SUPREME COURT NO. _____
COURT OF APPEALS NO. 71128-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT REED,

Appellant.

STATE'S ANSWER OPPOSING PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Reed, __ Wn. App. __, No. 71128-8 (Jun. 1, 2015) (unpublished opinion) (attached at Appendix A).

C. STATEMENT OF THE CASE

The relevant facts are set forth at length in the decision of the Court of Appeals and in the State's briefing in the Court of Appeals. See Reed, No. 71128-8, slip op. at 1-11; Amended Br. of Resp't at 3-13, 14-21, 29-34 (attached at Appendix B).

D. ARGUMENT

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

The Court should deny Reed's Petition for Review.[1] Reed's petition is based on a series of asserted errors that either were not

[1] Reed refers to his petition as a Motion for Discretionary Review. Petition at 1. These are governed by RAP 13.5A, a rule that applies only to a specific subset of decisions, none of which characterizes Reed's case. RAP 13.5A(a). The State assumes that Reed intended to file a Petition for Discretionary Review pursuant to RAP 13.4, which applies to "a Court of Appeals decision terminating review[.]" RAP 13.4(a).

raised before the Court of Appeals, are unsupported by controlling case law, or rely upon misrepresentations of the record. Accordingly, Reed's motion does not meet the criteria for discretionary review.

a. Standard Governing Acceptance Of Review.

The Washington Supreme Court will grant discretionary review of a Court of Appeals decision terminating review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

In addition to these criteria, "[a]n issue not raised or briefed in the Court of Appeals will not be considered by this court." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993);

see also Fisher v. Allstate Ins. Co, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review.").

b. Reed Has Failed To Meet The Criteria For Discretionary Review.

In his brief before the Court of Appeals, Reed raised four assignments of error: (1) the trial court erred by ruling that the door had been opened to evidence of Reed's prior involvement in prostitution activities; (2) the trial court erred by instructing the jury that it could consider evidence of Reed's prior domestic violence assault convictions for impeachment purposes under ER 609, when the evidence was actually admitted under ER 404(b) to explain the dynamics of his domestic violence relationship with the victim; (3) defense counsel was ineffective for failing to object to the improper ER 609 instruction; and (4) defense counsel was ineffective for failing to request an ER 404(b) limiting instruction. See Br. of App't at 1, 14-21, 21-23, 23-28 (attached at Appendix C).

The Court of Appeals rejected Reed's claims. It affirmed the trial court's ruling that Reed had opened the door to evidence of his involvement in prostitution, and held that any error in the admission of this evidence was harmless. Reed, No. 71128-8, slip op. at

11-13. It also held that, even assuming without deciding that Reed's attorney gave deficient performance by failing to object to the ER 609 instruction and to propose an ER 404(b) instruction, Reed could not demonstrate prejudice within the meaning of Strickland.[2] Id. at 13-15. That is, Reed did not show that there was a reasonable likelihood that, had his attorney taken these actions, the outcome of his trial would have been different. Id. at 14-15.

Reed has failed to show that the Court of Appeals decision meets any of the criteria for review under RAP 13.4(b). First, Reed asserts that the Court of Appeals decision—regarding the trial court's open door ruling—conflicts with the decision of this Court in State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). Petition at 1, 4-5 (citing Kilgore, supra). But Kilgore concerns only the admission of evidence pursuant to ER 404(b). See 147 Wn.2d at 289-90 ("The sole issue before us is whether a trial court must conduct an evidentiary hearing before admitting evidence of 'other crimes, wrongs, or acts' pursuant to ER 404(b)."). Kilgore does not govern

[2] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

the admission of evidence under the open door doctrine. The Court of Appeals decision does not conflict with Kilgore.[3]

Next, Reed challenges the Court of Appeals ruling that he failed to establish ineffective assistance of counsel. Petition at 1, 6-8. This claim appears to be predicated at least in part on the assertion that his attorney failed to object to the admission of his prior convictions under ER 404(b). Petition at 7 (citing cases for proposition that trial counsel's failure to object to admission of prior convictions constitutes deficient performance). If this is in fact Reed's claim, then Reed misrepresents the record. His trial attorney *did* object to the admission of the ER 404(b) evidence:

> . . . Your Honor, we would be objecting to any 404(b) evidence coming in at this time. The fact that Mr. Reed was convicted in 1993 and 1999 is so remote that it just would be so highly prejudicial for this information to come in front of the jury. It goes to . . . the things that I said in my brief, once a thief, always a thief.
>
> And the jury certainly could say, well, he assaulted before. They would not think that he's paid his price. They just would not be able to erase that from their mind if it came in as substantive evidence, even with any type of limiting instruction.

[3] Reed also failed to preserve this argument for review, because he did not rely at all on Kilgore below.

> And so for those reasons, I would ask that the two, the 1993 and 1999 incidents be omitted.

3RP 13 (attached at Appendix D).[4]

In this same section, Reed also argues, for the first time, that the trial court erred by denying his motion to substitute counsel, and that it warrants automatic reversal for a trial court to require an attorney to represent a defendant over that attorney's objection, when the attorney has a conflict of interest. Petition at 6 (citing Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). But Reed did not raise this claim in the Court of Appeals and has failed to preserve it for review. Even if the issue had been preserved, Reed identifies nothing in the record establishing that he ever made a motion to substitute counsel, or that such a motion was denied over his attorney's objection. Further, the sole conflict that he alleges in his petition appears to be based on the fact that his trial attorney was a woman; this, he appears to argue, made her unable to defend him zealously against a charge of domestic violence. Petition at 6. Again, nothing in the

[4] 13RP is a transcript of proceedings held September 11, 2013.

record supports the proposition that his attorney had such a conflict of interest. If Reed wishes to rely on information outside the record in support of an ineffective assistance of counsel claim, he must file a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Reed also asserts that the Court of Appeals erred in finding that he had failed to establish prejudice under Strickland—for his attorney's failure to object to the ER 609 instruction and to request an ER 404(b) instruction. Petition at 6-7. But the Court of Appeals properly recognized that the evidence against Reed was so overwhelming that, even if his attorney was deficient for failing to take these actions, there is no reasonable probability that any deficient performance affected the outcome of the case. Reed, No. 71128-8, slip op. at 13-14. Reed has not established that the Court of Appeals' straightforward application of Strickland was in error.

Finally, Reed appears to challenge the sufficiency of the evidence to sustain his conviction for first-degree assault. He argues that the evidence against him was no more than the "counter-lies of a scorned woman, her daughter, and sister-in-law-

best friend who conspired against Mr. Reed, who left [the victim] for good after much abuse." Petition at 8. He also claims that the victim was controlling, that she repeatedly threatened to report him to the police, and that he "waited on her hand and foot" after she had facial reconstructive surgery for her severe injuries. Petition at 2-3. He was, he claims, "the perfect mate," "as he always had been[.]" Petition at 3.

Reed's account bears little resemblance to the testimony at trial. Regardless, to the extent that Reed challenges the sufficiency of the evidence in his petition, he has failed to preserve this issue by failing to raise it before the Court of Appeals. Even if this issue had been preserved, this Court has stated that it "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Reed's petition should be denied.

E. CONCLUSION

For all of the foregoing reasons, the Court should deny Reed's petition.

DATED this 27th day of July, 2015.

Respectfully submitted,

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Appendix A

State v. Reed, __ Wn. App. __,
No. 71128-8 (Jun. 1, 2015)
(unpublished opinion)

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71128-8-I
Respondent,	)	DIVISION ONE
v.	)	
ROOSEVELT REED,	)	UNPUBLISHED
Appellant.	)	FILED: June 1, 2015

Cox, J. – Roosevelt Reed's severely beaten girlfriend lay bleeding and semi-conscious on the floor of their residence for 33 minutes before Reed finally called 911. During that half hour, Reed made multiple phone calls to his brother and a friend and even checked his voice messages. Although he claimed he told his brother during one call "that someone . . . almost killed the b-i-t-c-h," his brother and sister-in-law heard him say "I think *I* killed the bitch."[1] Reed also admitted the assault to his daughter. A jury rejected Reed's claim that the perpetrator was an unknown intruder and convicted him of first degree assault. He appeals, arguing that an evidentiary error and ineffective assistance of counsel require a new trial. The court did not abuse its discretion in admitting the challenged evidence. And given the strength of the State's case, there is no reasonable probability that any evidentiary error or deficient performance by defense counsel affected the verdict. We affirm.

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[1] (Emphasis added.)

Based on allegations that Reed assaulted and severely injured his girlfriend, J.G., the State charged him with first degree assault. The State alleged the assault was a crime of domestic violence, was committed shortly after Reed's release from prison, and was part of an ongoing pattern of abuse.

At trial, J.G. testified that she started dating Reed in the 1980s. They "were into drugs a lot."[2] When J.G. became pregnant, she left Reed because she "didn't want to be on drugs" during her pregnancy.[3] She later gave birth to a daughter, H.D. Reed is H.D.'s father.

J.G. did not see Reed again until 2008. A friend in prison told her that an inmate, Roosevelt Reed, wanted to speak to her. J.G. and H.D. started talking to Reed by phone and visiting him in prison.

In April 2012, Reed was released from prison and moved in with J.G. in Des Moines. Although they initially had only minor arguments, Reed became increasingly aggressive. He slapped J.G. on one occasion and would say things like "don't take me to that dark place . . . I have this dark place and you don't need to take me there."[4] J.G. knew that Reed had been in prison for "hitting his girlfriend in the head with a brick," and that he "broke the windshield out on some girl that used to be with him." Reed also told her "how he would beat her up" H.D.'s half-sister's mother.[5]

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[2] Report of Proceedings (Sept. 17, 2013) at 63.
[3] Id.
[4] Report of Proceedings (Sept. 18, 2013) at 82.
[5] Report of Proceedings (Sept. 17, 2013) at 82.

In early September 2012, J.G. and Reed visited H.D. in Spokane. H.D. testified that Reed was controlling toward J.G., became angry over small things, and called her a "bitch." When Reed asked H.D. for help with his phone, she saw that he had been exchanging text messages with another woman. Later, as they were driving home from Spokane, Reed told J.G. that the messages were about a girl that he had "beat up" years ago. J.G. said the assault was not funny and that was why he went to jail. Reed became angry so J.G. pulled the car off the freeway. Reed then took the keys, drove off, and left her on the side of the road. When J.G. called him and threatened to call the police, Reed returned and drove them home.

The incident at issue in this case occurred the next day. Reed testified that he had lunch that day with his friend Joe Kelley, who then drove him to his appointment with his Community Corrections Officer (CCO), Stacy Westberg. Kelley generally corroborated Reed's testimony. On cross-examination, Kelley conceded that he had refused to talk to a detective on the advice of Reed's lawyer. Kelley was also confused about the timing of events on the day of the assault and did not remember calling or receiving calls from Reed shortly after the assault. J.G. also had difficulty recalling events on the day of the assault and testified that she accompanied Reed to his DOC appointment. Cell phone records, however, suggested that she remained home during that time.

CCO Westberg testified that Reed seemed fine during his appointment until she told him that J.G. could no longer pick up his travel permits and that he had to pick them up himself. Reed became angry and left the office at approximately 4:05 p.m.

J.G. testified that when Reed arrived home they argued, possibly about money. Reed pushed her and she pushed him back. When she reminded him of their agreement not to fight anymore, he pushed her "really hard" into a wall. She then grabbed the gold chain necklace he was wearing and blacked out.

Reed denied arguing with J.G. or assaulting her. He claimed he arrived home and found her lying on the floor. Although she was semi-conscious, bleeding, and so swollen she was unable to talk, Reed did not call 911 because "I wanted to do my own investigation, because I took that personal."[6] He testified that he administered first aid, putting ice on her for the swelling and getting rags and clothing for her wounds. He eventually told her she needed medical attention, but she said "no." Reed testified that he couldn't "force that."

At 4:34 p.m., Reed made the first of a series of phone calls to his brother, Precious Reed, and to Joe Kelley. He called Precious at 4:34 p.m., 4:36 p.m., 4:38 p.m. and 4:39 p.m. He received calls from Precious at 4:37 p.m. and 4:39 p.m. He called his own voicemail and Joe Kelley at 4:37 p.m. He received a call from Joe Kelley at 4:40 p.m., and a call from Shantell Reed's cell phone at 4:57

[6] Report of Proceedings (Sept. 26, 2013) at 342.

p.m. Reed did not call 911 until 5:07 p.m., over 30 minutes after his initial call to his brother.

Reed testified that during one of the calls to Precious, he said "man, somebody came in my house and almost killed the b-i-t-c-h."[7] He explained that "b-i-t-c-h" was not derogatory and "can be considered honorable . . . in the African American language."[8] The prosecutor explored this topic further on cross-examination:

> Q. But I just want to get this straight. When you think she's actually dying on the floor, you call your brother and said – you called her a bitch then?
> A. Yes.
> Q. When she's laying there, like half dead, on the floor, you're saying, I think someone killed the bitch; right?
> A. My.
> Q. My bitch? Your bitch? She's your bitch; right?
> A. (Witness nods head affirmatively.)[9]

Precious's wife, Shantel Smith-Reed, testified that she overheard Reed's call to Precious. According to Shantel, Reed said "I need you to get over here" and "I think I killed the bitch."[10]

Detective Fred Gendreau of the Des Moines Police Department testified that he recorded a phone conversation with Precious. On the recording, Precious says Reed called him and said "come over here and get the car; I think

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[7] Id. at 339.
[8] Id. at 341.
[9] Id. at 393.
[10] Report of Proceedings (Sept. 23, 2013) at 6 (emphasis added).

I killed her."[11] Precious later said the same thing when Detective Gendreau served him with a subpoena. Precious also said that "what [Reed] did was wrong" and that Reed had an anger problem. During his testimony, Precious reluctantly admitted making the statement in the recorded phone conversation but repeatedly noted that he was using drugs at the time.

Officer Kevin Montgomery of the Des Moines Police Department testified that he arrived at the assault scene at 5:14 p.m. Reed told him he found J.G. lying in the doorway when he got home. Reed told Precious that same day that "somebody kicked the door open."[12] Police, however, found no signs of a break-in or missing property.

Officer Montgomery asked Reed if he could account for the time between his departure from the DOC office and his 911 call. Reed said he had "gone to a friend's house to pick up his vehicle."[13] Reed admitted during cross-examination, however, that he told his CCO that he left their meeting and went straight home.

Officer Anthony Nowacki testified that he tried to talk to J.G. at the scene, but she could not open her eyes or mouth and responded to questions with mumbles and groans. Because they could not communicate with J.G., the police did not arrest Reed at that time.

An ambulance took J.G. and Reed to a hospital where J.G. was treated for multiple facial fractures. She testified that doctors told her she would have been

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[11] Report of Proceedings (Sept. 25, 2013) at 245.
[12] Id. at 205.
[13] Report of Proceedings (Sept. 17, 2013) at 25.

killed if she had been hit one or two more times. She described the long-term effects of her injuries, stating:

> I can't feel any of my face. I can't feel – I can feel from this part of my lip over. And so like if I drink coffee, I have to put my tongue to it because my lip doesn't have any feeling. And when I talk, my lip doesn't move. It just feels like it has a piece of hard plastic or something in it. It doesn't move.
>
> And as the day wears on, my eye closes down more and more. As far as pain, anytime I lay down, I have migraines, so I'm on morphine for that . . . .
>
> I don't know how many plates they have in my face, but I know there's little circles of plates. And I have plates up here. This whole part of my face right here was broke out, so there's plates connecting everything here.
>
> And my jaw was broke up like this. I can't chew any food on this side of my mouth because it feels like I'm chewing nothing because I can't do it. So if I eat the food, sometimes it will get caught up in my lip. I have to clean up. I drink water that has a spout on it. If I drink it on this side of my mouth, it runs out of my mouth.
>
> . . .
>
> . . . Usually you have a bone that hooks up into your cheekbone and everything. I'm missing all this bone. It's all metal from under my eye.[14]

An emergency room social worker, Margaret Lake, testified that when Reed approached J.G. in her hospital room, J.G. immediately pulled away from him. Reed angrily told her to calm down. Lake said this was "a real unusual response for a family member."[15]

The day after the assault, Detective Gendreau called J.G. and Reed answered the phone. Detective Gendreau identified himself as a police detective

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[14] Id. at 89-90.
[15] Report of Proceedings (Sept. 18, 2013) at 121.

and asked to speak to J.G. Reed asked "why [he] was calling."[16] Detective Gendreau thought Reed's question was suspicious given that J.G. had just been the victim of a serious assault.

J.G. told several different stories about the assault. She told several people she was attacked by an unknown person in her doorway. She told H.D. that she had been injured in a car accident. Eventually, however, she told H.D. and the police that Reed had assaulted her. She told H.D. "I just can't believe he did me like this."[17]

H.D. testified that Reed admitted his guilt to her during a car ride, saying: "you know I messed up, [H.D.], you know I messed up, you know I have anger issues."[18] H.D. asked Reed why he hit J.G. even after she was unconscious. Reed replied "I felt like my freedom was jeopardized or at risk, and that I had nothing to lose."[19] Reed told H.D. that if the truth ever came out, she would have to "watch [her] family's back."[20] H.D. testified that she did not go to the police because of Reed's threat.

J.G. testified that she initially lied about the assault because she "still loved [Reed], however warped it might have been. That's my kid's dad."[21] But she began to see things differently when Reed told her he was sick of hearing

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[16] Report of Proceedings (Sept. 23, 2013) at 69.
[17] Report of Proceedings (Sept. 18, 2013) at 20.
[18] Id. at 23.
[19] Id. at 39.
[20] Id. at 41.
[21] Report of Proceedings (Sept. 17, 2013) at 95.

her complaints after the assault. J.G. eventually moved to Spokane where she reported the assault to authorities. The police then arrested Reed.

Once in jail, Reed told Precious in recorded phone calls not to talk to detectives and to hide his cell phone. Reed said "you don't know nothing" and also told Reed to give the phone to defense counsel. Precious expressed concern because the phone was the one Reed called Precious from on the day of the assault. When police eventually recovered the phone, most of the data from the days surrounding the assault were missing and could not be recovered. Reed also instructed Precious to pawn his gold necklace. When Officers later recovered the necklace from the pawn shop, they discovered that the clasp had been broken and put back together.

Reed admitted his criminal past at trial. He testified on direct examination that he had lived on "another side of the law, drugs, alcohol" during the 80s and 90s.[22] He said that he pleaded guilty in 1993 to assaulting a woman he "ran into . . . in the streets."[23] They were "living a destructive lifestyle, and it was a bunch of cheating on both ends."[24] Reed testified that he was also convicted of assault in 1999 and "was still involved in alcohol and drugs" at that time.[25]

Prior to cross-examination, the prosecutor argued that the defense had opened the door to questions concerning the details underlying Reed's prior

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[22] Report of Proceedings (Sept. 26, 2013) at 303.
[23] Id. at 306.
[24] Id.
[25] Id. at 307.

assaults. She asserted that J.G. and Reed's testimony concerning their former lifestyle opened the door to further questioning on that subject. The court ruled that Reed had opened the door to questions about the 1993 assault, including the fact that Reed was the victim's pimp and that he assaulted her because "she did not put money on his books."[26]

The prosecutor then asked Reed to describe the nature of his relationship with the 1993 victim. Reed said he would rather not answer the question. After the court instructed him to answer, Reed said "I had prostitutes back then. That was part of the lifestyle that I was living in my past." When Reed said he assaulted the woman in 1993 because he felt used, the prosecutor said "wasn't that actually because she hadn't given you money?"[27] Reed denied that explanation, but conceded that the victim told police that the assault arose from a dispute over money.

In closing argument, defense counsel said the police botched the investigation by failing to check Reed's hands for injuries, test blood-stained carpeting and clothing, photograph the door and Reed's chain necklace, and take Reed's and J.G.'s cell phones into evidence. Defense counsel also argued that text messages showed that J.G. was angry at Reed for leaving her and keeping

[26] Id. at 388.
[27] Id. at 390-91.

her car. Counsel maintained that "she wanted to punish him" and did so by changing her original story to implicate him in the crime.

The jury convicted Reed as charged. Reed appeals.

OPEN DOOR RULING

When a party opens up a subject of inquiry on direct examination, courts have discretion under the "open door" doctrine to allow cross-examination on that subject, including questions concerning otherwise inadmissible evidence.[28] The doctrine promotes fairness by preventing one party from raising a subject and then barring the other party from further inquiry.[29] We review decisions under the open-door rule for abuse of discretion.[30]

Reed contends the trial court abused its discretion in ruling that the defense opened the door to questions about the role prostitution played in his 1993 convictions. We disagree.

During J.G.'s testimony, defense counsel asked if she was ever jealous of Reed's involvement with other women. J.G. responded:

> Not at all. Because when I got with him in Los Angeles, he had another woman. She was in jail. *And I know what he claims to be as his profession in life. And so it's like if he had another girl, he's coming home to me every night, I don't care if he gets money from another girl, so what? I mean, that's how we lived.* It's kind of sick now.[31]

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[28] State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006), *aff'd on other grounds*, 165 Wn.2d 17, 195 P.3d 940 (2008); State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

[29] State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

[30] State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

[31] Report of Proceedings (Sept. 17, 2013) at 104 (emphasis added).

Reed did not object to this answer or a similar answer to a subsequent question. Later, during his own testimony, Reed described his relationship with the 1993 victim differently:

> . . . I was in a relationship that had went bad. We were living a destructive lifestyle, and it was a bunch of cheating on both ends.
>
> And the young lady that I was charged with assaulting, I had ran into her in the streets, and went up to try to talk to her; she didn't talk to me.
>
> And I wound up breaking the window, and in the process, she got cut by some of the glass, and I was taken to jail for it. And I pled guilty, and did my time, and took responsibility for what I did, because that's how I was living back then.[32]

On cross-examination, Reed said his lifestyle with the 1993 victim involved "illegal activities," but declined to say what they were. When the trial court ruled that the defense opened the door to questions about those activities, Reed testified that he "had prostitutes back then. That was part of the lifestyle that I was living."[33] In light of the prior testimony elicited by the defense from both Reed and J.G., and considering that Reed gave a relatively sanitized description of the lifestyle he led in 1993 and claimed to have left behind, we conclude that the court did not abuse its discretion in ruling that Reed opened the door to questioning about the details of the1993 assault.

In addition, any error in the court's ruling was harmless. Errors in the admission of prior misconduct evidence are harmless if there is no reasonable

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[32] Report of Proceedings (Sept. 26, 2013) at 306.
[33] Id. at 390.

probability the error affected the verdict.[34] The references to Reed's involvement in prostitution were brief, cumulative of J.G.'s testimony, and an insignificant part of Reed's admitted criminal history. The evidence of Reed's guilt was also extremely strong, if not overwhelming. There is no reasonable possibility that the court's open door ruling affected the verdict.

INEFFECTIVE ASSISTANCE OF COUNSEL

Reed next contends his trial counsel was ineffective for failing to object to an instruction that allowed the jury to consider his assault convictions solely for determining the weight and credibility of his testimony. He also contends counsel should have requested a limiting instruction precluding the jury from using the convictions for propensity. But even assuming defense counsel's performance was deficient, there is no reasonable probability counsel's omissions affected the outcome of the trial.

To prevail on an ineffective assistance claim, Reed must establish both deficient performance and prejudice.[35] The prejudice requirement is satisfied if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[36] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[37] There is no

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[34] State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

[35] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[36] Strickland, 466 U.S. at 694.

[37] Id.

reasonable probability that the outcome of this trial would have been different but for counsel's alleged omissions.

As noted above, the evidence against Reed was extremely strong, if not overwhelming. His brother and sister-in-law either testified or told others that he said "I think I killed the bitch." J.G. testified that Reed assaulted her and explained why she did not immediately implicate him. J.G.'s daughter H.D. testified that Reed admitted the assault to her. Significantly, despite J.G.'s severe injuries, Reed did not call 911 for at least a half an hour and instead made multiple phone calls to his brother and his friend Joe. He even checked his phone messages. His explanation for not immediately calling 911 was that he wanted to do his own research and that J.G. did not want medical help. Given the severity of J.G.'s injuries, a jury was entitled to decide that these explanations were not credible. Likewise, the fact that police found no evidence of forced entry or missing property severely undermined the defense's unknown intruder theory.

In addition, Reed's post-assault conduct was highly incriminating. He instructed his brother to hide his phone, not to talk to the police, and to pawn his necklace. When police recovered the phone, they discovered that data from the day of the assault and the two days immediately following the assault had been deleted. When police recovered Reed's necklace, the clasp appeared to have been broken and put back together. Reed also acted strangely in J.G.'s hospital

room and she drew away from him when she saw him. When police wanted to talk to J.G. the day after the assault, Reed asked "why?"

Finally, neither attorney mentioned the instruction regarding Reed's prior convictions in closing argument. Nor did counsel suggest that the convictions could be used for propensity purposes or to assess his credibility. In light of the evidence and arguments in this case, there is no reasonable probability that any deficient performance affected the outcome.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appendix B

Amended Brief of Respondent

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NO. 71128-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT REED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Otherwise inadmissible evidence is admissible on cross-examination if the defendant opens the door and the evidence is relevant to some issue at trial. Defendant Roosevelt Reed elicited testimony from the victim, Jane Gregory, on cross-examination that referred to Reed's involvement with prostitutes. He then testified on direct examination that he was previously involved in a "relationship that had gone bad." The trial court ruled that he had opened the door to evidence that he was involved with prostitutes. Did the trial court properly exercise its discretion?

2. A defense attorney's failure to object or propose a limiting instruction is presumed to be the result of legitimate trial strategy. Reed's attorney refrained from objecting to the trial court's ER 609 limiting instruction and from proposing an ER 404(b) limiting instruction. While the State concedes that the ER 609 instruction was submitted in error, it was actually helpful to Reed's defense. Further, an ER 404(b) limiting instruction would only have encouraged the jury to consider Reed's convictions in a way that served the State's theory of the case. Reed was not prejudiced by these tactical decisions. Did Reed receive effective representation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Roosevelt Reed with Assault in the First Degree, contrary to RCW 9A.36.011(1)(c). CP 1. The State alleged that on September 5, 2012, with the intent to inflict great bodily harm, Reed assaulted and did inflict great bodily harm upon Jane Gregory.[1] CP 1. The State further alleged that Reed's act was a crime of domestic violence, in that Jane was a family or household member at the time of the assault. CP 1; RCW 10.99.020.

The State also alleged two aggravating factors: (1) that Reed's crime was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time (an aggravated domestic violence offense); and (2) that Reed committed this offense shortly after being released from incarceration. CP 1-2; RCW 9.94A.535(3)(h)(i), (t).

[1] In order to avoid confusion, some witnesses in this case are referred to hereafter by first name only. No disrespect is intended. The victim, Jane Gregory, is referred to as Jane. Her daughter, Hope Darnell, is referred to as Hope. The appellant's brother, Precious Reed, is referred to as Precious.

Jury trial was held before The Honorable James Cayce. Report of Proceedings (RP).[2] The jury convicted Reed of first-degree assault as charged. CP 80; 12RP 465. The jury also found that Reed and Jane were members of the same family or household. CP 82; 13RP 25-26. At a bifurcated trial held subsequently, the jury also convicted Reed of both aggravators, finding that Reed committed an aggravated domestic violence offense and that his crime constituted rapid recidivism. CP 81; 13RP 26.

Reed's standard sentence range was 240 to 318 months. CP 94; 14RP 6. The trial court imposed an exceptional sentence of 360 months. CP 94-96, 99-100; 14RP 25.

This appeal timely followed. CP 104.

2. SUBSTANTIVE FACTS.

Jane Gregory met and began dating defendant Roosevelt Reed in Los Angeles, in the 1980s. 6RP 62. They habitually took drugs together. 6RP 63. Jane left Reed when she found out that she was pregnant. 6RP 63. She gave birth to a daughter, Hope Darnell. 6RP 63.

[2] The State refers to the report of proceedings in this case as follows: 1RP – Sep. 9, 2013; 2RP – Sep. 10, 2013; 3RP – Sep. 11, 2013; 4RP – Sep. 12, 2013; 5RP – Sep. 16, 2013; 6RP – Sep. 17, 2013; 7RP – Sep. 18, 2013; 8RP – Sep. 19, 2013; 9RP – Sep. 23, 2013; 10RP – Sep. 24, 2013; 11RP – Sep. 25, 2013; 12RP – Sep. 26 and 27, 2013; 13RP – Sep. 30, 2013; 14RP – Nov. 1, 2013.

Many years later, in 2008, Jane received a call from a friend in prison. 6RP 64. The friend told her that another man in prison wanted to speak to her. 6RP 64. That man was Reed. 6RP 65.

Reed began calling Jane regularly and speaking to Hope. 6RP 65. Jane and Hope began visiting Reed in prison, and would bring Hope's children to meet their grandfather. 6RP 66-68.

In April of 2012, Reed was released from prison and moved in with Jane, in an apartment in Des Moines. 6RP 69-70; 12RP 360. Initially, they had only minor arguments. 6RP 70. But in the weeks leading up to September, Reed became increasingly physically aggressive toward Jane. 6RP 76. At one point, he slapped her. 6RP 76; 7RP 76. He would also warn her, "Don't take me to that dark place . . . I have this dark place and you don't need to take me there." 7RP 82.

In early September, Jane and Reed drove to Spokane to visit Hope and the grandchildren. 6RP 71-72. Hope noticed that Reed was controlling toward Jane. 7RP 8. He became angry over small things and called Jane a bitch. 7RP 8.

Hope also observed Reed giggling to himself while using his cell phone. 7RP 9-10. When Reed asked Hope for help deleting something on his phone, Hope saw that he was exchanging text messages with another

woman. 7RP 9. Reed later explained that the messages were about an incident involving a knife and a girl in a car. 6RP 74; 7RP 10.

Hope told Jane about Reed's behavior and his text messages. 6RP 72-73; 7RP 11. Jane confronted Reed as they drove back to Seattle, on September 4. 6RP 74. Reed told her that the messages were about a girl that he had "beat up" years ago, and admitted that he had been laughing about it. 6RP 74. Jane told him that she didn't think it was funny that he was laughing about assaulting a girl. 6RP 74. She added that that was why he had been sent to prison. 6RP 74.

Reed's demeanor changed and he became very angry. 6RP 75. Jane feared she would be assaulted. 6RP 75. She exited the freeway and came to a stoplight. 6RP 75. He took the keys and drove away, leaving her on the side of the road. 6RP 75. After she called him and threatened to call the police, he returned, and they drove back home to Des Moines. 6RP 75-76.

The next day, September 5, Reed called in sick to work and left the house around 12:45 p.m., to meet his friend, Joe Kelley, at a car wash in Federal Way. 6RP 76-77; 12RP 334. He then went to Anthony's Homeport with Kelley for lunch, in Des Moines. 12RP 335. The two men finished lunch around 2:30 or 2:35 p.m. 12RP 335. They drove to Kelley's residence to drop off Reed's car. 12RP 336. Then, Kelley drove

Reed to the Department of Corrections ("DOC") office in Burien, so that Reed could meet with his Community Corrections Officer ("CCO"), Stacey Westberg. 9RP 83, 88-89; 12RP 336.

Reed checked in to his appointment with Westberg at approximately 3:10 p.m. 9RP 92; 12RP 338. At the beginning of his DOC appointment, Reed was smiling and seemed happy. 9RP 92-93. However, when Westberg told Reed that he would need to pick up his own travel permits in the future, and not rely on Jane to pick them up for him, his body language and demeanor changed. 9RP 93. He became angry. 9RP 93.

Reed left the DOC office at approximately 4:05 p.m. 12RP 338. Forensic analysis of his cell phone later confirmed that he received a phone call at 4:07 p.m. while heading south from the DOC office, in the direction of Des Moines. 8RP 33-34; 9RP 133-34. While the content of that call is unknown, the call was from Jane. 9RP 128, 133-34. Based on cell phone records, she was home at the time, in Des Moines.[3] 8RP 51.

When Reed arrived home from his DOC appointment, he and Jane began arguing, possibly about money. 6RP 77. He pushed her, so she

[3] Because of the nature and extent of her injuries, Jane had difficulty recalling details of the day of the assault. 6RP 66-67, 76-79, 97. She testified that she accompanied Reed to his DOC appointment. 6RP 77, 99-104. However, cell phone records suggested that she remained home during this time. 8RP 50-51.

pushed him back. 6RP 78. She told him that she thought they had agreed not to fight anymore and he pushed her harder, into a wall. 6RP 78-79. She snatched the gold chain necklace that he was wearing from his neck, and that was the last thing that she remembered. 6RP 78. Hours later, she regained consciousness briefly in an ambulance, and heard a voice telling her that she was being taken to Harborview. 6RP 78.

Meanwhile, at 4:34 p.m., Reed began making a series of eight phone calls to his brother, Precious Reed, and to his friend, Kelley. 8RP 34-35, 41-42, 71; 9RP 128-30; 12RP 371-75. He also made a call to check his voicemail. 12RP 373-74. All of the calls were made from the immediate vicinity of the apartment. 8RP 34-35. Precious's wife, Shantel Smith-Reed, was at home in Fife when Precious picked up the phone. 9RP 5. She overheard Reed tell Precious, "I need you to get over here" and "I think I killed the bitch." 9RP 6.

Over half-an-hour later, at 5:07 p.m., Reed finally called 911. 9RP 128; 12RP 375. In the intervening time, while Reed was calling his brother and Kelley, and checking his voicemail, Jane was lying critically injured on the floor of the apartment. 12RP 373-75. He waited all that time to call 911 because purportedly he "wanted to do [his] own research" about what happened to Jane. 12RP 341.

Officers arrived to find Jane severely beaten, semi-conscious and unable to speak, with her eyes swollen shut. 6RP 14-15, 42-44; Ex. 1A-D. Reed told officers that he came home from his DOC appointment to find Jane lying in the doorway. 6RP 23-24. He also told his brother that someone had kicked the door open. 11RP 200. However, officers found no sign of a break-in or forced entry, and nothing was missing from the apartment. 6RP 26-27, 49-50. Nevertheless, because officers were unable to communicate with Jane and gather any explanation to the contrary, they did not arrest Reed or treat him immediately as a suspect. 6RP 27, 50.

Jane was taken to the hospital where doctors diagnosed her with multiple severe facial fractures. 6RP 85; 7RP 101-02, 113-14. Doctors told Jane that if she had been hit one more time—two at the most—she would have been killed. 6RP 92.

Reed went to see Jane in the emergency room. 7RP 119-20. When he walked into her room, she immediately recoiled from him. 7RP 120. He did not react sympathetically, but told her in a loud and angry voice to calm down. 7RP 120, 127. A hospital social worker was struck by the way that Jane recoiled from Reed and thought that his behavior was "a real unusual response for a family member." 7RP 121. When Reed angrily told Jane to calm down, she began vomiting. 7RP 121, 127.

Because of the swelling in her face, doctors were unable to immediately operate on Jane. 6RP 82; 12RP 343-44. Jane declined to stay in the hospital and was released back to Reed. 6RP 78; 12RP 345.

The next day, September 6, Detective Geandreau called to speak with Jane about the assault. 9RP 69. Reed answered the phone. 9RP 69. When Geandreau identified himself as a police detective and asked to speak to Jane, Reed asked him why. 9RP 69; 12RP 379. Geandreau thought the question was odd and suspicious, given that Jane had just been the victim of a serious assault. 9RP 69. Reed gave the phone to Jane, who told Geandreau that she couldn't speak to him because she was on too much pain medication. 6RP 81. Reed was sitting right next to her, at the time. 12RP 381. Jane was afraid of Reed because of what he did to her, and also because she was aware of his history of domestic violence.[4] 6RP 81-82.

A couple days later, Jane took a picture of herself on her cell phone and sent it to her daughter, Hope. 6RP 84-85; 7RP 32. She told Hope that she had been injured in a car accident. 6RP 84-85. She lied to Hope

[4] Jane knew that Reed once hit a girlfriend in the head with a brick, and that he jumped on another's girlfriend's car, broke the windshield, and dragged her out of the vehicle through the broken window. 6RP 81-82.

because she didn't want her grandchildren to know what Reed did to her.[5] 6RP 90-91. However, Hope did not believe Jane, and traveled to Seattle to be with her. 7RP 15-17. When Hope arrived in Seattle, Jane told her, "I can't believe he did this to me." 7RP 20. She also told Hope that she remembered grabbing Reed's chain necklace, and a fist coming at her, but nothing after that. 7RP 20.

Hope and her mother packed up the car in an attempt to leave. 6RP 86; 7RP 21. But the vehicle broke down as they tried to leave town. 6RP 86-87; 7RP 21-22. They were forced to call Reed for help. 6RP 86-87; 7RP 21-22. When Reed realized that Hope was in town and that she knew what had happened, he asked her, "So what happens next?" 7RP 22.

On the way back from the repair shop, Hope had to ride with Reed. 7RP 23. He kept telling her, "You know I messed up, Hope, you know I messed up, you know I have anger issues." 7RP 23. He added that his mother would be mad at him because he had messed up so badly. 7RP 23.

Hope had to return to eastern Washington without Jane. 7RP 38. Reed dropped Hope off at the bus station. 7RP 39. He told her again that he had messed up and had anger issues. 7RP 39. But he also told her,

[5] Jane also initially lied to investigators or a social worker, claiming that she answered the door at her apartment and saw a flash of blue before losing consciousness. 7RP 68-69. She told this lie to protect Reed. 7RP 69.

"You know, she's talking about me going, being with some other b[itch], and you don't know everything that happened, Hope." 7RP 39. She asked him why he had continued to hit Jane, even after she was unconscious. 7RP 39-40. He told her it was because Jane had threatened his freedom and he felt that he had nothing to lose. 7RP 28, 39-40.

Despite this, Hope never reported Reed to the police, because she was afraid of him. 7RP 27. He told her that if the truth of the assault ever came out, she would have to "watch [her] family's life." 7RP 27, 40-41.

On September 13, Jane underwent surgery to repair the injuries to her face. 6RP 87. Doctors installed four titanium plates to reinforce her broken bones. 7RP 103-05. A piece of plastic with titanium mesh also had to be installed in order to prevent her eye from sagging beneath its socket. 7RP 103-06.

After having surgery, Jane continued to live with Reed. 6RP 87. For a few days, he waited on her attentively. 7RP 83. He cried and told her that his mother would kill him if she knew what he did to her. 7RP 83. He explained, though, that he "never had a female ever raise their hands to him before." 7RP 85.

Soon, Reed's apparent remorse ran out: around September 20, when Jane called him at work to say that she didn't feel well, Reed told her that he was sick of hearing her complain. 6RP 92; 12RP 347-48.

When she heard that, Jane knew that she had to leave. 6RP 92. She told her daughter that she was coming to Spokane. 6RP 87.

Reed came home from work to find Jane packing. 7RP 74. He told her that he would leave instead, packed his things, and left. 7RP 74.

Jane left for Spokane on September 20. 6RP 87. On September 24, she called Reed's CCO, Westberg, and told her that she was in a safe place. 9RP 108. Westberg contacted a DOC domestic violence victim's advocate, and asked her to reach out to Jane. 9RP 34-35. When the advocate called Jane, Jane told her that Reed had assaulted her. 9RP 35-36. The advocate told Detective Geandreau that Jane was ready to talk to law enforcement. 9RP 37-38, 71-72.

On October 3, Geandreau spoke with Jane by telephone. 9RP 72. She was still staying with family near Spokane. 9RP 72. After speaking with Jane, Geandreau made arrangements for Reed to be arrested. 9RP 73. Reed was arrested that same day. 12RP 381.

Once in jail, Reed instructed his brother Precious to obtain his cell phone and to hide it where no one could find it. 11RP 194-96. It was recovered by officers from Precious's vehicle in November, when he was arrested on unrelated charges. 9RP 15, 146. Officers examined the phone, but found that most of the data from September 4 through September 6—

the critical dates surrounding the assault—was missing and could not be recovered. 9RP 53-56.

Reed also instructed Precious to pawn his gold necklace. 11RP 203-05. Officers subsequently recovered the necklace from the pawn shop and confirmed that the clasp junction appeared to have been broken and put back together. 10RP 91; 99.

Finally, Reed instructed Precious not to talk to the police, and to otherwise claim that he had been threatened by the police and knew nothing about the assault. 11RP 175-76, 178; 12RP 383. Nevertheless, on October 10, Precious called Detective Geandreau and told him that Reed called him on September 5, to say "I think I killed her" and "You better get out here." 11RP 225-26, 245. Then, on February 26, 2013, Geandreau spoke to Precious at the King County Courthouse. 11RP 246-48. Precious again told Geandreau that Reed had called him on September 5 to say, "You better get out here because I think I killed her."[6] 11RP 190-91, 246-49.

Additional facts and procedural history are set forth below as appropriate.

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[6] At trial, Precious initially denied telling Detective Geandreau that Reed called him to say, "I think I killed her." 11RP 159. Upon further questioning, he admitted telling the detective that, but claimed that he was high and felt threatened. 11RP 159-62, 190-91. However, Precious told a defense investigator that what he said to Detective Geandreau was true. 11RP 184-85. He also told the defense investigator that Reed had "gotten himself in a world of trouble." 11RP 186.

C. ARGUMENT

1. REED OPENED THE DOOR TO EVIDENCE OF PROSTITUTION.

Reed asserts that the trial court erred by admitting evidence that he was previously involved with prostitutes, and that the admission of this evidence requires reversal of his conviction for first-degree assault. But Reed himself elicited evidence, on cross-examination, of his previous involvement in prostitution. He also sought to create a half-truth on direct examination, testifying that he was merely involved in relationships that had gone bad. The trial court did not abuse its discretion when it ruled that Reed had opened the door. If the trial court erred, the error was harmless in light of the overwhelming evidence as a whole. Reed's claim should be rejected.

a. Additional Facts.

On cross-examination—in a strategic attempt to paint Jane as jealous and vindictive—Reed's attorney asked Jane whether she was ever jealous of his involvement with other women. 6RP 104. Her answer alluded to Reed making money from prostitutes:

Defense: Were you jealous that he was talking to another woman?

Jane: Not at all. Because when I got with him in Los Angeles, he had another woman. She was

> in jail. *And I know what he claims to be as his profession in life. And so it's like if he had another girl, he's coming home to me every night, I don't care if he gets money from another girl, so what? I mean, that's how we lived.* It's kind of sick now.

6RP 104 (emphasis added). Reed did not object to Jane's answer or request a limiting or curative instruction. 6RP 104.

Later on cross-examination, Reed's attorney again questioned Jane as to whether she was jealous of Reed. 7RP 62-63. Again, she answered with a reference to Reed's involvement in prostitution:

> **Defense:** Did you in the past accuse Mr. Reed of cheating on you?
>
> **Jane:** No.
>
> **Defense:** And you never accused him of being with other women?
>
> **Jane:** Like I said before, ma'am, our relationship was like if he had other women, it wasn't a problem with me. When I got with him, he had another woman. I don't care about that. *Because I know it's not about a sex thing, it's about a money thing.* So I don't have a problem with that.

7RP 62-63 (emphasis added). Reed again did not object or request an instruction. 7RP 62-63.

Reed took the stand and testified in his own defense. 12RP 301-56, 359-87, 390-96, 398-401. He embraced his criminal past, admitting that he was previously "living another side of the law, drugs,

alcohol, just a self-destruct [sic], self-defeating lifestyle, from '80 pretty much all the way to '99." 12RP 303. But he sought to distance himself from his past, testifying that after being imprisoned twice for assault, he had made an effort to change his life for the better. 12RP 307, 367.

On direct examination, Reed described the circumstances of his first domestic assault conviction:

> **Defense:** Now, you had a 1993 case, or there's been some mention of a 1993 case. Can you describe what that case was about?
>
> **Reed:** Yes. I was in a relationship that had went bad. We were living a destructive lifestyle, and it was a bunch of cheating on both ends.
>
> And the young lady that I was charged with assaulting, I had ran into her in the streets, and went up to try to talk to her; she didn't talk to me.
>
> And I wound up breaking the window, and in the process, she got cut by some of the glass, and I was taken to jail for it. And I pled guilty, and did my time, and took responsibility for what I did, because that's how I was living back then.

12RP 306.

Reed's attorney also asked him about his 1999 domestic assault conviction:

> **Defense:** Now, what about—you had a case in 1999.
>
> **Reed:** Yes.

Defense: Can you tell the jury a little bit about that case?

Reed: That case was a little more in depth, but similar in [sic] the '93 case. I was really heavy into alcohol and drugs. And, also, in the '99 case, I was still involved in alcohol and drugs, but in a deeper depth. And, also, the person that I assaulted was on drugs, also, which was the first time I had ever got involved with someone that also used drugs with me. And that's what the case—it all—that's just one of the worst experiences of my life.

Defense: Okay.

Reed: And I went and I did—I went to prison, and I decided to change my life, and I got out. That was in 1999, and I was released in 2012.

12RP 306-07.

Reed referenced the 1993 assault again, later on direct examination, testifying that there was a misunderstanding when Hope and Jane thought that he was sending text messages and laughing about committing that assault. 12RP 329.

Prior to beginning cross-examination, the State requested clarification as to whether Reed had opened the door to further detail about the circumstances surrounding his previous assault convictions. 12RP 356. The trial court ruled that Reed had opened the door to further detail about the 1993 conviction. 12RP 357. Reed did not object, but apparently conceded that he had opened the door, "[b]ecause that was

related to the text messages." 12RP 357. However, the trial court ruled that the State could only explore the 1999 conviction to the extent that it was "a serious assault on a woman." 12RP 357.

The prosecutor then questioned Reed about his 1993 conviction:

Prosecutor: The 1993 relationship you had—

Reed: Yes.

Prosecutor: —you mentioned that it was a relationship that went bad?

Reed: Yes.

[. . .] (Exhibits shown to witness)

Prosecutor: Now, what was your relationship with the victim in this case?

Reed: We were in that—that destructive lifestyle.

Prosecutor: What was your relationship with her? What was her relationship with you?

Reed: Well, we were a couple, if that's what you're wanting me to say, or are fishing for.

I don't understand. What was the relationship? We were into a negative lifestyle which committed—I mean, which consisted of illegal activities.

Prosecutor: What sort of illegal activities?

Reed: I'd rather not go into detail. Do I need to?

Prosecutor: We can take that up later . . . .

12RP 364-65. Reed did not object to the prosecutor's cross-examination. 12RP 364-65.

Reed went on to admit that he had accosted his ex-girlfriend in public, jumped on the hood of her car, broke out the windshield, and that she was stabbed during the encounter. 12RP 366. He pleaded guilty to third-degree assault and was imprisoned for 13 months. 12RP 367. He also admitted to "seriously assault[ing]" another girlfriend in 1999, and to being imprisoned as a result of that conviction until 2012. 12RP 367-68.

Outside the presence of the jury, the prosecutor again asked to explore the defendant's 1993 conviction in further detail. 12RP 388. The prosecutor argued that Reed had testified that the victim in that case was his girlfriend, but that

> [i]n actuality . . . he was her pimp. He didn't want to answer that question. And she did not put money on his books, and that's why he had assaulted her, and I wanted to go into that. But I wanted to make sure and get a ruling from the Court first.

12RP 388. Reed objected, arguing that "this case ended up as an Assault-3, and there's no charge of any type of prostitution related crime, and we believe it's highly prejudicial." 12RP 389. The prosecutor countered that Jane had already testified about the lifestyle that both she and Reed had lived, presumably referring to Jane's testimony about

Reed's involvement in prostitution.[7] 12RP 389. He added that Reed had also testified about this prior lifestyle. 12RP 389. The trial court ruled that the defense had opened the door to evidence of Reed's prior involvement in prostitution. 12RP 389.

Cross-examination continued:

Prosecutor: Mr. Reed, I was asking you earlier questions about the 1993 case. When I asked you, you initially said that it was a woman that you had a relationship with, the victim in that case.

Reed: Yes.

Prosecutor: And I asked you what that relationship was, and your answer was that you would rather not answer it; right?

Reed: Yes it was. That was my answer.

Prosecutor: What was that relationship?

Reed: I still would rather not answer it.

Prosecutor: Your Honor, I would ask that he be required to answer the question.

Court: I'm instructing you to answer the question.

Reed: I had prostitutes back then. That was part of the lifestyle that I was living in my past.

[7] This understanding is confirmed by defense counsel's contemporaneous request to offer evidence of Jane's own involvement in prostitution, at that time. 12RP 389. The trial court denied that request. 12RP 389-90.

12RP 390. Reed went on to testify that he had assaulted her because he was upset at her for leaving him. 12RP 391. He denied assaulting her because she wouldn't give him money. 12RP 391. He testified again that, since that case, he had turned his life around. 12RP 392.

b. Standard Of Review.

Otherwise inadmissible evidence is admissible on cross-examination if the defendant "opens the door" and the evidence is relevant to some issue at trial. *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). A trial court has considerable discretion to determine whether the door has been opened. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005). Its ruling will be reversed only upon an abuse of discretion. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). The appellate court must find that no reasonable judge would have ruled as did the trial court. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

Erroneous rulings that the door has been opened are still subject to harmless error analysis. *Stockton*, 91 Wn. App. at 43. An evidentiary error is harmless if the improperly admitted evidence is of minor

significance in reference to the overall, overwhelming evidence as a whole. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006).

The Washington Supreme Court has explained that the purpose of the "open door" rule is to prevent a party from deceiving the fact-finder with half-truths:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

c. The Trial Court Properly Ruled That Reed Opened The Door To Evidence Of Prostitution.

The trial court did not abuse its discretion when it ruled that Reed had opened the door to evidence of his involvement with prostitutes. Reed twice elicited evidence of his involvement with prostitutes, when he questioned Jane about whether she was jealous of his history with other

women.[8] 6RP 104; 7RP 62-63. She responded that he claimed a certain "profession," in which he "had" other women and made money off them. 6RP 104; 7RP 62-63. Reed did not object to this testimony. 6RP 104; 7RP 62-63. Instead, he sought to create a half-truth when he minimized this history on direct examination, referring to only being involved in a "relationship that had went bad." 12RP 306. He did not attempt to hide his effort to create a half-truth—he expressly refused to answer questions about this relationship on cross-examination and explained that "I'd rather not go into detail." 12RP 365. The trial court had to instruct him to answer the prosecutor's question. 12RP 390.

This evidence was also relevant to a material issue at trial. The State's primary purpose in offering evidence of Reed's history of violence against women was to explain Jane's reasonable fear and her behavior, in the aftermath of the assault. 3RP 2-3, 8-12; CP 131-37 (State's Supplemental Memorandum on ER 404(b)). Jane knew that Reed employed and dated prostitutes, and that he assaulted at least two of his previous girlfriends. 6RP 81-82, 104; 7RP 62-63. A reasonable judge

[8] Reed asserts that his testimony about a relationship "gone bad" was a mere passing reference, insufficient to open the door. Br. of Appellant, at 18. But Reed ignores Jane's earlier testimony on cross-examination, elicited by the defense, that he was previously involved with prostitutes. While the trial court did not expressly rely on Jane's testimony in ruling that the door had been opened, a trial court may be affirmed on any basis supported by the record. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); RAP 2.5(a).

could have found a connection between Reed's pimping activities, his violent history toward women, and Jane's reasonable fear of his behavior.

While evidence of Reed's involvement in prostitution may not initially have been admissible,[9] it became admissible when he opened the door on both direct and cross-examination. At the very least, because it cannot be said that *no reasonable judge* would have ruled as did the trial court, the trial court did not abuse its discretion. Reed's claim should be rejected.

Even if the trial court abused its discretion by ruling that Reed opened the door to evidence of prostitution, Reed's conviction should be affirmed because any error was harmless. The evidence at issue was of minor significance in reference to the overall, overwhelming evidence as a whole. *See Brockob*, 159 Wn.2d at 351.

As the trial court observed at sentencing, it was "obvious" that Reed committed this assault. 14RP 25. Jane's last memory before losing consciousness was of being pushed by Reed and snatching his gold chain from his neck. 6RP 78-79. Reed then placed multiple phone calls from the apartment, attempting to reach Kelley and Precious, all while Jane lay

[9] The argument could be made that the probative value of this evidence was, initially, outweighed by the danger of unfair prejudice. ER 403. But this balance changed once Reed introduced evidence of his prostitution activities on cross-examination and sought to minimize and create half-truths on direct examination.

on the floor with severe injuries. 8RP 34-35, 41-42, 71; 9RP 128-30; 12RP 373-75. He told Precious, "I think I killed the bitch." 9RP 6. There was no evidence of a break-in or that anyone else had been at the apartment. 6RP 26-27, 49-50.

Reed also told Hope that he assaulted Jane because she had threatened his freedom and he felt that he had nothing to lose. 7RP 28, 39-40. He further explained that no "female" had ever raised her hands to him before. 7RP 85. He admitted to having anger issues and that his mother would be upset with him, if she knew what he had done to Jane. 7RP 23, 83.

When Reed went to visit Jane in the emergency room, she immediately recoiled from him. 7RP 120. Instead of acting with sympathy, he angrily told her to calm down. 7RP 120, 127. She started vomiting. 7RP 121, 127.

When Detective Geandreau called the day after the assault to speak to Jane, Reed asked him, "Why?" 9RP 69; 12RP 379. Reed's question was odd and suspicious, because Jane had just been the victim of a serious assault. 9RP 69.

In contrast to the strength of the evidence against him, Reed's defense was highly incredible. He claimed that he came home to find Jane injured, and left her to bleed on the floor of the apartment for over

half-an-hour while he tried to call his brother and Kelley, and even checked his voicemail. 12RP 371-75. He explained the delay by testifying that he "wanted to do [his] own research." 12RP 341. He finally called 911 after realizing that Jane had a "scar" above her eye, and that her face was "sensitive to the touch." 12RP 342. The jury would have weighed this explanation against the photographs in evidence, showing Jane's horrific injuries—photographs that, Reed admitted, accurately depicted her appearance at the time of the assault. 12RP 369-71; Ex. 1A-C.

Reed's defense was also beset by other inconsistencies. He called CCO Westberg the day after the assault and left her a voicemail, claiming to have gone straight home after his DOC appointment to find Jane injured. 9RP 95. But at trial, Reed testified that he actually went to Kelley's house after his DOC appointment to get his car, then went home. 12RP 338-39, 364. He testified that his voicemail to Westberg was mistaken. 12RP 364. He gave similarly inconsistent or incomplete accounts of his whereabouts to responding officers, on September 5. 6RP 25, 29.

Reed also testified that he never got in any physical confrontations with Jane and that she never ripped his gold chain from his neck. 12RP 315, 324, 342. But Smith-Reed testified that when she and Precious

arrived at the apartment, Reed took Precious aside and told him that he and Jane had argued over him seeing another woman, and that she broke his chain necklace.[10] 9RP 11, 29.

Reed also claimed that Jane's account was motivated by jealousy and the desire to regain possession of her car. 12RP 435, 438. While some evidence superficially supported this defense (for example, Jane admitted that she probably wouldn't have involved the police if Reed had simply returned her car, 7RP 79), this defense did not explain why Smith-Reed overheard Reed say to Precious that he thought he "killed the bitch." 9RP 6. It also did not explain why Precious twice admitted to Detective Geandreau that Reed called him to say that he thought that he killed Jane. 11RP 190-91, 225-26, 244-49. Reed's explanation, that he merely said, "*someone*" killed "*my*" bitch, and that "bitch" in this context was a term of endearment, rang hollow. 12RP 339, 341 (emphasis added).

Finally, as noted above, Reed fully acknowledged his criminal past at trial, a legitimate strategy to neutralize its effect. He admitted his prior lifestyle and his serious assault convictions, but stressed that "that was Roosevelt then," and that he had changed his ways. 12RP 307, 367. In

[10] The transcript here uses the word "brought" instead of "broke." 9RP 11. Either this is a typographical error, or Smith-Reed misspoke. This is apparent from the record as a whole, and from Smith-Reed's subsequent testimony on cross-examination, in which she clarifies that she overheard Reed say that Jane "grabbed his necklace off of his neck." 9RP 29.

light of the defense strategy regarding his criminal past, and the evidence of his serious assault history, Reed was not prejudiced by the introduction of evidence that he was involved in prostitution. Because this evidence was insignificant in light of the overwhelming evidence as a whole, any error in its admission was harmless. Reed's conviction should be affirmed.

2. REED RECEIVED EFFECTIVE REPRESENTATION.

Reed argues that his attorney was ineffective for failing to request an ER 404(b) limiting instruction. He further asserts that his attorney was ineffective for failing to object to the ER 609 instruction given by the trial court, allowing the jury to consider evidence of his convictions for the purpose of determining his credibility as a witness.

Reed's claims should be rejected. His attorney made a legitimate strategic decision not to request an ER 404(b) limiting instruction, in order to avoid reemphasizing the substantive purposes for which the jury could consider this evidence. Further, while an objection to the ER 609 instruction likely would have been sustained, counsel strategically refrained from objecting because the ER 609 instruction was favorable to Reed's defense. Even if counsel was deficient either for failing to request an ER 404(b) limiting instruction or to object to the ER 609 instruction,

Reed cannot demonstrate prejudice. For all of these reasons, his conviction should be affirmed.

a. Additional Facts.

Before trial, the prosecutor announced his intent to offer evidence of Reed's 1993 and 1999 assault convictions, for purposes of establishing Jane's delay in reporting the instant assault, to allow the jury to evaluate her credibility with knowledge of the details and context of the relationship, to explain Jane's reasonable fear and reasons for initially lying about who assaulted her, to show Reed's motive through his increasing hostility toward Jane, and to provide background information on Reed's relationship with Jane. CP 128-29 (State's Trial Memorandum), 131-37 (State's Supplemental Memorandum on ER 404(b)); 3RP 2-12.

The prosecutor reiterated that the convictions were being offered strictly under ER 404(b), and were not being offered for purposes of determining Reed's credibility under ER 609. 2RP 27; 3RP 12. The trial court found the convictions admissible under ER 404(b). 5RP 2-4. Specifically, the trial court found that the convictions were relevant to the issue of Jane's credibility and the dynamics of a domestic violence relationship—that is, why she feared Reed and initially lied about the

assault. 5RP 2-4. The trial court also found that evidence of Reed's 1993 conviction was admissible to establish the *res gestae* of the instant crime, because Reed and Jane had argued about that conviction on September 4, the day before the assault. 5RP 2.

Evidence of Reed's assault convictions was admitted several times at trial. Jane testified that, the day before Reed assaulted her, she confronted Reed about sending text messages and laughing about a time when he assaulted a girl. 6RP 74-75. She told him that it wasn't funny and that that was why he was sent to prison. 6RP 74. Reed became angry, and Jane was worried that she would be assaulted. 6RP 75. He left her on the side of the road and only returned when she threatened to call the police. 6RP 75-76.

The day after the assault, Jane refused to speak to Detective Geandreau over the telephone. 6RP 81-82. Reed was sitting right next to her at the time. 12RP 381. Jane feared for her life because she knew of Reed's criminal history—that he had gone to prison for hitting one girlfriend in the head with a brick, and for jumping on the car of another girlfriend, breaking the windshield, and pulling her out of the car. 6RP 81-82.

After the State rested, outside the presence of the jury, the prosecutor referred to the court's pre-trial ER 404(b) rulings, and asked

whether Reed's attorney planned to submit an ER 404(b) instruction. 11RP 297. Reed's attorney said, "It's been so long ago, I can't remember." 11RP 297. The trial court suggested that defense attorneys often "don't even want to go there," but added that it would issue an instruction if she requested. 11RP 297. Defense counsel confirmed her understanding that Reed's convictions were not being offered under ER 609. 11RP 298. She added that the defense intended to discuss Reed's 1993 and 1999 convictions in its case-in-chief. 11RP 298. She did not confirm whether she would request an ER 404(b) instruction. 11RP 298.

Reed testified on direct examination about his 1993 and 1999 convictions. 12RP 306-07. He acknowledged his previous engagement in criminal activity, but testified that he had decided to change his life after being released from prison in 2012. 12RP 307, 309.

Prior to cross-examination, the Court ruled that Reed had opened the door to additional questions about the 1993 case. 12RP 357. The court ruled that the State could only question Reed about the 1999 case to the extent that it involved a serious assault on a woman. 12RP 357.

On cross-examination, Reed again acknowledged his 1993 and 1999 convictions. 12RP 360, 364-68. In keeping with the defense strategy, he stressed again that "that was Roosevelt then." 12RP 367.

Outside the presence of the jury, the prosecutor asked to cross-examine Reed regarding his involvement in prostitution, as it related to his 1993 conviction. 12RP 388. The court ruled that the door had been opened. 12RP 388-99.

The prosecutor then asked Reed what his relationship was, with the victim in the 1993 case. 12RP 390. After initially refusing to answer the question, and being instructed to answer by the trial court, Reed testified that she had been one of his "prostitutes." 12RP 390.

After both sides rested, the parties litigated jury instructions. 12RP 402. The State proposed an ER 609 instruction.[11] Supp. CP __ (sub no. 79, at 9) (State's Proposed Jury Instructions); 12RP 402. The defense did not object to the instruction. 12RP 402-03. The trial court then instructed the jury that:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

CP 62 (Instruction 4). While the reading of instructions to the jury was not transcribed, there is no indication in the record that defense counsel objected when instructions were read. 12RP 409.

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[11] The State concedes that this instruction was submitted in error. However, Reed did not object to this instruction below, and thus the inquiry on appeal is limited to whether Reed's trial attorney was ineffective for failing to object. RAP 2.5(a). While Reed apparently assigns error to the instruction, itself, he has—appropriately—briefed only the ineffective assistance of counsel argument. *See* Br. of Appellant, at 1.

The State did not propose, and the defense does not appear to have requested, an ER 404(b) instruction. Supp. CP __ (sub no. 79) (State's Proposed Jury Instructions); 12RP 402. The trial court did not instruct the jury on the limitations of evidence offered under ER 404(b). CP 56-79 (Instructions 1-19).

During closing argument, the prosecutor stressed that Jane's behavior was explained by the cycle of domestic violence.[12] 12RP 419. Jane knew that Reed went to prison for assaulting one girlfriend. 12RP 419-20. She knew that, after he got out of prison, he went to prison again for assaulting another girlfriend. 12RP 419-20. Jane also knew that, the day before she was assaulted, Reed was laughing about assaulting a woman. 12RP 420. She herself was almost beaten to death by Reed. 12RP 420. Eventually, Jane made it to Spokane, where she was safe; there, no longer afraid, she reported the assault. 12RP 420.

Reed's attorney argued that Jane was jealous, angry, and felt that Reed owed her a debt for all that she had done for him. 12RP 435. She was upset that he moved out. 12RP 435. She was assaulted on September 5 but didn't report Reed until September 24, despite having multiple opportunities to do so. 12RP 433-34. She told the hospital social

[12] A victim's advocate had earlier testified that it is common for domestic violence victims not to immediately report their abusers. 9RP 37. "Most of the time," victims delay reporting because they are "strategizing when it is safest to report." 9RP 37.

worker that she was struck by a stranger in the doorway. 12RP 439. She never would have told police that Reed assaulted her if had given her the car back. 12RP 438. That was her real concern, and the reason why she involved the criminal justice system. 12RP 435.

Neither attorney argued that the jury should consider Reed's prior convictions for the purpose of determining his credibility. 12RP 411-48, 451-59.

b. Standard Of Review.

A challenge based on ineffective assistance of counsel is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both: (1) that trial counsel's performance fell below a minimum objective standard of reasonableness (the performance prong); and (2) that the defendant was prejudiced by counsel's deficient performance (the prejudice prong). *State v. West*, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *State v. Thomas*, 109 Wn.2d 222, 226,

743 P.2d 816 (1987) (citing *Strickland*, 466 U.S. at 689). Courts will presume that a failure to object "can be characterized as *legitimate* trial strategy or tactics," and the defendant bears the burden of rebutting this presumption. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (citations omitted) (emphasis original). This is because "[t]he decision of when or whether to object is a classic example of trial tactics," and "[o]nly in egregious circumstances . . . will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The defendant must also show that the proposed objection would likely have been sustained. *Davis*, 152 Wn.2d at 714.

Similarly, the failure to request a limiting instruction for evidence admitted under ER 404(b) is presumed to be a legitimate tactical decision. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *State v. Price*, 126 Wn. App. 617, 649-50, 109 P.3d 27 (2005)[13]; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). A legitimate trial tactic cannot be the basis for a claim of ineffective assistance of counsel. *Yarbrough*, 151 Wn. App. at 91.

[13] This Court recently recognized in *State v. Hampton*, __ Wn. App. __, 332 P.3d 1020, 1028-30 (2014), that *Price* implicitly was abrogated in part on other grounds by *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (concerning right to choice of counsel).

Regarding the prejudice prong, a defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). Trial counsel does not guarantee a successful verdict, and competency is not measured by the result. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

c. Counsel Had Legitimate Strategic Reasons Not To Propose An ER 404(b) Instruction And This Decision Did Not Prejudice Reed.

Reed asserts that his trial attorney should have proposed an ER 404(b) limiting instruction.[14] Yet Washington courts have routinely found that the decision not to request an ER 404(b) limiting instruction is a legitimate trial strategy, to avoid emphasizing damaging evidence. *See Yarbrough*, 151 Wn. App. at 90; *Price*, 126 Wn. App. at 649-50; *Barragan*, 102 Wn. App. at 762. While an ER 404(b) instruction may seem to assist the defense, because it prevents a jury from considering prior bad acts as evidence of character or propensity, it presents a severe

[14] ER 404(b) provides that "[e]vidence 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."

risk of reinforcing the exact purposes for which the State offers the evidence. *See Price*, 126 Wn. App. at 650 (reasonable not to request ER 404(b) limiting instruction in order to avoid emphasizing prior bad acts as proof of motive to commit murder).

In this case, the State offered evidence of Reed's prior convictions in order to explain Jane's behavior in the aftermath of the assault. Defense counsel relied in closing argument on the fact that Jane initially refused to talk to the police, claimed to have been attacked by a stranger, and did not report Reed as the assailant until several weeks after the attack. 12RP 433-34, 439. An ER 404(b) instruction would have undercut this defense by drawing the jury's attention to the State's theory—that Jane's actions resulted from her reasonable fear of Reed and the dynamics of a domestic violence relationship.

Instead of requesting a limiting instruction, defense counsel sought to neutralize Reed's criminal history by eliciting testimony that embraced his criminal past, but differentiated his current behavior. Reed testified that he had made efforts to change his life since being released from prison in 2012. 12RP 307, 309. This was a legitimate strategy. *See Barragan*, 102 Wn. App. at 762 (reasonable for defense counsel to elicit favorable testimony instead of requesting an ER 404(b) limiting instruction). Reed's claim should be rejected.

Even if defense counsel was deficient by failing to request an ER 404(b) limiting instruction, Reed has not shown a reasonable likelihood that, if such an instruction had been issued, the outcome of the trial would have been different. As described in detail above, the evidence against Reed was overwhelming. His defense, in contrast, was highly incredible. No reasonable jury would have believed that he came home to find Jane in a pool of blood, and spent half-an-hour making phone calls before finally calling 911 after realizing that she had a cut above her eye. His defense was further contradicted by multiple witnesses other than Jane, including Hope, Precious, and Smith-Reed. An ER 404(b) limiting instruction would not have made a difference in the result of the trial; instead, it would only have cemented the State's theory. Reed's conviction should be affirmed.

d. Counsel Had Legitimate Strategic Reasons Not To Object To The ER 609 Limiting Instruction And This Decision Did Not Prejudice Reed.

Reed asserts that his trial attorney should have objected to the ER 609 instruction, and that her failure to object constituted ineffective

assistance of counsel.[15] The State agrees that Reed's convictions were admitted pursuant to ER 404(b), not ER 609. An objection to the ER 609 instruction would likely have been sustained. However, that does not mean that defense counsel lacked legitimate strategic reasons to refrain from objecting.

By limiting the jury's consideration of Reed's prior convictions to the sole issue of determining his credibility, rather than the substantive purposes for which the jury was actually entitled to consider this evidence, the ER 609 instruction *aided* Reed's defense. While the jury was still able to consider Reed's history of violence against women in judging Jane's behavior, a significant part of that history—the fact of Reed's convictions—was effectively removed from their consideration for that damaging purpose. Thus, because trial counsel is presumed to have made a reasonable tactical decision, this Court should presume that Reed's trial attorney refrained from objecting to the ER 609 instruction because she reasonably considered it helpful to his defense.

[15] ER 609 provides that: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment." *Id.* at (a).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Reed's conviction for Assault in the First Degree – Domestic Violence.

DATED this 12th day of December, 2014.

Respectfully submitted,

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King County Prosecuting Attorney

By: _____
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Appendix C

Brief of Appellant

71128-8

71128-8

NO. 71128-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT REED,

Appellant.

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting unfairly prejudicial and irrelevant evidence of appellant's past involvement in prostitution. 12RP[1] 388-89.

2. The trial court erred by instructing the jury they could consider appellant's prior convictions in assessing his credibility when the convictions were not admitted for impeachment purposes. CP 62 (instruction 4).

3. Defense counsel was ineffective for failing to object to the credibility instruction when there was no basis for suggesting the jurors could consider the prior conviction as impeachment evidence.

4. Defense counsel was ineffective for failing to propose a 404(b)[2] evidence limiting instruction.

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – September 9, 2013; 2RP – September 10, 2013; 3RP – September 11, 2013; 4RP – September 12, 2013; 5RP – September 16, 2013; 6RP – September 17, 2013; 7RP – September 18, 2013; 8RP – September 19, 2013; 9RP – September 23, 2013; 10RP – September 24, 2013; 11RP – September 25, 2013; 12RP – September 26 & 27, 2013; 13RP – September 30, 2013; 14RP – November 1, 2013.

[2] 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.

Issues Pertaining to Assignments of Error

1. Appellant testified that he lived a destructive lifestyle during a prior "bad" relationship. 12RP 306. Over defense objection, the trial court found this testimony opened the door to further questioning by the prosecutor about appellant's involvement in prostitution during the relationship. Did the trial court err by admitting the unfairly prejudicial and irrelevant evidence where appellant's explanation was nothing more than a mere passing reference to a prior relationship?

2. Appellant was charged with first degree assault for an alleged incident with his girlfriend. Over defense objection, the trial court admitted evidence appellant had two prior assault convictions under several exceptions to ER 404(b). The prior assaults were not offered or admitted under ER 609(a)[3] as impeachment evidence. The trial court however, instructed the jury it could consider appellant's prior convictions for purposes of determining the credibility of his testimony. Was

[3] ER 609(a) states: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment."

appellant denied his constitutional right to effective representation when defense counsel failed to object to this erroneous instruction?

3. The trial court offered to give a limiting instruction after admitting appellant's two prior assault convictions under ER 404(b). Defense counsel failed to request a limiting instruction or clarify she did not want an instruction. Defense counsel instead stated she could not remember whether she wanted an instruction and explained appellant's intent to discuss the prior convictions during his testimony. Where proper limiting instructions could have sufficiently mitigated the harm from the 404(b) evidence while still permitting explanation of the circumstances of the prior convictions, was appellant denied his constitutional right to effective representation when defense counsel failed to propose the instructions?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Roosevelt Reed with one count of first degree assault with a family or household member, for an incident with Jane Gregory on September 5, 2012. CP 1-8. A jury found Reed guilty. CP 80. The jury also returned special verdicts finding the assault was an aggravated domestic violence offense and Reed committed the assault shortly after being released from prison. CP 81-82.

Based on the special verdicts, the trial court imposed an exceptional sentence of 360 months in prison. CP 93-103; 14RP 25. The trial court also imposed 36 months of community custody. Id. Reed timely appeals. CP 104.

2. Trial Testimony

Appellant Roosevelt Reed first met Jane Gregory in the nineteen-eighties. 6RP 63-64; 12RP 303-04. Gregory ended the relationship when she learned Reed was involved in another relationship. 12RP 304, 360. In 2008, Gregory and Reed reconnected after Reed learned he and Gregory had a daughter together. 6RP 64-65; 12RP 304-05, 360.

That daughter, Hope Darnell, along with Gregory, and Darnell's children regularly visited Reed in prison[4] over the next four years. 6RP 63, 65-68; 7RP 407. Reed was released from prison in April 2012 and moved into a Des Moines apartment with Gregory a short time later. 6RP 69-70; 12RP 307, 310, 313-14, 359. Reed complied with his community custody conditions after being released from prison. 9RP 109. He maintained stable employment and housing and checked in once monthly with his community corrections officer, Stacy Westberg. 9RP 88-89.

[4] Reed was in prison for a 1999 conviction for first degree assault. 12RP 307, 360, 366.

After moving in together, Gregory and Reed had "minor arguments over little things." 6RP 70. One time, Reed slapped Gregory on the chin. Gregory believed the incident was an accident. 6RP 76, 106; 7RP 72-73, 91, 95. There were no shoving or pushing incidents between Gregory and Reed. 6RP 106.

On September 4, 2012 Reed received permission from Westberg to travel to Spokane with Gregory to visit Darnell and her children. 7RP 7; 9RP 90. During the visit, Darnell believed Reed was controlling and would get angry about small things. 7RP 8. Darnell also noticed Reed spent time text messaging. 7RP 8. Darnell saw Reed giggle during one text message conversation and learned Reed was joking about a prior assault. 7RP 9-10. Darnell did not know the entire context of the text message conversation. 7RP 29. Darnell told Gregory about the text messaging but could not remember if she told her about the context of Reed's messaging. 6RP 73-74; 7RP 10.

On the way home, Gregory confronted Reed about the text messaging, telling him to be more involved in visiting Darnell. Gregory also told Reed it was not funny to joke about assaulting someone. 6RP 74; 7RP 77. Gregory said Reed's demeanor changed and he became angry. Gregory believed Reed might hit her. 6RP 75. When Reed stopped the

car, Gregory got out. Reed drove away without Gregory but returned after she threatened to call police. 6RP 75-76.

The next day, Reed called in sick to work. Gregory explained she and Reed went a cousin's apartment and then got lunch. 6RP 77, 99-102; 7RP 65. Gregory then took Reed to his meeting with Westberg. 6RP 77, 102; 7RP 65. Reed was calm, happy, and smiling when he met with Westberg. 9RP 92-93, 103. He did not mention any problems with Gregory. 9RP 99. Westberg told Reed that in the future he needed to be responsible for obtaining his own travel permits. Reed's body language changed and Westberg believed he was angry. Reed told Westberg all future communication would only be between the two of them. 9RP 93. Westberg believed Reed left the office by 4 p.m. 9RP 94, 111. Gregory said Reed's meeting with Westberg lasted about ten minutes. 6RP 103-04.

Gregory and Reed returned to the apartment after the meeting with Westberg. They began arguing about money and possibly Reed's text messaging from the day before. 6RP 77, 104-05; 7RP 65-66. Reed pushed Gregory and she pushed back. 6RP 78-79, 84, 105-06; 7RP 72. When Gregory told Reed they had agreed not fight, Reed pushed her more firmly. In response Gregory "snatched his [Reed] chain off his neck." 6RP 78-79, 84, 105-07; 7RP 72. Gregory could not remember what

happened next. 6RP 78-79, 83-84, 97, 107-08; 7RP 72, 75. She did not specifically remember Reed hitting her. 6RP 112-13.

Reed called 911. 6RP 23. When officers arrived at the apartment, Gregory had swollen cheeks, lips, and blood on her head and face. 6RP 14, 42-43. Officer Kevin Montgomery described Gregory's injuries as "severe" but not life threatening. 6RP 14, 23. Gregory had difficulty talking and was hard to understand. 6RP 15, 23, 44, 57. Gregory had six fractures to her cheekbone, eye socket, and nasal bone. 6RP 85, 93; 7RP 102-03.

Police saw no signs of forced entry into the apartment. 6RP 27, 49-50. Nothing was missing. 6RP 25-26, 50. There was blood on the apartment carpet, kitchen sink, and clothing items. 6RP 16, 20-22, 31, 33. Police seized a broken vase which may have been used defensively or as a weapon. 6RP 49, 57. No fingerprints or DNA were found on the vase. 6RP 56; 9RP 115.

Reed told Montgomery that he left the apartment between 12:30 and 1:00 p.m. to meet with a friend and attend his meeting with Westberg. Reed found Gregory when he returned home around 4:00 p.m. When Montgomery asked about the time between when Reed discovered Gregory and called police, Reed explained he had also picked up a car

from a friend. Reed was cooperative and answered all questions. 6RP 23-25, 29. He was not arrested. 6RP 29, 50, 53, 58.

Gregory voluntarily left the hospital the next day and returned to the apartment she shared with Reed. 6RP 80, 82, 112. Reed called Westberg on September 7 and told her Gregory had been assaulted. 9RP 95-96. Gregory declined Westberg's offer of assistance. 9RP 97-98. Shortly thereafter, Reed obtained permission to travel to Whidbey Island with Gregory. 9RP 96-97, 105-06.

Gregory told Darnell she received the injuries from a car accident. 6RP 84-85; 7RP 14, 32, 76. Darnell did not believe Gregory and suspected the injuries resulted from domestic violence. 6RP 85; 7RP 15, 32-33. Darnell traveled to Des Moines to help Gregory. 6RP 85-86; 7RP 17, 67. Gregory was able to drive Darnell to and from the train station. 7RP 36-37.

After Darnell arrived, Gregory told her she was injured by Reed and wanted to leave. 6RP 86; 7RP 19-20. After Gregory's car broke down however, Darnell called Reed to ask him to fix it. 7RP 21-22. Reed told Darnell he hit Gregory because he had nothing to loose and she jeopardized his freedom. 7RP 29, 39-40. Reed told Darnell he "messed up," and had anger issues. 7RP 23, 39. Darnell took Gregory back to the

hospital before leaving for Spokane. 7RP 24, 38, 74. Darnell did not call police or Westberg to report the alleged incident. 7RP 27-28, 38-41.

Over the next several weeks, Gregory had surgery to place crews and plates in her cheekbone, nose, and eye socket. Gregory's nose was shifted and held in place with a splint. Plastic was placed under Gregory's eye socket to prevent it from drooping. 7RP 99-107. Surgeon Craig Birgfeld believed Gregory's injuries were consistent with blunt force trauma. 7RP 112-13.

Reed moved out of the shared apartment on September 20. 6RP 87. Four days later, Gregory told advocate Angela Croker that Reed caused her injuries. 7RP 61; 9RP 33-41. Gregory did not provide Croker with any details of the incident and did not report the incident to police. 7RP 61; 9RP 40. Gregory continued to have headaches, double vision, facial numbness, and difficulty opening her right eye. 6RP 88-90; 9RP 110-12. She acknowledged lying to police about the incident. 7RP 69.

Reed was arrested on October 3. 12RP 381. Police seized Reed's phone and concluded it received signals from cell towers across the street from the apartments between 4:34 and 5:21 p.m. the day of the incident. 8RP 34-38. Reed made telephone calls to his brother, Precious Reed, from the apartment shortly after the incident. 11RP 153-54, 158, 166-68, 199-200; 12RP 339, 341, 378, 393, 399. Reed told Precious that

something had happened to Gregory and needed to come to the apartment. 11RP 158, 173, 176-77, 210. Precious' wife, Shantel Smith-Reed, reported Reed as telling Precious, "I think I killed the bitch." 9RP 6, 8, 17, 27. Gregory later told Smith-Reed that Reed had injured her. 9RP 13.

Precious denied Reed had told him he though he had killed Gregory. 11RP 180, 185. Precious explained any conflicting statements he gave to police were the result of his drug and alcohol use. 11RP 155, 159-61, 189-91, 206. Precious later collected Reed's belongings, including his cell phone, to prevent them from getting damaged. 11RP 162-63, 194-95, 217.

Reed denied assaulting Gregory. 12RP 356. Reed explained he requested the day off work and left the apartment to meet his friend Joe Kelley. 12RP 330-32, 334-35. Gregory was at the apartment when Reed left. 12RP 333. Reed met Kelley at a car wash and then they went to lunch. 11RP 276-77, 282-84; 12RP 334-35. After lunch, Reed left his car at Kelley's house. Kelley drove Reed to his meeting with Westberg. 11RP 278; 12RP 336, 363. Reed arrived at Westberg's office around 3:10 p.m. but did not meet with her until about 3:30 p.m. 12RP 336-37.

Kelley explained he waited in the car for over an hour while Reed met with Westberg. 11RP 278, 287. After the meeting with Westberg, Reed picked up his car and returned to his apartment. 11RP 280, 287-89;

12RP 339, 364. Reed found Gregory surrounded by blood on the floor of the apartment. Reed gave Gregory first aid and called Precious. 12RP 339, 370. Reed told Precious someone had almost killed the "bitch." 12RP 339, 341, 378, 393, 399. Reed explained "bitch" was a term of endearment. 12RP 341, 385.

Gregory told Reed she saw a flash of blue when she opened the apartment door. Someone then asked Gregory for money and car keys. 12RP 340. Reed believed the incident was connected to other crime in the area. He waited to call 911 so he could give Gregory first-aid and research prior crime incidents. 12RP 341-42, 371, 373.

Reed took care of Gregory over the next several weeks. 12RP 346. Gregory ended the relationship on September 20. 12RP 348. Reed acknowledged prior assault convictions from 1993 and 1999. He explained those incidents stemmed from bad relationships and his use of drugs and alcohol. 12RP 306-07, 364-69. He acknowledged text messaging about the 1993 incident during the visit with Darnell, but denied laughing about it. 12RP 326-29. Reed explained he had decided to change his life after his release from prison in April 2012. 12RP 307, 360, 366.

3. 404(b) Evidence

Before trial, the State sought to introduce evidence that Reed was convicted of third degree assault in 1993 and first degree assault in 1999. The State also sought to admit evidence that before Gregory's alleged assault, Reed had slapped, pushed, and covered Gregory's face with a pillow. The State explained the day before the alleged incident Reed had joked with another person via text message about the 1993 assault and Gregory was aware of that text message and Reed's prior assault convictions. 3RP 2-4, 8-12; Supp. CP ___ (sub no. 68A, State's Trial Memorandum at 19-20).

The State argued the prior incidents were admissible under ER 404(b) to explain: Gregory's delay in reporting the charged incident, Gregory's fear of Reed, and Gregory's credibility and why she initially lied about who assaulted her. The State also argued the prior incidents were admissible under ER 404(b) to explain Reed and Gregory's relationship and to show Reed's motive for committing the alleged assault through increasing hostility toward Gregory. 3RP 9-12; Supp. CP ___ (sub no. 68B, State's Supplemental Memorandum on ER 404(b)). The State noted it was seeking to admit the prior incidents, "strictly under a 404(b) analysis," and not for propensity purposes, or under ER 609. 2RP 27; 3RP 10, 12.

Defense counsel objected, arguing the prior assault convictions were too remote in time and "highly prejudicial," given the similarity of the prior assaults and the current charged assault. Defense counsel noted the jury would likely not be able to "erase" the prior assault convictions from their minds even with a limiting instruction. 3RP 13; CP 22-29. Defense counsel also objected to admission of the prior incident between Gregory and Reed, noting it was prejudicial and Gregory had never reported the incident to police. 3RP 14.

The trial court overruled defense objections, finding the offered 404 (b) evidence relevant to prove Reed's motive, Gregory's credibility and "why she might be afraid and initially lied," and res gestae given the alleged text message incident. 4RP 2-6. The trial court noted the prior incidents, "cannot come in for propensity." 4RP 2.

The court "assume[ed]" defense counsel would want a limiting instruction and offered to give an instruction both when the 404(b) evidence was admitted and when the jury was instructed at the end of the case. 4RP 3. Defense counsel did not request an instruction or explain she did not want one given.

Before Reed testified the State questioned whether defense counsel intended to ask for a limiting instruction. Defense counsel responded, "It's been so long ago, I can't remember." 1RP 297. The trial court noted

some attorney's did not want to reemphasis evidence with a limiting instruction, but reminded defense counsel the court would give a limiting instruction if requested. 11RP 297.

Defense counsel explained she understood Reed's prior convictions were not admissible for credibility purposes under ER 609 and that Reed would explain the 1993 and 1999 incidents during his testimony. 11RP 298. Defense counsel failed to request a limiting instruction, propose her own, or explain she did not want an instruction.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING UNFAIRLY PREJUDICIAL AND IRRELEVANT EVIDENCE.

Generally, evidence of other crimes is not admissible to show a defendant's conformity with those acts. ER 404(b). Otherwise inadmissible evidence may be admissible on cross-examination if the witness 'opens the door' to an issue on direct examination and the evidence is relevant to that issue. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). The court must also weigh the prejudicial effect of the evidence against its probative value. Stockton, 91 Wn. App. at 41.

In order to 'open the door,' the defendant must first introduce inadmissible evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995), rev. denied, 129 Wn.2d 1007 (1996). But a mere

passing reference during direct examination to a prohibited topic does not serve to 'open the door' to unrestricted questioning about prior misconduct. Stockton, 91 Wn. App. at 40 (citing Avendano-Lopez, 79 Wn. App. at 715).

This court reviews a decision to permit evidence under the open-door rule for abuse of discretion. State v. Bennett, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985), rev. denied, 105 Wn.2d 1004 (1986). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

a. Reed Did Not 'Open the Door.'

Application of these rules to Reed's case shows the trial court abused its discretion by finding Reed had opened the door to irrelevant and prejudicial evidence. Reed testified the 1993 assault conviction stemmed from "relationship that had went bad," and that he and the complaining witness were "living a destructive lifestyle." 12RP 306-07. On cross-examination, Reed explained the he and the complaining witness were a "couple" and the destructive lifestyle consisted of "illegal activities." 12RP 365. Reed initially declined to elaborate on the details of the illegal activities. 12RP 365, 390.

The prosecutor argued Reed's testimony about his "girlfriend" opened the door to questioning him further about that relationship. The prosecutor specifically sought to question Reed about a prostitution relationship he had with the complaining witness and how that relationship led to the 1993 assault. 12RP 388. Defense counsel objected, noting there had never been any charge related to the alleged prostitution and therefore it was highly prejudicial. 12RP 389. The trial court concluded the "door had been opened," and allowed the prosecutor to question Reed further. 12RP 389. Upon further cross-examination, Reed acknowledged involvement in prostitution as part of prior his prior lifestyle. 12RP 390-91.

The trial court erred in concluding Reed's testimony opened the door to irrelevant evidence. Stockton and Avendano-Lopez are instructive in this regard.

Avendano-Lopez was charged possession of cocaine with intent to deliver. Avendano-Lopez, 79 Wn. App. at 708. During direct examination, Avendano-Lopez explained he was living with a friend because he "just came out of jail." Avendano-Lopez, 79 Wn. App. at 714, n.18. In fact, Avendano-Lopez had been in jail for possession of heroin. Avendano-Lopez, 79 Wn. App. at 714.

On cross-examination the prosecutor asked Avendano-Lopez about his past use of heroin and prior drug selling activity. Avendano-Lopez acknowledged using heroin a few days before his arrest but denied ever selling heroin. The trial court concluded Avendano–Lopez 'opened the door' to the prosecutor's questions when he volunteered on direct examination that he had recently been released from jail. Avendano-Lopez, 79 Wn. App. at 712-13.

The Court of Appeals concluded Avendano–Lopez's passing reference to recently being released from jail, without mentioning any additional details, did not "open the floodgates to questions about prior heroin sales." Avendano-Lopez, 79 Wn. App. at 715. The Court of Appeals likewise concluded the prosecutor's question could not be justified on the basis the door was opened to exploration of Avendano-Lopez's general character since Avendano-Lopez never placed his character at issue. Avendano-Lopez, 79 Wn. App. at 716.

Similar testimony was deemed a passing reference in Stockton. Stockton was charged with unlawful possession of a firearm after he grabbed a gun from men. Stockton testified that he believed the men were attempting to rob and sell him drugs. Stockton, 91 Wn. App. at 37-38. On cross-examination, the prosecutor questioned Stockton about his knowledge of how to purchase street drugs. The trial court overruled

defense counsel's objection and Stockton acknowledged he had bought street drugs before. Stockton, 91 Wn. App. at 39.

This Court concluded Stockton's testimony that he thought the men were trying to sell him drugs was no more than a passing reference to any knowledge he may have had about drugs. Stockton, 91 Wn. App. at 40. The Court likewise rejected the State's assertion the prosecutor's cross-examination placed the attack in context because the question did not focus on the context of the altercation. Rather, the prosecutor's questions did not counter Stockton's testimony that the men were trying to sell him drugs or cast doubt on his claim that they tried to rob him when he walked away. The Court found the prosecutor's question only elicited testimony about Stockton's prior drug use, which was only marginally relevant to any issue at trial and was highly prejudicial. Stockton, 91 Wn. App. at 41.

Like Stockton and Avendano-Lopez, Reed's description of his relationship and "destructive lifestyle" was nothing more than a passing reference to a prior relationship with the 1993 complaining witness. Reed did not create a false impression that required correction or rebuttal. For example, Reed did not suggest he was a law-abiding citizen or that he and the complaining witness had a harmonious relationship. Indeed, Reed acknowledged he was previously involved in illegal activities. 12RP 306,

365. Cf., State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002) (trial court did not err by permitting State to elicit previously excluded evidence of syringes found in defendant's home during redirect examination after defendant took advantage of exclusion ruling to convey false impression that home lacked items indicating drug-related activities), rev. denied, 148 Wn.2d 1023 (2003); State v. Shaver, 116 Wn. App. 375, 384-85, 65 P.3d 688 (2003) (trial counsel was ineffective for opening door to admission of Oregon drug conviction by eliciting testimony that defendant had no convictions other than ones for two burglaries and one escape).

Evidence of Reed's prior prostitution was also not relevant. To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). As discussed above, the evidence was not relevant to impeach Reed because he did not lie or create a false impression about his prior relationship. Moreover, the fact that Reed had previously been involved with prostitution had no bearing on the question of whether he allegedly assaulted Gregory. Although the prosecutor theorized the 1993 assault stemmed from a prostitution relationship between Reed and the

complaining witness, there was no evidence of prostitution alleged in this case. 12RP 388. Reed's prior involvement in prostitution therefore did not make any material fact more or less likely in the current case.

For these reasons, the admission of Reed's prior alleged involvement in prostitution did not serve the purpose of the open-door rule and the rule did not justify the trial court's ruling. The court therefore abused its discretion.

b. The Trial Court's Error Prejudiced Reed.

The trial court's error prejudiced Reed. An evidentiary error is not harmless if it is reasonably probable the jury's verdict would have been materially affected had the error not occurred. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

The jury had already been told of Reed's prior two assault convictions. By allowing the jury to also consider evidence Reed had previously been involved in alleged prostitution, jurors were even more likely to conclude Reed lacked credibility, thereby undermining his defense. Jurors were also more likely to conclude Reed was predisposed to commit crimes.

For these reasons, it is reasonably probable the trial court's error in permitting admission of the prostitution evidence affected the jury's

verdict. The court's error was thus not harmless, and this Court should reverse Reed's conviction.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN ALLOWING THE COURT TO INSTRUCT JURORS THEY COULD CONSIDER REED'S PRIOR CONVICTIONS FOR CREDIBILITY PURPOSES

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

a. Counsel was Deficient.

The trial court has a duty to determine the purpose for which it admits evidence of a defendant's prior bad acts and "give the cautionary instruction that such evidence is to be considered for no other purpose or purposes." State v. Brubaker, 62 Wn.2d 964, 970, 385 P.2d 318 (1963).

The only jury instruction addressing Reed's prior assault convictions read as follows:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

CP 62 (instruction 4).

This instruction was improper because it failed to inform the jury of the proper purpose for which they could consider the prior assault convictions. Reed's prior convictions were neither offered, nor admitted, for credibility purposes under ER 609. Indeed, the State explained before trial it was "not proceeding under ER 609," with respect to Reed's assault convictions. 2RP 27.

There was no legitimate reason for defense counsel not to object to the trial court's erroneous instruction. By failing to object, defense counsel allowed the jury to consider Reed's prior convictions for improper purposes.

b. Counsel's Deficient Performance Prejudiced Reed.

Defense counsel's deficient performance also prejudiced Reed. Reed denied he assaulted Gregory. Reed's own testimony was crucial to this defense because he explained what happened at the time of the incident. By allowing the jury to consider Reed's prior assaults for credibility purposes, Reed's own theory of the case was also undermined.

Counsel's failure to object to the erroneous jury instruction therefore undermines confidence in the outcome of Reed's case. This Court should reverse his conviction.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION FOR 404(b) EVIDENCE

Reed's counsel was also ineffective for failing to propose a 404(b) limiting instruction. Reversal is required because there is a reasonable probability the lack of a limiting instruction materially affected the outcome at trial.

a. Counsel was Deficient.

The prosecution may not use evidence to demonstrate a defendant's criminal propensity:

> 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).

The rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's ER 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

"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." Gresham, 173 Wn.2d at 423-424. Consistent with the express language of ER 404(b), jurors in Reed's case needed to be told the one way in which they absolutely could not use the evidence. Cf. State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated "the jury could not use the testimony

to judge Kennealy's character or propensity to commit such acts, but that it could only consider the testimony in determining whether it showed that Kennealy had a common scheme or plan."), rev. denied, 168 Wn.2d 1012 (2010); State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (noting court properly instructed jurors that evidence could only be considered for whether there was a common scheme or plan and not to prove defendant's character).

Counsel must nevertheless request the instruction and the failure to do so generally waives the error. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). In Reed's case there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the character evidence. Had counsel requested an instruction, the court would have been required to give one and undoubtedly would have given its repeated offers to do so. Defense counsel's decision not to request that instruction, or to propose a limiting instruction of his own, is puzzling since she acknowledged the evidence demonstrated Reed's propensity for violence.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a

limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. Evidence that Reed had two prior convictions for assaults against women was not of a type the jury could be expected to forget or minimize. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed a central piece of the State's case.

In any event, no evidence suggests defense counsel was worried about reemphasizing the convictions. Rather, defense counsel failed to request an instruction because she could not remember whether she wanted a limiting instruction and because Reed intended to discuss the convictions during his testimony. But, there was nothing preventing Reed from explaining the circumstances of his prior convictions while still limiting the jury's use of that evidence. See e.g., City of Seattle v. Patu, 108 Wn. App. 364, 369, 30 P.3d 522 (2001) (Patu testified about the circumstances of his prior conviction and also requested a limiting instruction), aff'd 147 Wn.2d 717, 58 P.3d 273 (2002).

Counsel's failure to propose an adequate limiting instruction fell below the standard expected for effective representation. There was no

reasonable trial strategy for not requesting a limiting instruction. Counsel was aware of the risk of prejudice from the 404(b) evidenced by her objection to its admission. Counsel simply neglected to request a necessary limiting instruction. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel's Deficient Performance Prejudiced Reed.

Counsel's failure to request an adequate limiting instruction was prejudicial. The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome at trial. Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including as proof Reed was a violent person. Indeed, the jury is naturally inclined to treat evidence of other bad acts in this manner. See Patu, 108 Wn. App. at 377 (recognizing that absent an instruction the jury may assume the defendant has a "bad" general character and therefore a propensity to commit the charged crime);

see also Micro Enhancement Intern, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) ("Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.").

Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict simply because a bad person deserves punishment "creates a prejudicial effect that outweighs ordinary relevance." Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Absent a limiting instruction, a reasonable juror would probably conclude Reed's prior violent assaults against women made it more likely he would also violently assault Gregory. There is a reasonable probability the outcome would be different but for defense counsel's conduct. Reed's constitutional right to effective assistance counsel was violated. This Court should reverse his conviction.

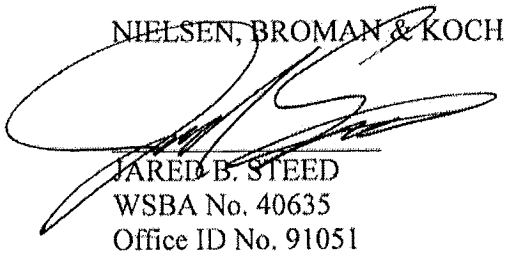
D. CONCLUSION

For the reasons discussed above, this Court should reverse Reed's conviction and remand for a new trial.

DATED this 22nd day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Appendix D

Transcript of Proceedings held September 11, 2013 ("3RP")

SUPERIOR COURT OF KING COUNTY, WASHINGTON

State of Washington, Plaintiff,	NO. 12-1-06320-2KNT
v.	COA: 71128-8-I
Roosevelt Reed, Defendant.	September 11, 2013

VERBATIM REPORT OF PROCEEDINGS, taken before the Honorable James Cayce, at the Maleng Regional Justice Center.

APPEARANCES

FOR THE STATE:

Mr. Shaya Calvo
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

Ms. Mary Ellen Ramey
Attorney at Law

JOSEPH T. RICHLING
OFFICIAL COURT REPORTER
MALENG REGIONAL JUSTICE CENTER
KENT, WASHINGTON

(On September 11, 2013, with counsel for the parties present, the following proceedings were had:)

THE COURT: How are we going to proceed on the 404(b) this morning?

MR. CALVO: Your Honor, I did receive the Defense 404 brief this morning. The State is ready to proceed.

I did make exhibits of the four statements, two from Hope Darnell and two from Jane Gregory. And I would like to submit those.

I also submitted to the Court a summary of what I thought would help the Court. I gave it to Ms. Ramey, also. There's only portions of those statements that are relevant. And I didn't want the Court to have to wade through them all.

I also wanted to mark as exhibits the three Court-related documents. One being the assault one conviction, the second being the assault three conviction which was another domestic violence victim, and the third being the information on the assault three as well as the certification for determination of probable cause.

THE COURT: You said assault three?

MR. CALVO: Right, it was assault three. It

was originally charged as assault two and taking motor vehicle. And the certification in that case, this was done in 1993 when the prosecutor still did the certifications. And this contains information about that incident which corroborates the information regarding the text on September 4, the allegation that Mr. Reed was texting someone and laughing about the prior incident, and that that information was relayed to Ms. Gregory through Hope Darnell.

MS. RAMEY: But the '93 case is not a DV.

MR. CALVO: In any event, Your Honor, it relates to the -- as it relates to this case, Your Honor, it clearly is the prior assault case on another woman, and it was a stabbing case. And it's something that was mentioned on September 4, the day before this incident.

And the State's position is that when Jane Gregory confronted the Defendant about this the night before, that was the argument they had on the way back from Spokane. And we believe it's relevant because she knew of his violent tendencies not only from the assault one case, but also we have information about this prior 1993 case. We are going to call it the one with the knife.

Let me mark those formally and submit those

exhibits, if I could.

THE CLERK: State's Exhibits 2 through 8 marked for identification.

MR. CALVO: Your Honor, the first two exhibits are Exhibits 7 and 8. Let me show them to counsel.

Exhibit 7 is the statement from Jane Gregory on October 3, 2012. And Exhibit 8 is the statement of Jane Gregory from February 11, which was the Defense interview.

And the State is offering those two exhibits as well as Exhibit 6, which is the interview from Hope Darnell taken by the detective on that same day, October 3, 2012. And Exhibit 5, which is the Defense interview with Hope Darnell on February 11, 2013. And that is Exhibit 5.

Exhibit 3 is the assault one conviction from 1999, the prior domestic violence conviction.

Exhibit 2 is the 1993 judgment and sentence from the assault three case under Cause Number 93-1-05314-9.

And Exhibit 4 is the original charge and the certification that went along with that.

There was a mention in Hope Darnell's statement in the Defense interview, she mentioned the name Kayana. And that name was also mentioned in the

certification in Exhibit 4. In any event, Your Honor, those documents comprise the State's offer of proof.

THE COURT: Ms. Ramey, are you prepared to respond to the offer of proof at this point, or do you need some time?

MS. RAMEY: Your Honor, as far as the statements that have been designated 2 through 8 --

THE COURT: The exhibits?

MS. RAMEY: The exhibits, yes. They are statements in the prior convictions. I would like an opportunity to review those statements again. I ran out of time last night working on this brief.

And I also would ask the Court to review the entire statement. Because I think these things that Mr. Calvo is trying to prove are just taken out of context. And I think when you read the whole statement, you will be able to see that.

And I would also like to be able to prepare a short summary like he did pointing out to the Court the various items that I think are relevant to this motion.

THE COURT: You certainly have the right to present your own offer of proof. I need to go through those. I need to read your brief. I am suggesting 1:30.

MR. CALVO: Your Honor, I don't have any

opposition to that. I tried to narrow things down.

THE COURT: I don't know if we will get to it by 1:30. We will see where we are, at least.

MR. CALVO: I understand. I did talk to Ms. Ramey about the statements we were relying on yesterday. My goal wasn't to dump a bunch of paper on her today, but I understand she needs time to look through them.

THE COURT: Do you want to try to get jurors and just figure out the length of time we may need them, and get some people on reserve, or do you want to just wait until we are through with this?

MR. CALVO: If I can address the Court on one more issue. And I told counsel about this.

We did hear back from Detective Gendreau this morning. The warrant was signed yesterday. The phone was put on the Cellebrite system and they pulled information from that phone.

I did tell counsel about what I learned, but I really won't know until I see it. But my understanding is that Detective Gendreau requested a few zip drives from me. I imagine one is for me and one is for the Defense. I anticipate having those this morning.

I would rather wait and see what's on them before we start picking a jury.

THE COURT: Are you okay with that?

MS. RAMEY: Yes.

THE COURT: Do you have a sense that it is the phone that you were thinking it would be?

MR. CALVO: My understanding is it is the Defendant's phone. Looking at the phone, it was a 295 number. Based on the initial impressions of talking with the detective, there were texts going back and forth between the Defendant and a name very similar to Jane Gregory.

Again, I haven't seen it. I don't want to misrepresent anything. But I do believe it's his phone.

THE COURT: We will check back at 1:30 and see where we are in terms of the 404(b).

MS. RAMEY: Again, I don't want to go back to West Seattle, so the summary that I would present to the Court would probably be handwritten.

THE COURT: That's fine, as long as your handwriting is legible.

MR. CALVO: I can try and assist her if she needs access to a laptop.

THE COURT: A laptop or something?

MR. CALVO: By no means was I trying to give her a bunch of paper.

THE COURT: No problem. We might be able to get you a laptop, if you prefer that. Handwritten is

fine.

Okay. We are in recess.

LUNCH RECESS

THE COURT: Ms. Ramey, I think we are back over to you.

MS. RAMEY: After we returned this afternoon, I asked Mr. Calvo specifically what items he was trying to introduce as far as 404(b). I wanted him to articulate it because I didn't think it was mentioned in his brief.

I know that the incident, the 1993 incident, a certified copy involving a stabbing and a 1999 incident where Mr. Reed just finished his 13-year sentence were two of the items, but I couldn't tell what other items were being requested to use under 404(b).

And he indicated that there were others. And I would like him to articulate which ones he's talking about because there is some vague references to other things in the transcripts. But I want to be able to respond one by one.

THE COURT: Let's go through those.

MR. CALVO: Sure, Your Honor. Besides the two that counsel is talking about, there's the incident that happened in Spokane the day before, which is on September 4, 2013.

THE COURT: And your intent is to prove that, just testimony of the witness?

MR. CALVO: Right. Both Hope and Jane Gregory, both of those. And then there's the assault in 2012 which she mentioned after his release from custody while they were living in Des Moines. And she mentioned assaults. She basically said that he was getting increasingly more aggressive. She said she was slapped, pushed against the wall, and that he held a pillow down over her head, and then he acted like he was joking. But she didn't think that he was.

Those are the incidences of misconduct the State is attempting to present in this case under 404(b).

And then with respect to the 1993 incident, the context of that, Your Honor, is that the Defendant and Jane Gregory went over to Hope's residence. The Defendant was doing something on his phone. There was some conversation going on. It didn't appear that he was listening. And so at some point Hope had checked his phone or something. Somehow she found out that he was texting back and forth about this 1993 incident, and the name of Kayana came up, which is one of the names mentioned in the certification of the case which I provided to the Court.

Then after that, Your Honor --

THE COURT: What was the date when she saw the texting?

MR. CALVO: That would be the 4th, September 4, the day before the incident.

What happened was Hope in turn told Jane Gregory about it, but Jane Gregory didn't bring it up because they were over at their daughter's house. That was brought up on the way home. And that's what led to the argument between her and the Defendant where the Defendant left her off. She basically ended up pulling over to the side of the road. He ended up eventually driving the vehicle, leaving her there. And then she called Hope a few different times. And we believe that goes directly to Jane Gregory's state of mind certainly the day before the incident.

But we also believe, Your Honor, that particular incident that he was laughing about, Jane Gregory said in the interview that she didn't think it was right that he was laughing about stabbing a woman when he had just got out of prison for such a long period of time for similar conduct. We believe that that is actually relevant to 404(b).

And counsel has noted she's concerned about propensity, but we are not bringing it in for that.

We're bringing it in because the credibility of the victim will be critical in this case, the alleged victim. And that under the case law, Grant, Baker and Cook, the dynamics of domestic violence and the domestic violence relationship becomes important in explaining why a victim might act differently than they would without having that relationship.

THE COURT: You said it comes in for her state of mind on the day before the incident. Why the state of mind before the incident?

MR. CALVO: I was kind of ahead of myself, Your Honor. That information comes in through Hope. And Hope is the one that had the phone call where she was crying. And I was jumping ahead a little bit. I thought you might have to look at exceptions to any of the rules that would be under hearsay that would come in. I think it would be excited utterance or it would be her state of mind, because at that point in time she was actually scared of the Defendant.

I think this is all -- it's part and parcel of this case. They got in an argument the night before. She told Hope that she was going to call her that night. She didn't. Hope said that she was concerned. And two days later her mom is calling her and telling her she's been in a car accident, which is a different story than

what she told the police.

THE COURT: I understand that her state of mind at the time of the incident and not reporting it and the dynamics of DV.

MR. CALVO: I realize I jumped the gun. Your Honor, the purpose of the misconduct in this case is to show that -- it's just the whole dynamic of the relationship.

THE COURT: I'm referring only to the 1993 stabbing and then the texting the day before and your statement that that would come in to show her state of mind the day before. If that's the only reason you are offering that, then it would clearly have less weight than if it's being offered for other reasons as well.

MR. CALVO: No, Your Honor. The State is offering it to show when, in fact, the victim -- why, in fact, the victim made the statement that she did the next day that someone else committed this offense. I take into account -- I'm sorry. I jumped ahead. I was thinking you were going to ask me the exception to the hearsay rule. I was thinking a step ahead because we still have to admit it that way. But I'm bringing that in, Your Honor, strictly under a 404(b) analysis.

THE COURT: Ms. Ramey, does that answer your question?

MS. RAMEY: Yes, kind of, sort of. Your Honor, we would be objecting to any 404(b) evidence coming in at this time. The fact that Mr. Reed was convicted in 1993 and 1999 is so remote that it just would be so highly prejudicial for this information to come in front of the jury. It goes to my named -- the things that I said in my brief, once a thief, always a thief.

And the jury certainly could say, well, he assaulted before. They would not think that he's paid his price. They just would not be able to erase that from their mind if it came in as substantive evidence, even with any type of limiting instruction.

And so for those reasons, I would ask that the two, the 1993 and the 1999 incidents, be omitted. Usually in the past when I've dealt with this topic, we were dealing with things such as, well, he was burglarizing the house and he happened to have some marijuana, and so the idea would be, well, we are going to move to eliminate or move to have the marijuana not heard by the jury. But this is something that occurred so long ago that those two items, I think, the Court is going to have to determine whether or not it's admissible and give the reasons why the Court thinks so.

As far as these other items, when I was going

through my list, I didn't really know that this is what Mr. Calvo was trying to do as far as these other slapping incidents or covering the face with the pillow. Again, I think this is highly prejudicial. First of all, there was never any report to the police that I'm aware of. There doesn't have to be a report to the police. But we don't have the foundation. We don't have the date. We don't have anybody that this was reported to other than the police.

And all through the information that was gained in the Defense interview as well as the interview to Detective Gendreau, it says that Mr. Reed was playful and that the alleged victim here, Jane, thought that it was a joke. And that this was part of his personality. It was joking, and she never thought about it afterwards.

So for those reasons, I think that any reference to any 404(b) evidence in this case should not be admitted.

THE COURT: Is there anything else from the State in response?

MR. CALVO: The stabbing incident that he was joking about the day before is part and parcel related to the assault one that he had, the conviction he has. Because she obviously -- the State's position is she

made up a different story from what happened to the police. And she later ended up telling the police what really happened in this case.

And it's the State's position her knowledge of the Defendant and the fact that she actually knew -- in this case, she actually lived with him. She moved to be near the prison with him. She essentially lived through part of his incarceration. She, first of all, knew all about the serious assault one case.

But in addition to that, she knew that he was texting back and forth, laughing about the fact that he seriously assaulted someone else. And that is one of the factors the State believes it should be able to argue, that that is why she, in fact, said someone else initially committed this offense. And I just wanted to clarify that, Your Honor.

MS. RAMEY: And, Your Honor, I did make a list when I was going through the statements in the interview. And I don't know if this informal copy should be filed.

The main thing that I was trying to point out when I made the summary is that there was no fear. That Jane Gregory had been aware of the fact that there had been these prior convictions, and it didn't seem to bother her. She didn't seem to be afraid in any way.

And, in fact, after this incident, there was a two-week period of time that she lived with Mr. Reed. She had every opportunity to escape. He went to work every day at Maggiano's in Bellevue from 6:00 a.m. to 3:00 p.m. She was able to go to the DOC office at any time during that two-week period of time and say that she was afraid. She could've notified her daughter, who was in Spokane. She could have hopped on a bus or train. She could have driven over to Spokane.

But she indicated that she really wasn't afraid. And I think in both the interview with the Defense and the statement to Detective Gendreau, it bears out the fact that she wasn't afraid. And fear is one of the items that Mr. Calvo brought up in his brief. That's why I'm responding to that.

THE COURT: And those are exhibits that are in front of me on this issue?

MS. RAMEY: Yes.

THE COURT: Which exhibit numbers, the Defense interview and Detective Gendreau?

MS. RAMEY: It would be Exhibits 7 and 8, are the Defense interviews -- the statement of Jane Gregory to Detective Gendreau on October 3, and Number 8 is the Defense interview on February 11, 2013 of Jane Gregory. Number 6 is the October 3 statement of Hope Darnell to

Detective Gendreau. And Exhibit Number 5 is the February 11, 2013 Hope Darnell Defense interview.

MR. CALVO: May I respond very briefly?

THE COURT: Yes.

MR. CALVO: She talks about in that interview, which I'm sure you read, she talks about the fact that she wasn't scared of his family, but that doesn't mean she wasn't scared of him. She talks in there about how she knew that most of his family knew that this incident occurred, and that most of his family knew how bad it was. And she said, I wasn't so much worried about his family. Because she had already spoken to Precious about it anyways. But that doesn't mean she wasn't scared of him, Your Honor.

And I think when you read that transcript, she even says in there that she knows how capable he is of snapping. So I contest what counsel is saying, Your Honor. I do think all of the arguments she is making are exactly the same reason the State believes it's appropriate to bring this information in because it is a domestic violence relationship. It's a relationship between her and a person that she loves or is in love with. And that explained the dynamic, explains why she took or didn't take the actions that she did.

THE COURT: And I have some other matters I

was working on, so I haven't had a chance to read all of those. I will, but it's not going to be this afternoon. Unless there's something else to do.

MR. CALVO: I can give the Court an update. I did talk to Detective Gendreau before coming in today. He does have a PDF he's going to give counsel. And I told him to make a copy. Whatever he gives to me, I told him to make for counsel. Because I want to make sure she has what I have.

So we might have more information. We have some more work to do on our own. I think you will be here in about an hour.

THE COURT: So let's talk scheduling because I heard you have a vacation coming up.

MS. RAMEY: Starting September 30 for four days.

THE COURT: I'm concerned if we don't get a jury tomorrow for some reason, if we had to use jurors from tomorrow and some more from Monday, start trial on the 17th, that would give us seven trial days. Is that going to be enough?

MR. CALVO: I think if we start on the 17th, I would anticipate the State will finish on the 23rd. I know I have one witness from the FBI that I'm trying to accommodate her schedule. I know I have another witness

on the 18th. But I believe we will finish our case by the 23rd. That's what I anticipate.

I know the Defense is calling two witnesses and potentially the Defendant. But I still think we can make that.

THE COURT: Okay.

MS. RAMEY: I think so.

MR. CALVO: I think we are okay on the time.

THE COURT: Is yours a vacation that can't be rescheduled?

MS. RAMEY: It is.

THE COURT: You will definitely get your vacation.

Okay, so we will be in recess until 9:00.

MR. CALVO: We both need to know what's on that phone.

THE COURT: Based on what's there, I can envision potentially a request for a continuance. We will just have to deal with it, if there is. It depends on what's on it.

MR. CALVO: Right, agreed. I understand.

MS. RAMEY: There's one other item, Your Honor. I didn't put this in my trial brief. I thought of it as I was working on this case yesterday.

There's reference to a lot of photographs of

the alleged victim. And I think they have to be reviewed before they are admitted. I know at one point Ms. Gregory said there were 1800 pictures of her that she retrieved from Harborview Hospital. I think, obviously, some photographs have to be admitted, but I think some of them are extremely prejudicial. I mean, they say what they say, but trying to admit multiple ones of the same thing I think shouldn't happen.

MR. CALVO: I want to address that real quick. I think what Ms. Ramey means is, she went to Harborview and Dr. Birgfeld is going to testify in this case -- he's a plastic surgeon. He has a disc that he gave the Defense that has within it like a thousand pictures, 1200 pictures. It's an actual file that actually moves. And that's why there's so many photos. It's not like there's a thousand pictures. There's one picture, and then the diagram itself actually moves if you hit the cursor. That's why there's so many pictures in it.

THE COURT: You will need to go through and figure out which ones you are going to be offering. And then the two of you get together and see what you can agree on, and leave the ones you can't agree on for argument.

MR. CALVO: Okay.

MS. RAMEY: I think I was also referring to

the ones in discovery that were taken at the scene.

THE COURT: Okay. For all the photos, you need to work together on that.

So we will be in recess.

MR. CALVO: Your Honor, maybe we can do some of the photos now.

THE COURT: Yes. You can be seated.

MR. CALVO: Counsel spoke about the judgment and sentences. I want to be clear. I'm not trying to admit the judgment and sentences, but the State believes those corroborate what was in the statement. I want to be clear on that. I'm not trying to admit the judgment and sentence, Your Honor.

That's all I have.

THE COURT: Okay.

PROCEEDINGS ADJOURNED

CERTIFICATION

I, Joseph T. Richling, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Joseph T. Richling

_____

Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Roosevelt Reed, Petition *Pro Se*, at:

Attn: Roosevelt Reed, DOC # 962757
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

The envelope contained a copy of the State's Answer Opposing Petition for Discretionary Review, in State v. Roosevelt Reed, Cause No. _____, in the Washington Supreme Court.

This matter was previously heard under Cause No. 71128-8 in Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of July, 2015.

L Brame
Name
Done in Seattle, Washington

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the State's Answer Opposing Petition for Discretionary Review, in State v. Roosevelt Reed, Cause No. _____, in the Supreme Court, for the State of Washington.

This matter was previously heard under Cause No. 71128-8 in Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of July, 2015.

LuBrame

Name:
Done in Seattle, Washington