limited to whether the trial court abused its discretion in admitting the prior rape evidence under ER 404(b). The record shows the trial court complied with ER 404(b)'s requirements. First, the court considered Mr. Robinson's prior convictions and found by a preponderance of evidence he committed the prior rapes. Second, the court identified

the purpose for admitting evidence of the prior rapes as "establish[ing] common scheme or plan." CP at 172, 174. Third, the court determined evidence of the prior rapes was relevant "to establish forcible compulsion and rebut consent defense." CP at 172, 174. Finally, the court weighed probative value against prejudicial effect in its letter opinion, oral ruling, and findings of fact and conclusions of law. The court noted Mr. Robinson's consent defense heightened the evidence's probative value and a limiting instruction could reduce its prejudicial effect.

Further, the court found the prior rapes were similar to the crimes charged here because in each case the victim "was asleep when the Defendant unlawfully entered her home and committed acts of sexual intercourse by forcible compulsion," and because "there was a significant age difference between the victim and the Defendant." CP at 171-72. The court also found similarities to here because in the earlier of the two prior rapes Mr. Robinson "was armed with a knife which he threatened the victim with," and in the later of the two prior rapes Mr. Robinson "had a nylon stocking covering his head and face." CP at 171-72. Based on these findings, the court concluded the prior rapes were "clearly similar" to the crimes charged here. CP at 173. Finally, the court found Mr. Robinson committed the prior rapes within less than one month from each other and committed the crimes charged here nearly 36 months after his release from confinement. Based on these findings, the court concluded the various crimes "occurred close in time

to each other," and "were on-going and occurred on multiple occasions." CP at 173. The court's reasoning is supported by the record. Thus, we cannot conclude the trial court abused its discretion in admitting evidence of Mr. Robinson's prior rapes under ER 404(b).

Mr. Robinson's case is much like *Williams*, 156 Wn. App. 482. There, the defendant raped and sexually assaulted two victims within days of each other, and within 14 months of his release from confinement on a prior rape conviction. *Id.* at 491. In a consolidated trial of the two more recent incidents, the superior court admitted evidence of the defendant's prior rape under ER 404(b). *Id.* This court affirmed, reasoning first, evidence of the defendant's prior rape showed he followed a "common scheme involving similar victims (women of similar age, involving drugs) and a similar method of attack (promise of drugs, attacked from behind with a forearm across the throat, strangled into unconsciousness during the rape)." *Id.* Second, this scheme "was relevant to the element of forcible compulsion" because the defendant "claimed that his current victims consented to sexual intercourse." *Id.*

In sum, we conclude the trial court did not err in allowing the ER 404(b) evidence. Thus, we do not reach the parties' prejudice and harmlessness contentions.

B. Limiting Instruction

The issue is whether the superior court erred in giving Instruction 23. Mr.

Robinson contends Instruction 23 misstated the law, permitting the jury to consider evidence of Mr. Robinson's prior rapes for impermissible propensity purposes. The State responds Mr. Robinson invited any error by proposing Instruction 23. We agree with the State.

We review de novo claimed legal errors in jury instructions. *State v. Vander Houwen*, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). "Jury instructions are improper if they do not permit the defendant to argue his theories of the case, mislead the jury, or do not properly inform the jury of the applicable law." *Id.*

"If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request." *Gresham*, 173 Wn.2d at 423. "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and 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. However, under the invited error doctrine, "'[a] party may not request an instruction and later complain on appeal that the requested instruction was given.'" *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (alteration in original) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

Before jury deliberations, Mr. Robinson proposed a limiting instruction, partly

reading, "Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior convictions and conduct of the defendant and may be considered by you only for the purpose of proving a common scheme, plan, *or forcible compulsion*." CP at 59 (emphasis added). Mr. Robinson cited ER 404(b) and WPIC 5.30 as authority for this proposed instruction. The superior court accepted Mr. Robinson's proposed instruction and read it to the jury as Instruction 23. The instruction permitted the jury to consider evidence of Mr. Robinson's prior rapes for the purpose of proving forcible compulsion. Mr. Robinson contends this was an impermissible propensity purpose, as forcible compulsion was an essential element of first degree rape and had other implications for first degree burglary with sexual motivation. But Mr. Robinson invited any error in Instruction 23.

Mr. Robinson incorrectly argues the invited error doctrine is displaced by the court's duty to give a proper ER 404(b) limiting instruction. He fails to recognize this is not a case of a rejected instruction or a failure to instruct. *Gresham*, 173 Wn.2d at 424. A central purpose of the invited error doctrine is "to prevent parties from misleading trial courts and receiving a windfall by doing so." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Mr. Robinson's argument is untenable.

In sum, the superior court did not commit reversible error in giving Instruction 23 because Mr. Robinson invited any error by proposing the instruction. Considering our

rulings, Mr. Robinson has failed to show any reversible trial error. Thus, we do not reach his arguments concerning cumulative error.

C. Legal Financial Obligations

Mr. Robinson contends the trial court's findings on his ability to pay LFOs are unsupported by the record. The State concedes this point, but suggests the matter is not yet properly before us.

We review a trial court's determination on an offender's financial resources and ability to pay under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

If a sentencing court finds an offender has the ability to pay LFOs, it must make an adequate record for this court to conclude it had a sufficient "factual basis" to do so. *Baldwin*, 63 Wn. App. at 311 (affirming a trial court finding that an offender had the

present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the offender "describe[d] himself as employable"). Some evidence is required. *Bertrand*, 165 Wn. App. at 404 (reversing, as clearly erroneous, a trial court finding that an offender had the present or likely future ability to pay LFOs where the record contained no evidence to support it). Even though Mr. Robinson did not object to the trial court's findings on his ability to pay LFOs, the State now correctly concedes "there is no record" to support them. Br. of Resp't at 26.

In sum, paragraphs 2.7, 4.D.4, and 4.D.5 of the judgment and sentence are clearly erroneous to the extent they find Mr. Robinson had the present or likely future ability to pay LFOs.

Despite its concession, the State contends Mr. Robinson's challenge is unripe[4] because the government has not yet attempted to collect costs from him.

Generally, "'the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.'" *Bertrand*, 165 Wn. App. at 405 (emphasis omitted) (quoting *Baldwin*, 63 Wn. App. at 310). Further, under RAP 3.1, an offender is not aggrieved by an order to pay "'until the State seeks to enforce payment and contemporaneously determines [the offender's] ability to pay.'" *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009) (quoting *State v. Mahone*, 98 Wn. App. 342,

[4] In fact, the State misapplies mootness. We nonetheless interpret the State's contention as a ripeness challenge because it clearly implicates ripeness issues.

347-48, 989 P.2d 583 (1999)). These rules govern review of *orders* to pay LFOs, not *factual findings* of ability to pay LFOs. *See Bertrand*, 165 Wn. App. at 403-05. Such factual findings are governed by the clearly erroneous standard and are ripe for review upon entry. Mr. Robinson challenges the superior court's factual findings only, not its orders. The State's contention is thus untenable.

Conviction Affirmed. Findings on ability to pay LFOs reversed. Remanded with instructions to strike paragraphs 2.7, 4.D.4. and 4.D.5 from the judgment and sentence. [5]

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.

_____
Brown, J.

WE CONCUR:

_____ _____
Korsmo, A.C.J. Siddoway, J.

[5] While we reverse the trial court's *findings* on Mr. Robinson's ability to pay LFOs, its *order* for him to pay LFOs remains in effect. *See Bertrand*, 165 Wn. App. at 405. However, the State cannot collect LFOs from Mr. Robinson unless and until there is a proper determination he has the ability to pay them, considering his financial resources and the nature of the burden LFOs would impose on him. *See id.* at 405 n.16; *Baldwin*, 63 Wn. App. at 312; former RCW 9.94A.760 (2005); former RCW 10.01.160(3) (2008); former RCW 70.48.130(4) (2007).