No. 44461-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jennifer Markwith,

Appellant.

Mason County Superior Court Cause No. 12-1-00174-0

The Honorable Judge Amber L. Finlay

Appellant's Opening Brief

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Double jeopardy prohibits multiple convictions for a single offense. Here, Ms. Markwith's convictions for assault and reckless endangerment stemmed from the same conduct. Did the two convictions violate Ms. Markwith's state and federal constitutional rights to be free from double jeopardy?

2. A trial court must define reasonable doubt and the burden of proof using WPIC 4.01. Here, the court used an instruction that omitted a critical portion of that instruction. Did the court violate Ms. Markwith's Fourteenth Amendment right to due process by failing to tell jurors that she had no burden of proving the existence of a reasonable doubt?

3. A criminal conviction may not be based on propensity evidence. In this case, the jury heard evidence that Ms. Markwith smashed the rear window of Bell's car the night before the incident with Tecpile, and the state argued that this evidence showed her violent disposition. Did Ms. Markwith's convictions violate her Fourteenth Amendment right to due process because they were based in part on propensity evidence?

4. ER 403 and ER 404(b) prohibit introduction of evidence of prior uncharged misconduct, except in limited circumstances. Here, the court denied defense counsel's motion to exclude evidence that Ms. Markwith "intimidated" Bell the night before the incident with Ms. Tecpile. Did the trial court err by

denying Ms. Markwith's motion to exclude evidence of uncharged prior misconduct?

5. An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably introduced evidence that Ms. Markwith smashed Bell's car window the night before the incident with Ms. Tecpile, failed to seek an instruction limiting the jury's consideration of that evidence, and failed to object to Deputy McGill's comments on Ms. Markwith's decision to stop answering questions during custodial interrogation. Did counsel's deficient performance prejudice Ms. Markwith in violation of her Sixth and Fourteenth Amendment right to counsel?

6. An accused person may stop answering questions at any time during custodial interrogation, and the decision not to cooperate may not be used as evidence of guilt at trial. Here, the state introduced testimony that Ms. Markwith stopped answering questions following administration of *Miranda* warnings. Did the prosecutor infringe Ms. Markwith's Fifth and Fourteenth Amendment privilege against self incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jennifer Markwith and her partner, Yvonne Bell, lived in a barn on property belonging to Jose and Angela Tecpile. RP 70, 78, 115, 155. Ms. Markwith and Bell had permission to enter the Tecpile's house as needed to use the bathroom and kitchen. RP 71, 79, 92-93, 129, 156. Ms. Markwith and Bell stored their food in the house kitchen and their perishables in a refrigerator in the garage, which was accessed by walking through the house. RP 75, 156-57, 168.

One evening in April, Ms. Markwith and Bell had a disagreement, which resulted in Bell sleeping on the couch in the Tecpile house for the night. RP 115-16, 158. That same night, Ms. Tecpile informed Ms. Markwith that she needed to pack her belongings and move out of the barn. RP 79, 117, 158-59. The next morning, Ms. Markwith went to look for Bell in the Tecpile house. RP 116, 169-70. Ms. Tecpile wouldn't let Ms. Markwith enter the house. RP 116. Ms. Tecpile assaulted Ms. Markwith. RP 159-60. Ms. Markwith called 911 and Ms. Tecpile was arrested. RP 76, 119-20, 160.[1]

[1] Bell later claimed that Ms. Markwith had inflicted injuries upon herself to make it look as though she had been assaulted. RP 119.

After Ms. Tecpile's arrest, Ms. Markwith began packing her belongings from the barn and house. RP 160-61, 172.

Upon picking her up from jail later that morning, Mr. Tecpile informed Ms. Tecpile that he had seen Ms. Markwith drop a video game controller on the ground as she was packing. RP 65. There was no evidence regarding whether Ms. Markwith owned any video game equipment. RP 63-182. Ms. Tecpile called 911 to report a theft. RP 77. When the Tecpiles arrived home, Ms. Markwith was not there. RP 78. Ms. Tecpile noticed that some DVDs and video game paraphernalia were missing. RP 78.

The Tecpiles ran an errand and saw Ms. Markwith driving in the direction of the Tecpile home. RP 67, 80, 101. The Tecpiles got back into their car to follow Ms. Markwith to the property. RP 80. When they arrived, Ms. Markwith was packing her belongings into the car from the barn. RP 121, 162. Mr. Tecpile purposely parked his car so that Ms. Markwith was not able to leave via the driveway. RP 69, 81, 107, 122, 162. Ms. Tecpile called 911 a second time. RP 81.

Ms. Tecpile got out of the car and confronted Ms. Markwith, saying that she would not be permitted to leave the property until the police arrived. RP 81. Hoping to avoid another physical confrontation, Ms. Markwith got into her car and left the property by driving through a

barbed-wire fence near the driveway. RP 82, 123, 125, 141, 162-63. The route Ms. Markwith took was the only exit route available to her. RP 87, 132, 167. Ms. Tecpile testified that Ms. Markwith drove the car in her direction and that she had to jump out of the way to avoid being hit. RP 82.

Daniel Irwin, who also lived in the Tecpile home, was standing nearby. RP 82, 103. The barbed wire from the fence dragged behind the car and knocked Irwin's walker over, causing him to fall. RP 82, 103. Irwin cut his finger during the fall. RP 103-04. Ms. Tecpile called 911 a third time. RP 83.

Later that day, Ms. Markwith met up with Mason County Sheriff Deputy Ken McGill because she wanted to discuss Ms. Tecpile's assault on her that morning. RP 126, 133, 165. McGill arrested Ms. Markwith based on Tecpile's 911 report. RP 140, 165.

The state charged Ms. Markwith with second-degree assault, reckless endangerment, and residential burglary. CP 19-20.

At trial, the court denied Ms. Markwith's motion *in limine* to exclude evidence that she had "intimidated" Bell the night before the incident. RP 110. The court stated that the evidence was admissible because it was relevant to Bell's state of mind and to explain why Bell was sleeping in the house instead of in the barn. RP 113.

On direct-examination, Bell testified that she slept in the house instead of the barn the night before the incident because she was having "disagreements" with Ms. Markwith. RP 116. On cross-examination, defense counsel asked why Bell had needed a ride back to the Tecpile residence after Ms. Markwith was arrested. RP 134. Bell responded that she couldn't drive her own car because, on the night before the incident, Ms. Markwith had smashed the rear window of Bell's car with a baseball bat. RP 135.

On cross-examination of Ms. Markwith, the prosecutor used this evidence to accuse her of being "angry" and "a fighter." RP 171-72. In closing, the prosecutor invited the jury to "imagine the force that it takes to smash out the window of a car, the massive amount of force that it takes, the massive amount of anger that generates." RP 220.

During direct-examination of Deputy McGill, the state elicited testimony that after her arrest Ms. Markwith "got tired of [him] asking her questions real quick." RP 141. Ms. Markwith cut off questioning by using obscenities and accusing McGill of using drugs. RP 141-42.

McGill told the jury that he "couldn't get anything out of her." RP 141-42. Defense counsel did not object to this testimony. RP 141-42.[2]

At the close of evidence, the court gave a reasonable doubt instruction that differed from the pattern instruction. The court's instruction omitted the sentence providing "The defendant has no burden of proving that a reasonable doubt exists." Instruction 3, Court's Instructions, Supp. CP.

The jury found Ms. Markwith guilty of each of the three charges. RP 243; CP 5. After sentencing, Ms. Markwith timely appealed. CP 4.

ARGUMENT

I. MS. MARKWITH'S CONVICTIONS FOR BOTH ASSAULT AND RECKLESS ENDANGERMENT VIOLATED THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

A. Standard of Review.

Double jeopardy violations are constitutional issues reviewed *de novo*. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Double jeopardy violations constitute manifest error affecting a constitutional right, which can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

[2] In response to Ms. Markwith's unsuccessful motion *in limine* to exclude testimony regarding her use of obscenities, the prosecutor agreed not to elicit testimony about Ms. Markwith's exercise of her right to remain silent. RP 58.

B. Ms. Markwith's convictions for assault and reckless endangerment constitute double jeopardy under the "same evidence" test.

Both the Washington state and federal constitutions prohibit double jeopardy by multiple punishments for a single offense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 9; *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The Blockburger[3] or "same evidence" test controls the double jeopardy analysis unless there is a clear indication that the legislature intended otherwise. *Womac*, 160 Wn.2d at 652. Under the *Blockburger* test, multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one offense would also have been sufficient to support a conviction for the other. *Orange,* 152 Wn.2d at 816.

The legal elements of the offenses are not dispositive of the *Blockburger* test for double jeopardy. *Womac*, 160 Wn.2d at 652. The *Orange* court, for example, found that convictions for first degree attempted murder and first degree assault violated double jeopardy even though attempted murder required the additional element of intent to cause death. *Orange,* 152 Wn.2d at 820. The court held that, because the offenses were both based on the single act of firing one shot at another

[3] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

person, the evidence required for attempted murder was sufficient to support the assault conviction. *Id; see also State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (finding that convictions for assault and attempted rape violated double jeopardy despite different legal elements).

The reckless endangerment statute provides that:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

RCW 9A.36.050.

For unit of prosecution purposes, a reckless endangerment charge applies to a single person. *State v. Graham,* 153 Wn.2d 400, 103 P.3d 1238 (2005).

Second degree assault includes intentional assault with a deadly weapon. RCW 9A.36.021(1)(c). Assault is defined, *inter alia*, as

> An act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. Instruction 16, Court's Instructions, Supp CP.[4]

[4] Though the jury was instructed on all three alternative definitions of assault, it is apparent from the evidence and the state's theory in closing that Ms. Markwith's conviction was based on placing Tecpile in reasonable apprehension of bodily injury.

Ms. Markwith's reckless endangerment conviction was based on the same act of allegedly driving toward Ms. Tecpile and Bell. RP 224-25.[5]

To find Ms. Markwith guilty of assaulting Ms. Tecpile, the jury had to find that she drove the car with the intent to cause apprehension of bodily injury and that Ms. Tecpile was reasonably placed in such apprehension. Instruction 16, Court's Instructions, Supp CP. In order to find her guilty of reckless endangerment, the jury had to find that Ms. Markwith drove the car in a reckless manner and created a substantial risk of death or serious bodily injury. RCW 9A.36.050.

The jury was instructed that an act is reckless if it is also intentional. Instruction 20, Court's Instructions, Supp CP. Thus, the *mens rea* element necessary to convict on the assault charge was also sufficient to convict on the reckless endangerment charge. *Orange,* 152 Wn.2d at 816.

Under the evidence here, in order to find Ms. Markwith guilty of assault the jury also had to find that she drove toward Tecpile in a manner

[5] It was not completely clear whom the state claimed had been endangered by Ms. Markwith's conduct. The state amended the Information on the final day of trial to remove a reference to Ms. Tecpile "and/or" Irwin as the alleged victims of the reckless endangerment charge. RP 193-96. The amended information did not name an alleged victim of the reckless endangerment charge. CP 19-20. This is despite the fact that reckless endangerment applies to a single person for double jeopardy purposes. *Graham,* 153 Wn.2d at 400.

that placed her in reasonable apprehension of bodily injury. Driving toward Tecpile in such a manner would also have been sufficient to find that Ms. Markwith had created a substantial risk of death or serious bodily injury. RCW 9A.36.050. The evidence necessary to convict on the assault charge would also have been sufficient to convict on reckless endangerment. *Orange,* 152 Wn.2d at 816. Thus, conviction for both violated the prohibition against double jeopardy. *Id.*

Ms. Markwith's convictions for both reckless endangerment and second-degree assault based on the same evidence violated the constitutional protection against double jeopardy. *Id.* Ms. Markwith's convictions must be reversed. *Id.* at 821.

II. THE COURT'S NONSTANDARD REASONABLE DOUBT INSTRUCTION RELIEVED THE STATE OF ITS BURDEN OF PROOF.

A. Standard of Review.

An appellate court reviews jury instructions *de novo*. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). A jury instruction relieving the state of its burden of proof can constitute manifest error affecting a constitutional right raised for the first time on review. *Id.*; RAP 2.5(a)(3).

B. The court's reasonable doubt instruction omitted critical language and failed to make the standard manifestly clear.

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is "the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a reasonable doubt. *Peters*, 163 Wn. App. at 847. Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give a reasonable doubt instruction that differs from the WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011). Divisions I and II approach the issue of harmlessness differently. Division I does not evaluate *Bennett* errors for harmlessness. *Castillo*, 150 Wn. App. at 473. Division I has noted that "the [*Bennett*] court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt." *Id.* By contrast, Division II applies the harmless error standard for constitutional error. *Lundy*, 162 Wn. App. at 870-871.

Even under Division II's approach, the error here requires reversal. In *Lundy,* the trial court used a modified instruction, which differed only slightly from the pattern instruction. *Lundy*, 162 Wn. App. at 870-71. The instruction unequivocally informed jurors "that the defendant has no burden of proving that a reasonable doubt exists." *Id, at* 873. Because the

instruction correctly communicated the burden of proof and the reasonable doubt standard, the *Lundy* court found the error harmless beyond a reasonable doubt. *Id., at* 872-873.

Here, the court omitted the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." Instruction 3, Court's Instructions, Supp. CP. This instruction presents the same error at issue in *Castillo.* It differs significantly from the instruction addressed by the *Lundy* court.

Unlike the instructions in *Bennett* and *Lundy,* Instruction 3 provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Ms. Markwith had no burden. In other words, Instruction 3 did not make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The instruction left open the possibility that Ms. Markwith had the burden of raising a reasonable doubt. The same error persuaded Division I to reverse.[6] *Castillo,* 150 Wn. App. at 473.

The trial court erred when it failed to instruct the jury that Ms. Markwith had no burden of proving that a reasonable doubt existed.

[6] The instruction in *Castillo* suffered from other flaws as well.

Castillo, 150 Wn. App. at 473. This instructional error requires reversal of Ms. Markwith's conviction. *Id.*

III. MS. MARKWITH'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.,* 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

A manifest error affecting a constitutional right may be raised for the first time on review.[7] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009)). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001).[8] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable

[7] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

[8] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." *State v. WWJ Corp.,* 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.[9] U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau,* 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) ("There is, accordingly, no question that propensity would be an 'improper basis' for conviction…") (citation omitted).

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

> [S]uch evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover…jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. …[J]urors will credit propensity evidence with more weight than

[9] The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

> such evidence deserves…[S]uch evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause,* 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In the absence of a limiting instruction, the jury is likely to use evidence of prior misconduct as propensity evidence; this is especially true when jurors are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved…" Instruction 1, Court's Instructions, Supp. CP.

C. Ms. Markwith's convictions were based in part on propensity evidence.

Here, the jury heard evidence that Ms. Markwith broke the rear window of Bell's car the night before the incident with Tecpile. RP 135. The evidence was admitted without limitation, and the jury was not instructed to consider it solely for its intended purpose. *See* Court's Instructions, *generally*, Supp. CP. Because of this, the court's instructions permitted the jury to consider the evidence for any purpose, including as substantive evidence of guilt. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

In fact, the court instructed the jury that it "must consider all of the evidence" admitted by the court, in considering whether or not a particular proposition had been proved. Instruction 1, Court's Instructions, Supp. CP. In light of this instruction, it is highly likely that the jury erroneously used evidence of prior misconduct as propensity evidence. Furthermore, the prosecutor used the evidence to suggest that Ms. Markwith had a violent disposition. RP 220.

This error was manifest, because it had practical and identifiable consequences at trial. By permitting the jury to consider Ms. Markwith's prior criminal involvement as substantive evidence of guilt, the court tipped the balance in favor of conviction. Accordingly, the error can be reviewed for the first time on appeal. RAP 2.5(a)(3); *Nguyen*, 165 Wn.2d at 433.

The evidence suggested that Ms. Markwith had a propensity to violence. The court's instructions and the prosecutor's argument encouraged jurors to convict based on propensity evidence. This violated Ms. Markwith's Fourteenth Amendment right to due process. *Garceau,* 275 F.3d 769. Accordingly, her convictions must be reversed and the case remanded for a new trial. *Id.*

IV. THE COURT ERRED BY DENYING MS. MARKWITH'S MOTION TO EXCLUDE EVIDENCE OF UNCHARGED MISCONDUCT.

A. Standard of Review.

A court's decision to admit evidence of the accused's prior wrongs is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A party whose motion *in limine* is denied maintains a standing objection to the challenged evidence, which preserves the issue for appeal. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010). Reversal is required if there is a reasonable probability that the improper evidence materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013).

B. Evidence of Ms. Markwith's unproven prior wrongs should not have been admitted to show action in conformity therewith.

The prosecution may not introduce evidence of the accused's prior crimes, wrongs, or acts to "prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of other wrongs becomes admissible at trial only if the court (1) finds by a preponderance of the evidence that the misconduct occurred, (2) identifies the purpose for which the proponent is offering the evidence, (3) determines that the evidence helps prove an element of the charge, and (4)

weighs the probative value against the prejudicial effect. *Thang*, 145 Wn.2d at 642; ER 402, 403, 404(b). In doubtful cases, the court should exclude the evidence. *Id.*

A court abuses its discretion if it exercises it "on untenable grounds or for untenable reasons" or when any reasonable judge would have ruled differently. *Thang*, 145 Wn.2d at 642.

Ms. Markwith moved to exclude evidence that Ms. Markwith had "intimidated" Bell the night before the incident. RP 110. The court denied Ms. Markwith's motion, holding that the evidence was relevant to Bell's state of mind and to explain why Bell was sleeping in the house. RP 113.

The court did not conduct the inquiry set out in *Thang*. RP 110-113. The court did not find that the prior misconduct had occurred by a preponderance of the evidence, determine that the evidence helped prove an element of the charge, or weigh the probative value against the prejudicial effect. *Id.*; *Thang*, 145 Wn.2d at 642. Though the court did identify the purpose for which the state was offering the evidence – to demonstrate Bell's state of mind – that purpose was not relevant to any charge or defense at issue in the case. Bell was neither the alleged victim nor an alleged accomplice in the case. The prejudicial effect of the evidence upon Ms. Markwith's defense outweighed any probative value.

The court abused its discretion when it denied Ms. Markwith's motion to exclude evidence of her alleged "intimidation" of Bell the night before the incident. *Thang*, 145 Wn.2d at 642.

After the court denied Ms. Markwith's motion, Bell testified that Ms. Markwith had smashed out the back window of her car and that "the violence in their relationship had taken a turn" the night before the alleged offenses. RP 129, 134-35.[10]

During cross-examination of Ms. Markwith, the prosecutor asked her:

> PROSECUTOR: Alright, yet you busted out the back window of a vehicle with a baseball bat and you say you aren't a fighter?
> RP 171.

> PROSECUTOR: And you were mad when you busted out that windshield, weren't you – or that rear window, weren't you? You were mad, weren't you?
> RP 172.

In closing, the prosecutor further argued that Ms. Markwith's alleged conduct the night before the incident provided evidence of her character and, thus, of her guilt:

> … She admitted to busting the rear window out of Ms. Bell's vehicle the day before, April 23rd, with a baseball bat. Now, it should be noted, can you imagine the force that it takes to smash

[10] This testimony was elicited by defense counsel on cross-examination of Bell. As argued elsewhere in this brief, defense counsel's elicitation of this evidence constituted ineffective assistance of counsel.

> out the window of a car, the massive amount of force that it takes, the massive amount of anger that that generates.
> RP 220.

The court's erroneous ruling to permit evidence of alleged misdeeds by Ms. Markwith the night before the incident encouraged the jury to infer that she had acted in conformity with those actions the next day. ER 404(b); *Thang*, 145 Wn.2d at 642. There is a reasonable probability that the improper evidence materially affected the outcome of Ms. Markwith's case. *Fuller*, 169 Wn. App. at 831. The error was not harmless. *Id.*

The court erred when it denied Ms. Markwith's motion to exclude evidence of unproven prior bad acts, which were introduced in order to "show action in conformity therewith." ER 403, 404(b). Ms. Markwith's conviction must be reversed. *Thang*, 145 Wn.2d at 649.

V. MS. MARKWITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance raises an issue

of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel provided ineffective assistance by introducing evidence that prejudiced Ms. Markwith.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

1. Defense counsel should not have introduced evidence that Ms. Markwith smashed the rear window of Bell's car and acted violently toward her.

A defense attorney should not introduce evidence that unfairly prejudices his or her own client. *State v. Saunders*, 91 Wn. App. 575, 578-580, 958 P.2d 364 (1998). Evidence whose danger of unfair prejudice outweighs its probative value is not admissible. ER 403. Evidence of the accused's alleged prior bad acts is never admissible "to show action in conformity therewith." ER 404(b).[11] Such evidence may only be

[11] Prior to admission of evidence of prior bad acts, the court must (1) find that the misconduct occurred, (2) identify the purpose for which evidence is offered, (3) determine that the evidence helps prove an element of the charge, and (4) weigh the probative value against the prejudicial effect. *Thang*, 145 Wn.2d at 642.

admitted for a limited purpose. ER 404(b). If evidence is admitted for a limited purpose, counsel should ask for a limiting instruction. ER 105; *Russell*, 171 Wn.2d at124.

The court at Ms. Markwith's trial did not made the inquiry outlined above. Nonetheless, Ms. Markwith's defense counsel elicited testimony from Bell that his client had allegedly smashed the rear window of her car with a baseball bat the night before the incident. RP 129, 134-35. Counsel had no valid tactical reason for eliciting this testimony, which improperly encouraged the jury to infer that Ms. Markwith had acted in conformity therewith the next day. ER 404(b); *Thang*, 145 Wn.2d at 642. Defense counsel recognized the prejudicial nature of the testimony enough to move *in limine* to exclude it. RP 110. There was no strategic reason for defense counsel to then elicit the evidence on cross-examination when the prosecution had not elicited it on direct-examination. Counsel also failed to propose an instruction informing the jury that the evidence could not be used to infer Ms. Markwith's action in conformity therewith. Defendant's Proposed Instructions for the Jury, Supp CP. Counsel's performance was deficient. *Saunders*, 91 Wn. App. at 578.

The prosecutor used Bell's testimony (elicited by defense counsel) to argue in closing that Ms. Markwith was angry on the day of the incident and had acted in conformity with her actions on the previous night. RP

220. There is a reasonable probability that counsel's deficient performance affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862 Ms. Markwith was prejudiced by counsel's deficient performance. *Id.*

Ineffective assistance of counsel denied Ms. Markwith a fair trial. *Kyllo*, 166 Wn.2d at 862. Ms. Markwith's conviction must be reversed. *Id.*

VI. IMPROPER COMMENTS ON MS. MARKWITH'S EXERCISE OF HER RIGHT TO REMAIN SILENT VIOLATED HER PRIVILEGE AGAINST SELF-INCRIMINATION AND HER RIGHT TO DUE PROCESS.

A. Standard of Review.

Improper comments on an accused's post-arrest silence present a constitutional issue reviewed *de novo*. *State v. Silva*, 119 Wn. App. 422, 428, 81 P.3d 889 (2003). Such comments can constitute manifest error affecting a constitutional right raised for the first time on review. *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004).

B. Deputy McGill's comment on Ms. Markwith's post-arrest exercise of her privilege against self-incrimination violated due process.

Both the federal and state constitutions protect the accused's right to silence. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. The

privilege against self-incrimination is liberally construed. *Holmes*, 122 Wn. App. at 443.

The *Miranda* warnings carry an implicit assurance that the accused's silence will not carry a penalty. *Silva*, 119 Wn. App. at 429. Thus, telling the jury that the accused remained silent after being informed of his/her rights "violates fundamental due process by undermining [that] implicit assurance." *Id.*

Additionally, an accused's exercise of his/her constitutional right to remain silence is not evidence of guilt. *Id.* at 428-29. The state may not invite the jury to infer that the accused is guilty based on his/her exercise of that right. *Id.* Such an inference "always adds weights to the prosecution's case and is always, therefore, unfairly prejudicial." *Id.* It is also highly prejudicial for the state to "suggest… that silence casts doubt on the defendant's credibility." *Holmes*, 122 Wn. App. at 443.

Because it presents a constitutional error, an improper comment on silence requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 446.

A direct comment on the accused's silence – such as a statement that s/he refused to speak to a police officer – "is always constitutional error." *Holmes*, 122 Wn. App. at 445. If a law-enforcement statement at trial can reasonably be considered a purposeful comment on the accused's

silence, reversal is required unless the error was harmless beyond a reasonable doubt. *Holmes*, 122 Wn. App. at 445-46.

A comment on silence is purposeful if it is responsive to the state's questioning and carries "even slight inferable prejudice" to the accused. *Id.* A comment on silence from law enforcement that is nonresponsive to the state's questions requires review under the constitutional harmless error analysis if: (1) it was given for the purpose of prejudicing the accused, (2) resulted in the unintended effect of likely prejudice to the accused, or (3) was exploited by the state during the course of the trial in an attempt to prejudice the accused. *Id.*

The following exchange took place during the state's direct-examination of Deputy McGill:

> PROSECUTOR: Did, after this conversation, did Ms. Markwith say anything to you – regarding, you know, use of obscenities?
>
> MCGILL: She got tired of me asking her questions real quick, started yelling obscenities at me, saying that I was a liar and accused me for some reason of having drugs with the victim.
> ...
> MCGILL: Right, and at that time I could not get anything out of her, so I just stopped any questioning.
> RP 141-42.

McGill testified that this exchange took place after he had advised Ms. Markwith of her *Miranda* rights and placed her in handcuffs. RP 140.

McGill's statements regarding Ms. Markwith's refusal to answer questions constituted a purposeful, direct comment on her exercise of the right to remain silent. *Holmes*, 122 Wn. App. at 445-46. McGill testified that he attempted to conduct post-arrest questioning and that Ms. Markwith exercised her constitutional right not to answer. The comment was a direct answer to the state's question. *Id.*

Even if the comment was unresponsive to the state's questions, it had both the purpose and effect of prejudice to Ms. Markwith's defense. *Id.* The state's case revolved around attempting to paint Ms. Markwith as an angry and aggressive person. McGill's testimony that she was not cooperative during his interrogation likely corroborated the state's version of her character in the eyes of the jury. The comment encouraged the jury to infer Ms. Markwith's guilt from her exercise of her right to silence in violation of her due process rights. *Silva*, 119 Wn. App. at 428-29.

The state cannot show that this violation of Ms. Markwith's constitutional privilege against self-incrimination was harmless beyond a reasonable doubt. *Holmes*, 122 Wn. App. at 446.

McGill's comment on Ms. Markwith's post-arrest exercise of her constitutional right to silence violated due process and requires reversal of her convictions. *Silva*, 119 Wn. App. at 429.

C. Defense counsel should have objected to evidence that Ms. Markwith chose to stop answering questions during custodial interrogation.

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). As noted above, comments on an accused person's post-*Miranda* exercise of the right to remain silent violate the privilege against self-incrimination and the right to due process. *Silva*, 119 Wn. App. at 429. An accused person's decision to stop answering questions may not be used as evidence of guilt or credibility. *Id.* at 428-29; *Holmes*, 122 Wn. App. at 443.

Here, counsel failed to object to improper comments on Ms. Markwith's decision to stop answering questions. RP 141-42. Counsel had no valid tactical reason for this failure. McGill's testimony painted Ms. Markwith in a negative light, suggesting that she had something to hide. Thus, counsel's failure to object likely affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to object to comments on Ms. Markwith's exercise of her right to silence. *Hendrickson*, 138 Wn. App. at 833. Her convictions must be reversed. *Kyllo*, 166 Wn.2d at 862.

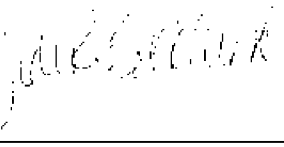
CONCLUSION

The court violated Ms. Markwith's right to be free from double jeopardy when it entered judgment for assault and reckless endangerment based on the same evidence. The court violated due process when it instructed the jury in a manner relieving the state of its burden of proof. The court erred when it denied the defense motion to exclude propensity evidence, which the prosecutor relied upon to suggest Ms. Markwith had a violent disposition.

Ms. Markwith's counsel provided ineffective assistance when he elicited testimony that prejudiced his client and failed to object to inadmissible testimony. Deputy McGill's improper comment on Ms. Markwith's exercise of her right to remain silent violated due process. For all these reasons, Ms. Markwith's convictions must be reversed.

Respectfully submitted on August 27, 2013,

BACKLUND AND MISTRY



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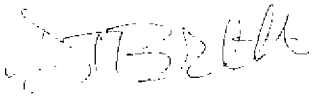

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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Shelton, WA 98584

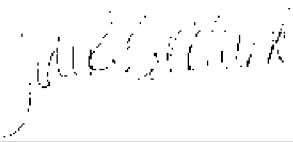
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 27, 2013.



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