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NO. 70546-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

KARINA TORRESCANO-HERNANDEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting irrelevant and prejudicial evidence of an alleged prior bad act the state did not connect to appellant.

2. Admission of improper opinion testimony violated appellant's right to a fair trial and invaded the province of the jury.

3. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. In the state's prosecution against appellant for assaulting her child, did the court err in admitting evidence of a prior injury to the child in the absence of any evidence connecting the injury to appellant?

2. Whether appellant was deprived of her right to a fair trial where the doctor who treated her son for burn injuries to his hands testified he believed appellant burned the child's hands on the stove?

3. To the extent defense counsel contributed to the erroneous admission of the opinion evidence by failing to object, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 2, 2012, the Snohomish county prosecutor charged appellant Karina Torrescano Hernandez with second degree assault of her minor son, C.T.[1] CP 141-42. The state was later allowed to amend the information to add a deliberate cruelty aggravator. CP 136-37. Following a jury trial, Torrescano was acquitted of second degree assault and convicted of the lesser offense of third degree assault. CP 28, 30. The jury acquitted her of deliberate cruelty. CP 27.

2. Court's Ruling Admitting Evidence of Prior Injury

The state filed the second degree assault charge after C.T. sustained second degree burns to his hands. The state alleged Torrescano burned C.T.'s hands on the stovetop upon discovering C.T. had taken someone else's property. CP 138-40. Torrescano denied burning C.T. and asserted he burned himself while attempting to roast marshmallows on the stovetop, which C.T. was not allowed to touch. CP 139, 129.

After the burns were discovered, child protective services (CPS) took C.T. for an examination by Dr. Kenneth Feldman at

[1] C.T. was born on May 27, 2006. CP 141-42.

Seattle Children's Hospital. CP 140. Feldman specializes in child abuse pediatrics. RP 649-50. In his opinion, the burns were unlikely accidental. CP 140.

During his examination, he noticed a mark he described as a "U-shaped hyperpigmentation" on C.T.'s thigh. CP 140. He opined the mark was evidence of abusive whipping from a looped cord. CP 140; RP 416.

The defense moved under ER 404(b) to exclude evidence of the mark on C.T.'s thigh and the related photographs taken by Dr. Feldman. CP 105; RP 416. In response, the prosecutor argued the mark was indicative of abuse, although C.T. never said he was whipped or that his mother made that mark. RP 417. As the prosecutor indicated, during an interview, C.T. said "something much more generic[,]" like "Karina hits me and she makes me marks." RP 416. Of import to the prosecutor was the fact that "Feldman has said that this is the one other injury he can confirm appears to be resulting from intentional infliction." RP 417. But as the prosecutor acknowledged, Feldman did not even ask C.T. about the mark. RP 417.

Defense counsel objected the state failed to prove Torrescano caused the injury and that its admission would be

unfairly prejudicial. RP 417-18. As defense counsel pointed out, C.T. also said he had been hit by his grandmother. RP 417.

When the court asked how the prosecutor would deal with "the issue of who did it," the prosecutor responded: "By being absolutely upfront with the jury about not saying who did it." RP 418. According to the state, the purported whipping was relevant regardless, because:

> if true, whipping with a looped cord is in that upper level extreme physical discipline category that would have an effect on the child even if it was delivered from a grandmother as opposed to a mother.

RP 418.

The prosecutor conceded, however, he did not have a witness who would testify as "to the impact that it might have had on the child, and the child's willingness to discuss what happened to him or not happened to him, or whatever other potential impact it may have had." RP 418-19.

The court found "a sufficient offer of proof to show it's indicative of abuse." RP 419. Of more concern to the court, however, was "how did it get there." RP 419. The court therefore reserved ruling. RP 419.

In anticipation of Feldman's testimony, the state called Feldman to make an offer of proof regarding the injury. RP 636. Following the offer of proof, the prosecutor asserted the "loop whip cord injury" should be admitted as relevant to Feldman's conclusions, because it was indicative of a pattern of abuse:

> You heard him testify that in his opinion, this is indicative of or consistent with only one type of injury and that's an abusive inflicted injury. And that while he acknowledges we have no information on the person who caused that injury, it is nonetheless important to his conclusions because it's indicative of a pattern of abuse of a particular child which would bear on the child's willingness to disclose or report about the abuse.[2]

RP 636-37.

Defense counsel reiterated that in the absence of any connection to Torrescano, the evidence would be unfairly prejudicial:

> Regarding the mark, he has indicated there's no information that my client caused that mark. He has no idea who caused it, the age of it, when it happened.
>
> He has information that the child was born in Mexico. I think it's highly prejudicial to present information regarding a mark without any indication of who caused it or when it occurred.
>
> And to try to suggest that there's a pattern, because that inference of a pattern suggested the

[2] During the offer of proof, Feldman actually testified his opinion about C.T.'s burns would be the same with or without the existence loop cord injury. RP 621.

pattern was my client. I think that's unfairly prejudicial.

RP 637.

The court ruled that despite the lack of any connection, the injury was relevant on the issue of C.T.'s willingness to disclose:

> The evidence from this witness is it's his quite, appears to the court to be, emphatic opinion that this is an inflicted injury. No one knows how the injury got on the child. No one apparently knows when the injury got on the child.
>
> So on the issue of whether the defendant is the person who may have inflicted this injury or not, Ms. Coburn has a point. But that does not appear to be what is important, at least as it relates to this case.
>
> No one is suggesting that the defendant did, no one is suggesting that the jury should presume that the defendant did.
>
> What appears to be important to this case – and I didn't appreciate this until I heard what the doctor testified to in the cross-examination of the doctor – what is important is the presence of the injury, which in his opinion is inflicted, and its impact on the child in willingness to disclose.[3]

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[3] Contrary to the court's ruling, Feldman's testimony on the potential impact such an injury might have on a child's willingness to disclose occurred during direct and was equivocal:

> Q [prosecutor] And how would a pattern of inflicted injuries be significant to your medical determination if indeed that pattern existed?
> A [Feldman] Well, again, my medical determination on the burns would be the same with or without this. But we often see child abuse as a series of repetitive injuries out of discipline or frustration.
> Q Can that repetition or pattern of behavior affect how a child chooses to report or not report any injuries?
> A It may.

RP 621-22.

> Given the way that the evidence has come out in this case, that's quite a relevant issue. How the child disclosed and the child's willingness to disclose is a significant issue in this case.
>
> And so the doctor's testimony with regard to the injury, whoever inflicted, and the impact, in his training and experience and his subspecialty of pediatric child abuse, the impact that may have on the child's willingness to come forward and say what happened or not is significant. It is of substantial issue before the jury.

RP 639-40.

3. Trial Testimony[4]

Torrescano is the single mother of C.T. and his younger brother, N.H. RP 1092, 1097. Torrescano came to Washington from Mexico in 2007.[5] RP 1097. When the state's allegations arose, the family was living in a well-kept two bedroom apartment in Lynnwood that Torrescano paid for with her wages working graveyard five days a week at a local fast food restaurant.[6] RP 840, 1098, 1100-1101, 1098, 1100, 1270.

[4] The trial transcripts are contained in eleven bound, consecutively paginated, volumes with dates between May 28, 2013 and June 12, 2013.

[5] C.T. was born in Mexico and lived with his grandparents until he was four years old. RP 742, 1095.

[6] While N.H.'s father provided support for N.H., C.T.'s father had never been involved. RP 1092, 1097, 1268-69.

In September 2012, former coworker Maria Del Carmen Hernandez began babysitting C.T. and N.H. for a reduced rate while Torrescano was at work. RP 554, 556, 1110-1111.

On the five nights that she worked, Torrescano readied her children for bed before walking to Del Carmen's around 9:30 p.m. to tuck them in for the night. RP 557, 1113-15. Torrescano returned to Hernandez's in the morning after finishing her shift at 6:00 a.m., brought the children home, cooked them breakfast and readied C.T. for school. RP 557, 1115-16. Once C.T. left for school, Torrescano and N.H. slept for a bit. RP 1118.

When C.T. returned home after school, Torrescano typically took the boys on errands or to the park, cooked them dinner and made sure C.T. did his homework. RP 1118. In the evening, Torrescano gave the boys a bath, readied them for bed and herself for work before taking the boys to Hernandez's and going to work again. RP 1120.

On Thursday, September 13, 2012, Torrescano and her sons went to church with Hernandez and her daughters before Torrescano went to work that night. RP 483, 486, 494-95, 500, 521, 558, 562-63; Ex 15. Maria Davalos, Hernandez's teenaged daughter remembered C.T. did not play with his brother when they

returned to Hernandez's after church. RP 487. C.T. and N.H. slept in the other bed in Davalos' bedroom. RP 478.

Davalos testified that N.H. was jumping on the bed, but C.T. just lay there with his hands under the covers. RP 487. When Davalos asked what was wrong, C.T. said his brother was bothering him. RP 488. Davalos did not remember how exactly, but she saw C.T.'s hands. RP 489. There were not blistered but had light brown spots and some kind of ointment on them. RP 489, 500. C.T. said he injured them on the monkey bars. RP 491. He also said he burned them cooking marshmallows on the stove. RP 491, 500, 520.

Davalos asked N.H. to leave the room. RP 491. Davalos claimed that once N.H. left, C.T. said his mother burned his hands on the stove and asked Davalos not to tell. RP 492-93.

Nonetheless, Davalos told Hernandez something was wrong with C.T.'s hands. RP 561. Hernandez went to check on C.T. and asked what happened to his hands. RP 561. When C.T. did not respond, Hernandez asked if he hurt them on the monkey bars. RP 561. Hernandez testified C.T. looked frightened and she wanted to give him an easy out to discontinue the conversation. RP 562-63.

C.T. nodded his head affirmatively. RP 584. Davalos took a picture of C.T.'s hands that night.[7] RP 494-95, 500, 562-63, 565.

The following morning, Hernandez's younger daughter and classmate of C.T., Angela Chacon Hernandez, also observed C.T.'s hands. RP 564. Chacon told a classmate at school. RP 535, 539-41.

At some point, possibly the day after noticing C.T.'s injuries, Hernandez confronted Torrescano. RP 590. Torrescano explained C.T. injured himself toasting marshmallows. RP 568-70, 1248.

At trial, Torrescano testified that in the past, she had toasted marshmallows on the stove for her children as a treat. RP 1103. The children were not allowed to touch the stoves themselves, however. RP 1104, 1273.

Earlier that week, on Monday, September 10, Torrescano had noticed C.T.'s injuries while giving him a bath. RP 1125, 1128, 1130. At first, when Torrescano asked what happened, C.T. said he hurt himself on the monkey bars. RP 1126.

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[7] Although Hernandez and Davalos could not pinpoint the exact date they discovered C.T.s' injured hands, Hernandez sent the picture of C.T.'s hands via text message to fellow churchgoer Irma Reyes (RP 566), who received it on Friday, September 14 (RP 602-605); this suggests the injury was discovered on Thursday, September 13, as both Hernandez and Davalos believed the discovery was made after church on a Thursday night. RP 486-89, 563.

Torrescano explained to C.T. that if anyone saw his hands, that person would think Torrescano caused the injury. RP 1126. Therefore, C.T. needed to tell her what happened. RP 1126. C.T. reportedly said he had tried to cook marshmallows like he saw Torrescano do in the past. RP 1126. Torrescano's testimony suggested the accident could have happened that previous Saturday, while she was sleeping after work. RP 1133. Torrescano testified she did not burn C.T.'s hands. RP 1256.

On September 24, news of C.T.'s injury made it to the school counselor, who called C.T. into the dean's office the following day. RP 770-71. C.T. was tearful and said he injured himself throwing hot wood chips, but then said he was injured at the park. RP 771. The counselor assured C.T. he was not in trouble. RP 773.

The same day, September 25, CPS social worker Janell Berger came to talk to C.T. RP 784, 830. At the dean's office, a police officer and detective Elizabeth Wareing (formerly Post) joined Berger in trying to find out what happened to C.T.'s hands. RP 776-78, 788, 834, 837-38, 923-25, 928, 963-64, 966-67. C.T. did not say his mother caused his injuries. RP 776, 778-79, 793, 837, 873. On the contrary, he told Wareing he was by himself

when it happened. RP 969. Berger took pictures of C.T.'s hands. RP 841.

Berger, Wareing and another detective went to Torrescano's apartment to interview her. RP 840. Berger described the home as neat and clean. RP 841, 874. N.H. was eating at the table and interacted appropriately with his mother. RP 841, 874, 971. During the interview, Torrescano showed Wareing some skewers from the kitchen and unsuccessfully attempted to locate some marshmallows.[8] RP 972-73.

Despite Torrescano's cooperativeness (RP 973, 1041), Berger filed for dependency and took custody of C.T. and N.H. on September 27.[9] RP 802, 846, 849, 876-77. Following CPS' intervention, C.T. and N.H. lived with Hernandez and her daughters for a while. RP 578.

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[8] A friend of Torrescano's who helped clean out the apartment after Torrescano's arrest testified she saw skewers and marshmallows in the kitchen. 1076, 1078-79. The friend also noticed a little red stool in the kitchen. RP 1076. Torrescano testified she used her children's little red stool to reach the kitchen cabinets. RP 1102.

[9] C.T.'s teacher Laurie Davis brought C.T. to the office when CPS came to pick him up. RP 804, 877. Before C.T. left with CPS, Davis sat him on her lap and told him his mother needed help; that what she did was wrong. RP 802. C.T. had not told Laurie or other school officials his mother did anything. RP 805.

At a pretrial hearing, defense counsel argued C.T.'s subsequent statements were tainted by Davis and should be excluded as unreliable, but the court disagreed. See e.g. RP 203, 217-18, 298.

Davalos remembered that on one occasion, near the end of October 2012, C.T. made additional statements about his burns. RP 481, 521; see also RP 1017. Reportedly, C.T. said that when he tried blowing on his hands, his mom became angry, put his hands on the stove again, after putting salt on them, and told him to stop blowing on them. RP 497-498, 521.

Hernandez similarly remembered an occasion when C.T. said his mother burned his hands on the stovetop and put them on the burner a second time and told him to stop crying. RP 581, 587.

Physician assistant Janell Ibsen examined C.T. on September 28. RP 749. C.T.'s hands were healing nicely. RP 757. Ibsen testified that when she asked C.T. what happened, he said he had been accused of taking someone's iPod and that his mother became angry and burned his hands on the stovetop. RP 752-53. Ibsen noticed other markings and asked if his mother did anything else. RP 753. C.T. reportedly said she hit him with a shoe and a spoon and pinched him. RP 753.

Ibsen testified she noticed the hyper pigmentation on C.T.'s thigh. RP 755. When asked how it happened, C.T. reportedly said, "Oh, I've been hit by a few things." RP 755. Ibsen was unfamiliar

with this type of marking and recommended that C.T. be examined by someone at Children's Hospital. RP 756, 759.

On October 2, 2012, C.T. was interviewed by child interview specialist Gina Coslett. RP 884. C.T. said his mother burned his hands on the stove because he touched an iPad. Ex 2, at 6-7. He also said she put salt on the burn and caused it to hurt more. Ex 2, at 18. When asked if he had any other place on his body that got hurt, C.T. said no. Ex 2, at 9-10. When asked if his mother hurt him in any other way, C.T. said no. Ex 2, at 11.

However, C.T. also said his mother had hit him on the bottom with a shoe. Ex 2, at 20. He said it left a mark "[b]ecause when she hits me he makes me marks." Ex 2, at 20. C.T. said his mother never hit him with anything else except a big spoon.[10] Ex 2, at 20.

C.T. told Coslett he has a grandmother and grandfather in Mexico. Ex 2, at 14. When asked what happens when he gets in trouble at his grandparents' house, C.T. said his grandmother hit him with a back scratcher and left marks. Ex 2, at 15-16.

[10] Torrescano admitted that in the past, she had spanked C.T. with her hand and a sandal on his bottom. RP 1105. She also admitted being irritated with C.T. while in the kitchen holding a spoon. RP 1105.

Feldman examined C.T. on October 5, 2012. RP 660, 661. Feldman testified he asked C.T. about his hands. RP 662. According to Feldman, C.T. said his mother burned them on the stove. RP 663. When asked if she was mad, C.T. said yes. RP 663. When Feldman asked if C.T.'s mother caused any other injury, C.T. said no. RP 663.

The burns were fairly well healed by the time Feldman saw C.T. RP 664-65, 723. However, CPS had sent photographs taken at the time the burns were discovered. RP 672-73. Feldman testified the pictures depicted rosy, band-shaped arcs, typical of sub-acute contact burns, meaning they were probably a week old (at the time of the pictures) and caused by direct contact with a hot solid object matching the shape of the arcing bands, such as a stove element. RP 674, 682.

In Feldman's opinion, C.T. had three separate injuries on the palms of his hands – one on his left and two on his right. RP 676, 682, 705. The injuries consisted of two parallel bands with a gap in between. RP 675. In Feldman's opinion, C.T.'s right hand exhibited one set of parallel bands intersecting at one point with another set. RP 675, 688. Feldman claimed that meant two separate applications of that hand to the hot object. RP 675.

Feldman described the burns as shallow, second degree or partial thickness burns that typically heal on their own. RP 676-77.

In Feldman's opinion, a child C.T.'s age would know stove burners are hot and would not put his hand on one. RP 684. Feldman allowed that if a burner had only recently been turned off, a child might not have known it was hot and could have burned himself once. RP 684. In Feldman's opinion, however, the child would not make the same mistake twice. RP 684. Feldman opined that a child C.T.'s age would also have enough coordination, if falling, to avoid being burned. RP 684, 718.

Feldman testified "it would be terribly unlikely" for C.T. to have burned himself accidentally. RP 687. Feldman found it more likely "that his history and the history that he had given other people that his mother had burned him was correct." RP 687. As Feldman added: "And additionally, that he had prior evidence of abusive injury, even though I didn't know when or by whom, of the right thigh." RP 687.

Earlier in his testimony, Feldman had discussed the U-shaped hyper pigmentation or loop whip cord injury on C.T.'s right thigh. RP 666. With that exception, every other mark Feldman noticed on C.T. could have been accidental. RP 665, 723-24.

Feldman took pictures, which were admitted and shown to the jury. RP 666. Feldman testified the mark was typical of a high velocity beating injury, such as when a child is whipped by a flexible object, such as an electrical cord. RP 668.

Feldman testified the injury was not an acute bruise but a pigment change that occurs over time; it can last months or even years. He therefore had no way of knowing when it occurred.[11] RP 668.

Nonetheless, Feldman testified the injury was significant because abuse often is the result of a series of frustrated or disciplinary acts. RP 669. In general, according to Feldman, a child who has had repetitive abuse may feel more afraid of future punishment if he or she discloses. RP 669. The child may be more likely to disclose in bits and pieces. RP 669.

Forensic pathologist Dr. Carl Wigren investigated C.T.'s burns and testified on Torrescano's behalf. RP 1286, 1296. As part of his investigation, Wigren obtained the stovetop burners from Torrescano's former apartment (with the new tenant's permission), a nine-inch and a ten-inch burner. RP 1310, 1314, 1318, 1321-23. Wigren also took pictures of the oven/stove appliance and adjacent

cupboards and drawers. RP 1315. Noticeably, the oven did not have an anti-tip bracket. RP 1315-16.

In April 2013, Wigren took pictures of C.T.'s hands together with a visible measuring device – an American board of forensic odontology (ABFO) ruler – to provide perspective or scale to C.T.'s hands.[12] RP 1298, 1300. The pictures previously taken (at the time of the injuries) did not include a measuring device and therefore offered no perspective or scale. RP 1297-1301.

Wigren then superimposed the more current pictures of C.T.'s hands over the older pictures depicting the burned hands and enlarged one set until it was the same size as the other set. RP 1327-1333, 1361, 1370. He then took a snap shot of the ABFO ruler from the most recent set and used it to measure the burns in the older set. RP 1332-1333, 1366.

Wigren concluded the burns were consistent with a single contact of each hand to the nine-inch burner. RP 1383-91, 1395, 1423. Whereas Feldman believed the right hand showed an intersection of two separate burns, Wigren saw one burn pattern

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[11] Torrescano testified C.T. had that mark when she picked him up from Mexico. RP 1096.

with an additional irregularly shaped burn at the base of the thumb and index finger. RP 1390-91. As Wigren explained, when the thumb is touching the index finger (closed), a small fold of skin in that area protrudes slightly and could have been caught between the heating elements during a single contact, as opposed to being evidence of a separate, second contact. RP 1390-91.

Wigren could not say whether the burns were inflicted or suffered accidentally. RP 1395. However, he opined that if a child of C.T.'s height were standing on the open oven door and lost his balance when the oven – without an anti-tip bracket – became unstable, the child could have put his hands down to catch himself and would have suffered burns similar to C.T.[13] RP 1396-97, 1411.

At trial, C.T. did not provide detail but claimed his mother burned his hands. RP 445-451. However, C.T. acknowledged he likes to eat marshmallows and remembered putting them on a stick. RP 461. C.T. also admitted he had touched the stove, although he was not supposed to. RP 458-59. When asked if he had told his

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[12] C.T. had no residual scarring. RP 1308. Like Feldman, Wigren described the burns as superficial, partial thickness or second degree burns, possibly one-to-three weeks old at the time of the initial pictures. RP 1306.

[13] Another scenario could have involved a child losing his balance while standing on one of the drawers near the oven. Wigren testified one such drawer he examined was broken. RP 1416.

mother he burned his hands trying to cook marshmallows, C.T. said he did not remember. RP 462.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE.

In the absence of any connection linking a defendant to a child's prior injury, it is error in an assault case to admit evidence of the child's prior injury. Feldman opined the U-shaped hyper pigmentation on C.T.'s right thigh was evidence of an abusive whipping. However, the state had no evidence linking this injury to Torrescano. C.T. never said his mother whipped him or caused the mark. The state did not have evidence suggesting the mark was even recent. For all anybody knew, it happened in Mexico. A potentiality that all acknowledged.

The court found the evidence nonetheless relevant, because it suggested a "pattern of abuse" that may have impacted C.T.'s willingness to disclose. Whether a "pattern of abuse" in general may make a child less willing to disclose, no one established any such pattern here or impact on C.T. Most importantly, however, admission of the mark as evidence of a "pattern" was unfairly

prejudicial, because the state did not establish Torrescano was part of that pattern. The court erred in admitting the evidence.

ER 404(b) 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, absence of mistake or accident.

The purpose of ER 404(b) is to prevent consideration of prior bad acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn. 2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is whether the evidence is relevant and necessary to prove an element of the charged crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d

697 (1982). Evidence is logically relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice.[14] Saltarelli, 98 Wn.2d at 362-63. Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs it prejudicial effect. State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

In a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). The State's burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404 (b) is substantial. State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003). To be admissible under ER 404(b), the prior misconduct must link the defendant to the crime

[14] Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

charged. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005).

Evidence of prior injuries to a child is admissible to show absence of accident only if the state connects the defendant to those injuries by a preponderance of the evidence. State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998), abrogating State v. Mercer, 34 Wn. App. 654, 663 P.2d 857 (1998). In Mercer, the court held prior instances in which the deceased infant had suffered injuries while in the defendant's care were admissible to show lack of accident in the state's prosecution against Mercer for the infant's death. State v. Mercer, 34 Wn. App. 654, 663 P.2d 857 (1983), abrogated by State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998).

The court expressly held the state was not required to prove the defendant was the one who committed the prior injuries to be admissible. Mercer, 34 Wn. App. at 660. The court reasoned:

> It is possible to negative accident or inadvertence, and to infer deliberate human intent, without forming any conclusion as to the personality of the doer. Thus if, one *661 morning after a high wind, A's cellar window is found broken, the pieces lying inside, he may well assume the probability that the force of the wind blew the glass in; but if, on the next morning and the next, he again finds a window broken in the same way, though no high wind

> prevailed the night before, he gives up the hypothesis of the force of the wind as the explanation, and concludes that a deliberate human effort was the highly probable cause of the breakage, although he can form no notion whatever of the personality of the doer.
>
> Thus it is thus clear that innocent intent—accident, inadvertence, or the like—may be negatived by anonymous instances of the previous occurrence of the same or a similar thing. After the defendant's connection with the deed charged is assumed or proved, his innocent intent may be negatived by such instances, which may have force for that purpose, though they are not connected with the defendant.

Mercer, 34 Wn. App. at 660-61 (quoting 2 J. Wigmore, Evidence § 303, at 247–48 (rev. ed. 1979)).

This reasoning was soundly rejected in Norlin: "We hold that, in child abuse prosecutions, evidence of such prior injuries is admissible under ER 404(b) only if the State connects the defendant to those injuries by a preponderance of the evidence. Norlin, 134 Wn.2d at 572.

Although the court found the state had proved it was the defendant who committed the prior injuries in that case, it held the absence of such proof would make evidence of the prior injuries irrelevant:

> Because logic suggests that the only "crimes, wrongs, or acts" that would have any weight as to a defendant's character are those that were committed

> by the defendant, it follows that the portion of ER 404(b) allowing the admission of such evidence is similarly limited to "crimes, wrongs, or acts" that are tied to the defendant.

Norlin, 134 Wn.2d at 577.

The court noted that the "doctrine of chances" rationale quoted from Wigmore in Mercer actually endorses the view that the defendant needs to be tied to the prior injuries before evidence of those injuries can be received at court. Norlin, 134 Wn.2d at 580-81. The court further noted its long history requiring a connection, as well as other jurisdictions holding the same. Norlin, 134 Wn.2d at 577, 580-81.

Under Norlin, the U-shaped hyperpigmentation was inadmissible because the state offered no evidence connecting it to Torrescano. The court recognized as much but admitted the evidence anyway. This was clearly an abuse of discretion. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P. 3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

In its response, the state may argue Norlin is inapposite because the court here reasoned the mark was admissible for its potential impact on C.T.'s willingness to disclose (as testified to by Feldman), as opposed to lack of accident. However, in Norlin, one of the trial court's reasons for admitting evidence of the prior injuries was as a basis for the expert's opinion about abuse.[15] Norlin, 134 Wn.2d at 574. Regardless of this alternate basis for admission, the Supreme Court held the prior injuries were not admissible without a connection to Norlin. Thus, Norlin is analogous to the present case.

In any event, Feldman's testimony was that a *pattern of abuse* inflicted on a child may affect that child's willingness to disclose (669) and that there was evidence of such a pattern here, considering the hyper pigmentation. Indeed, Feldman testified the existence of the hyper pigmentation made it more likely "the history that [C.T.] had given other people that his mother had burned him was correct." RP 687. Hence, the testimony and court's rationale for admitting the evidence was intimately tied to showing a pattern, i.e. an absence of accident. Norlin is directly on point and prohibits the state from offering such evidence for that purpose, no matter

[15] Coincidentally, Dr. Feldman testified in the Norlin case as well.

what it's called, lack of accident or "pattern of abuse." The trial court therefore erred in admitting the loop whip cord evidence as indicative of a "pattern."

An error in admitting evidence under ER 404(b) mandates reversal, if the error materially affected the outcome of the case within a reasonable possibility. State v. Fuller, 169 Wn. App. 797, 831, 282 P.3d 126 (2012). Conversely, such an error is harmless if the improperly admitted evidence is of little significance in light of the evidence as a whole. Fuller, 169 Wn. App. at 831 (citing State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

Reversal of the convictions is required because there is a reasonable probability that juror consideration of the loop whip cord evidence tainted deliberation on whether the state proved Torrescano committed the charged assault beyond a reasonable doubt.

Significantly, the defense offered an alternate explanation for what happened to C.T.'s hands – he burned himself while trying to toast marshmallows. Not only did Torrescano testify this is what C.T. told her, but Davalos testified C.T. told her this the night his burns were discovered. The defense also offered expert testimony suggesting the burns were the result of a one-time contact to the

hot stove element. Even Feldman conceded a one-time contact increased the possibility of the burns happening accidentally.

In closing argument, the state highlighted the import of the U-shaped mark to its case:

> You know that Christopher was very reluctant to disclose what happened to him. And there is a lot of reasons why that's the case.
>
> Dr. Feldman gave you a little insight into that when he talked about how, in his training and experience, someone who's been subjected to a pattern of abuse would be much more likely to be extremely reluctant to tell the things that have happened to him.
>
> In Dr. Feldman's professional opinion, Christopher is that child because he's received that mark on his thigh that is indicative to Dr. Feldman of an abusing [sic] whipping with some sort of looped whipping cord action. That's what he testified it's consistent with.
>
> And make no mistake. The State is not saying that Karina inflicted that whip mark. I don't have the evidence to show you one way or the other who inflicted that whip mark on Christopher. Could have been his grandparents in Mexico or someone else.
>
> But the relevance, the importance of the mark, is that it's on Christopher. He experienced it. He's experienced that pattern of abuse that Dr. Feldman told you is important in understanding the context of a child's disclosure.

RP 1530-31.

The prosecutor asserted the mark was indicative of a pattern of abuse. While he did not say the pattern was carried out by Torrescano, that would be the obvious inference made by jurors.

Otherwise, the mark and "pattern" are not relevant. Why would a "pattern of abuse" carried out by someone else a long time ago in Mexico have any effect on C.T.'s willingness to disclose now, in the United States, while living far away from the other proposed perpetrator? That makes no sense.

Jurors would draw the only logical inference – that Torrescano engaged in a pattern of abuse and it is therefore more likely C.T.'s burns were inflicted by her than suffered accidentally. Any juror with a lingering doubt would have resolved it against Torrescano. There is more than a reasonable probability admission of the whip loop cord injury affected the outcome of the case. This Court must reverse.

2. DOCTOR FELDMAN'S OPINION TESTIMONY DENIED TORRESCANO A FAIR TRIAL.

(i) Admission of the Testimony Was Manifest Constitutional Error that Torrescano May Raise for the First Time on Appeal.

The jury's fact-finding role is essential to the constitutional right to trial by a jury of one's peers. Wash. Const. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement

or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn. 2d 577, 594, 183 P.3d 267 (2008); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

The admission of opinion testimony is manifest constitutional error when it is an explicit or nearly explicit witness statement on the ultimate issue of fact. State v. Kirkman, 159 Wn.2d 918, 938, 155 P.2d 125 (2007). The doctor's statements at issue in Kirkman were determined not to be manifest constitutional error. But they bear little resemblance to doctor Feldman's opinion in this case, which conveyed his opinion it was more likely "that [C.T.'s] history and the history that he had given other people that his mother had burned him was correct." RP 687. This opinion was an explicit statement on guilt, as the question before the jury was whether C.T.'s burns were intentionally inflicted by his mother or accidently suffered on his own.

The two consolidated child rape cases in Kirkman involved four instances of opinion testimony, including two by an examining physician. First, Dr. Stirling testified the child gave a very clear

history with lots of detail, a clear and consistent history of sexual touching . . . with appropriate affect and that [t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent. Id. at 929. In the other case, Dr. Stirling testified, to have no findings after receiving a history like that is actually the norm rather than the exception. Id. at 932.

The court concluded:

> Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that [the accused] was guilty, nor did he opine that C.M.D. was molested or that he believed C.M.D.'s account to be true. Dr. Stirling testified only that he was able to communicate with C.M.D. because she had good language skills for her age, she spoke clearly, . . . His testimony was content neutral, focusing upon the clear communication, rather than the substance of matters discussed. The doctor's testimony did not constitute manifest error.

Id. at 933.

In contrast, Dr. Feldman did not say C.T.'s injuries were more consistent with an intentional burn or something content neutral. Rather, he testified it was more likely C.T.'s mother burned him, in the manner he described to others. This was not testimony about interview protocols or scientific evidence that indirectly supported an inference of witness credibility or guilt. It was instead

an explicit comment on Torrescano's guilt. State v. King, 167 Wn.2d 324, 332, 219 P.3d (2009) (citing Kirkman, 159 Wn. 2d at 936). The testimony was thus manifest constitutional error. Id. at 938.

The State cannot demonstrate the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The jury was presented with two different theories – the state's theory that Torrescano intentionally burned C.T., and the defense theory that C.T. burned himself trying to toast marshmallows on the stovetop. The second theory was supported not only by defense expert testimony that falling on the stove was a plausible explanation, but on C.T.'s and Davalos' testimony about cooking marshmallows. Because of Dr. Feldman's status as a pediatric abuse expert, the jury may have been unfairly persuaded by his opinion. Where they may have had a reason to doubt the state's theory, Dr. Feldman resolved any doubt against the defense theory and in favor of conviction.

(ii). In the Alternative, Counsel's Failure to Object to the Doctor's Opinion Testimony Violated Torrescano's Constitutional Right to Effective Representation.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

More specifically, failing to object constitutes ineffective assistance where: (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); see also State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), aff'd, 165 Wn.2d

474, 198 P.3d 1029, cert. denied, 557 U.S. 940, 129 S. Ct. 2873 (2009).

Torrescano recognizes the decision whether to object may be deemed tactical. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). But to defeat a claim of ineffective assistance of counsel, "tactical" or "strategic" decisions by defense counsel must be reasonable and legitimate. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Wiggins v. Smith**Error! Bookmark not defined.**, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); State v Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel's failure to object was objectively unreasonable. The defense theory was that C.T. burned himself accidentally trying to roast marshmallows on the stovetop. The defense presented evidence to support this theory. There was no reason to allow doctor Feldman to express his opinion C.T. was burned by his mother, in the manner C.T. had described to other people. See Thomas, 109 Wn.2d at 228 (counsel's failure to take steps consistent with defense theory of the case deemed deficient).

Moreover, defense counsel objected when the state sought to introduce Detective Wareing's testimony about probable cause to arrest, on grounds it was an opinion on guilt. RP 1004. Accordingly, it is clear defense counsel did not have any overriding strategic decision not to object to this improper opinion testimony.

To show prejudice, Torrescano need not establish counsel's deficient performance more likely than not altered the outcome of the proceeding. Id. at 226. Rather, she need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Strickland, 466 U.S. 668).

Torrescano has made that showing here. As indicated in the preceding section, the jury had two competing theories to weigh. In order to convict, all twelve jurors had to conclude it was not possible that C.T. burned himself accidentally while trying to roast marshmallows. Because of Feldman's testimony, especially in light of his expert status, the jury likely resolved any doubt against the defense. Feldman's testimony opining on Torrescano's guilt undermines confidence in the reliability of the outcome.

A timely objection to Feldman's testimony would have been sustained. Significantly, during Wareing's testimony, the court excused the jury out of concern her testimony was broaching an opinion on guilt, as opposed to merely rebutting the defense's suggestion that CPS and/or the police jumped the gun. RP 992. In that vein, the court ruled the prosecutor could not ask Wareing about Torrescano's arrest and the meaning of probable cause. RP 993. The court expressly held the detective's thought process regarding Torrescano's arrest was overly prejudicial on grounds it was up to the jury to decide whether C.T.'s injuries occurred accidentally or intentionally. RP 997. The court's concerns during Wareing's testimony make clear the court was cognizant of the prejudicial nature and inadmissibility of opinions on guilt.

Because Torrescano was prejudiced by her attorney's failure to object to Feldman's testimony, this Court should reverse Torrescano's conviction.

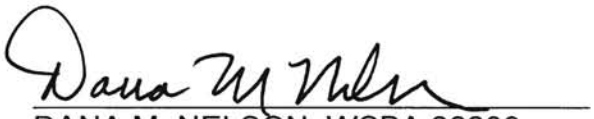
D. CONCLUSION

Because the court's erroneous admission of irrelevant, unfairly prejudicial evidence likely affected the outcome of the case, this Court should reverse Torrescano's conviction. Reversal is also required because improperly admitted opinion evidence deprived Torrescano of her right to a fair trial.

Dated this 24th day of March, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70546-6-I
	)	
KARINA TORRESCANO-HERNANDEZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] KARINA TORRESCANO-HERNANDEZ
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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MARCH 2014.

X Patrick Mayovsky