70704-3

70704-3

No. 70704-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN WILHELM,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

To admit evidence of a prior bad act under ER 404(b), the evidence must be relevant for some legitimate purpose. It is improper to admit the evidence to show that a defendant has a propensity to commit bad acts. Here, in a prosecution for assault and felony violation of a court order, the State sought to admit under ER 404(b) evidence of a prior assault against the defendant's girlfriend, the alleged victim. The purported purpose was to assist the jury in evaluating the credibility of the girlfriend's testimony. The girlfriend, however, testified consistently that she had been very drunk at the time and that she did not remember the defendant throwing anything at her. Because the evidence of a prior assault was not relevant as to the witness's credibility and served as propensity evidence, this Court should reverse the convictions for fourth degree assault and felony violation of a court order. Alternatively, this Court should reverse for ineffective assistance of counsel, failure to bifurcate the proceedings, and prosecutorial misconduct.

B. ASSIGNMENTS OF ERROR

1. The court erred in admitting under ER 404(b) the defendant's prior conviction for assault. CP 77 (Finding of Fact/Conclusion of Law 3).

2. Trial counsel was ineffective in obtaining a limiting instruction that commented on the evidence by telling the jury that the girlfriend's testimony was inconsistent.

3. The court erred in denying the defendant's request to bifurcate the trial on the charge of felony violation of a court-order.

4. The court erred in overruling the defendant's objection that the prosecutor's closing argument shifted the burden of proof.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defendant's girlfriend testified consistently that she did not remember being assaulted by the defendant. She had memory problems because she had been heavily intoxicated after a night of drinking with the defendant. She readily admitted that she had been uncooperative with police because she knew there were no-contact orders forbidding the defendant from contacting her and she did not want him to get in trouble. Was evidence that the defendant had previously assaulted the girlfriend admissible under ER 404(b) for the purpose of evaluating the girlfriend's

credibility? If yes, was it reasonable for the court to conclude that the probative value outweighed the danger of unfair prejudice?

2. The limiting instruction given by the court told the jury that it could not consider the evidence of a previous assault in deciding the current charge of assault. The instruction, however, told the jury that it could use the evidence in evaluating the credibility of the girlfriend and "the inconsistencies" in her testimony. Did this instruction comment on the evidence by telling the jury that the girlfriend's testimony was inconsistent?

3. The girlfriend's testimony, if viewed as credible by the jury, established that she did not remember being assaulted by the defendant. The limiting instruction, by telling the jury her testimony was inconsistent, effectively told the jury to disbelieve her testimony about not remembering being assaulted. Was defense counsel ineffective in obtaining an instruction that unfavorably resolved a factual question?

4. One predicate on the charge of felony violation of a court order was that the defendant had violated two court orders before. To remove any prejudicial effect these prior convictions might have had when the jury was deciding the current charge, the defendant proposed that the proceeding be bifurcated so that the jury would only hear about the two prior violations after deciding the other elements of the crime. The court

denied the motion to bifurcate, reasoning that the case law did not support this procedure. The case law, however, did not forbid this procedure. Did the court abuse its discretion in denying the motion to bifurcate when it incorrectly thought it did not have discretion under the case law?

5. The defendant argued that the State had not met its burden of proving that the court orders forbidding contact with his girlfriend were in existence or that he had knowledge of their existence. The evidence established that court orders are sometimes recalled and that the computer database does not recognize this fact. During closing argument, the prosecutor argued that because there was no evidence that the orders had been recalled, the jury could not have a reasonable doubt on the contested elements. Did the court err in overruling the defendant's objection that the prosecutor's argument shifted the burden of proof? If yes, is there a substantial likelihood that the misconduct affected the jury's verdict?

D. STATEMENT OF THE CASE

The State charged Damien Wilhelm with felony violation of a court order (domestic violence) and third degree assault. CP 16-18. The charges were based on events that happened at a grocery store early in the morning of March 11, 2013. CP 16-18; 7/11/13RP 8-9, 33. Earlier that evening, Wilhelm went out to a bar with his girlfriend, Leah Hensel, and their friend, Heather Wilmore. 7/11/13RP 62-63, 119. Before leaving for

the bar, the three drank alcohol and became "pretty" intoxicated. 7/11/13RP 121, 144-45.

Wilhelm, Hensel, and Wilmore continued drinking at the bar. 7/11/13RP 64, 99-97, 122. While at the bar, Wilhelm and Hensel went back to the car they had arrived in and drank there as well. 7/11/13RP 65, 71. By the time they left the bar, all three were very drunk. 7/11/13RP 97, 99-101, 122, 145. Damien Keitt,[1] a friend they had met at the bar, left with them. CP 5; 7/11/13RP 63, 121, 123.

The four planned to go back to the condo where Hensel lived, but they missed the exit and decided to stop at a QFC (Quality Food Center). 7/11/13RP 73, 123. Around 3:00 a.m., Wilhelm and Hensel went into the store while Wilmore and Keitt waited in the car. 7/11/13RP 76; ex. 2. Because Wilhelm and Hensel were taking too long to return, Wilmore and Keitt eventually went in as well. 7/11/13RP 76-77; ex. 2.

According to Gary Morrison, an employee at the QFC, the group of friends appeared to be under the influence of alcohol. 7/11/13RP 11, 22-23. Wilhelm asked him where the alcohol was, but Morrison told him he could not sell alcohol after 2:00 a.m. 7/11/13RP 10. Later, as

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[1] This last name is based on the certificate of probable cause in the record. CP 5. At trial, Hensel and Wilmore did not know his last name so he was referred to as "other Damien" so as to not confuse him with the defendant, Damien Wilhelm. Keitt was not called as a witness.

Morrison was working at the front of the store, he heard a commotion coming from aisle 13. 7/11/13RP 12-13, 48. He saw Hensel on the floor on her knees. 7/11/13RP 14. He also saw Keitt and Wilhelm fighting. 7/11/13RP 16-17, 48. Some grocery items were on the floor. 7/11/13RP 49-50. Another employee at the store called the police. 7/11/13RP 18. After the scuffle between Keitt and Wilhelm subsided, he saw Wilhelm and Hensel leave the store. 7/11/13RP 37; see Ex. 2.

According to Wilmore, who was drunk and uncertain of events, she heard Hensel and Wilhelm arguing in the store. 7/11/13RP 78-80, 101, 109. Although she had stated before she had not seen anything, she testified she saw Wilhelm throwing grocery items at Hensel. 7/11/13RP 81, 104, 107. She believed she saw a box hit Hensel in the shoulder. 7/11/13RP 107, 111. Hensel was upset and on the ground. 7/11/13RP 82-83. Keitt grabbed Wilhelm from behind and wrestled him to the floor. 7/11/13RP 84. Afterward, Wilhelm left the store. RP 85-86.

Hensel, because she was very drunk, did not remember what happened inside the QFC. 7/11/13RP 124. She only recalled going into the store and Wilhelm running out of the store. 7/11/13RP 124-25. She did not remember Wilhelm throwing anything at her. 7/11/13RP 124. She did remember that she did not want to talk to the police because she did not want Wilhelm to get into trouble. 7/11/13RP 126. She knew there

was a court order forbidding Wilhelm from contacting her. 7/11/13RP 126. She remembered that she had a cut on her head, but did not remember what caused it. 7/11/13RP 145.

Police arrived in response to a call about two men fighting. 7/12/13RP 24-25. They found Hensel in the parking lot. 7/12/13RP 13, 31. She was intoxicated. 7/11/13RP 162, 168; 7/12/13RP 14. Hensel declined to give a statement. 7/12/13RP 17. Police found Keitt and Wilmore inside the store. 7/12/13RP 33. They were also intoxicated. 7/12/13RP 14. The police found Wilhelm on foot about a quarter mile away. 7/12/13RP 36, 39. After a brief pursuit, they arrested Wilhelm. 7/12/13RP 41-43. Wilhelm was intoxicated. 7/11/13RP 179. At the CrR 3.5 hearing, Wilhelm testified that he only remembered drinking, going to the QFC, and waking up in jail. 7/9/13RP 23-28.

Before trial, the court denied Wilhelm's motion to bifurcate the trial on the charge of felony violation of a court order, which was predicated on two prior violations or an assault. 7/9/13RP 47-49. Over Wilhelm's objection, the court admitted under ER 404(b) evidence that Wilhelm had previously assaulted Hensel. 7/9/13RP 65.

At trial, Wilmore, Hensel, the investigating police officers, and Morrison (the QFC employee) testified. A surveillance video from the QFC was admitted as evidence. RP 25; Ex. 2. The video shows the front

of the store at some self-check stands. Ex. 2. At various points in the video, Wilhelm, Hensel, Wilmore, Keitt, Morrison, and another QFC employee can be seen on the video. Ex. 2; RP 31-42, 91-94, 133-35. While the video shows Wilhelm and Keitt wrestling on the floor at the end of a grocery aisle, the video does not show an assault upon Hensel. Ex. 2.

The jury found Wilhelm guilty of violating a court order. CP 25. The jury acquitted him of the third degree assault charge and found him guilty of the lesser offense of fourth degree assault. CP 26-27.

E. ARGUMENT

1. The trial court erred by admitting under ER 404(b) evidence that the defendant had previously assaulted his girlfriend.

a. While finding the evidence was highly prejudicial, the court admitted evidence of a previous assault against the girlfriend for the purpose of "credibility."

Before trial, Wilhelm moved to exclude all evidence of prior bad acts under ER 404(b). CP 14; 7/9/13RP 52. The State sought to have two of Wilhelm's previous assault convictions admitted under ER 404(b), purportedly so that the jury could evaluate Hensel's credibility. Supp. CP __; sub no. 40; 7/9/13RP 49-52, 57-59. The State expected her testimony to be inconsistent. In ruling, the court reasoned the evidence had a legitimate purpose. 7/9/13RP 62. The court stated that the probative value and the prejudicial effect were both high. 7/9/13RP 62. The court

excluded one of the assaults as too prejudicial. 7/9/13RP 64-65. The court admitted the other assault, premised on Hensel testifying to conflicting versions of events:

> The Court admits evidence of the defendant's September 2011 conviction of Assault 4th Degree – DV against Leah Hensel, predicated on Ms. Hensel actually testifying to conflicting versions of the events. The evidence of the September 2011 assault serves to elucidate Ms. Hensel's state of mind, which is relevant for the purpose of assessing her credibility, which will be a central issue during the State's case in chief. The jury is entitled to assess evidence of the victim's credibility with full knowledge of the dynamics of a relationship marked by domestic violence. Particularly in this case, the jury will need to assess Ms. Hensel's behavior, including why she did not report the assault to the police herself, why she invited contact with the defendant despite the no contact orders, and why she was reluctant to cooperate with police or the prosecution. In light of Ms. Hensel's inconsistent acts, the defendant's prior bad acts help explain the context of the relationship, her minimization/denial of the incident, and her state of mind and credibility.

CP 77; see also 7/9/13RP 61-67. The court's oral ruling explained that that Hensel had to testify contrary to what she told police in order for the evidence of the assault to come in. 7/9/13RP 61 ("if she testifies in accord with her statements to police on the night in question, the court ruling does - - the state is not permitted to use the 404(b).").

Hensel testified that other than recalling that Wilhelm left the QFC, she did not remember what happened inside the store. 7/11/13RP 124-25. She did not remember Wilhelm throwing anything at her.

7/11/13RP 129. She did not remember what she told police that night, though she recalled not wanting to talk to them. 7/11/13RP 128. Hensel did not fear Wilhelm and wanted to continue their relationship. 7/11/13RP 143, 148. Despite the lack of any internal inconsistency in her testimony or a showing that her testimony contradicted what she told police, the State elicited from Hensel that Wilhelm had been convicted of assaulting her in September 2011. 7/11/13RP 140.[2]

b. ER 404(b) forbids the use of propensity evidence to establish that a defendant is the type of person who commits criminal acts.

Under ER 404(b), evidence of other crimes is inadmissible to prove that a person has a propensity to commit a crime, although such evidence may be admitted for other purposes:

> 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).[3]

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[2] Later, a police officer testified that Hensel, while intoxicated at the scene, had told him that she had been in a fight with Wilmore. 7/11/13RP 164. This statement was admitted only as impeachment evidence. 7/11/13RP 163-64.

[3] ER 404(a) also contains the prohibition against propensity evidence.

ER 404(b) is a "categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Thus, under ER 404(b), evidence that Wilhelm assaulted Hensel before could not be used to show that Wilhelm had again assaulted Hensel. See e.g., State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (premise of "once a thief, always a thief," is not legally relevant under ER 404(b)).

Nevertheless, the same evidence, although inadmissible for this forbidden purpose, may be admissible for another purpose despite the danger that it might be used for the forbidden purpose. See Gresham, 173 Wn.2d at 420. To be admissible, the trial court must (1) find that the bad act occurred, (2) identify the legitimate purpose of the evidence, (3) determine that the evidence is relevant, and (4) weigh the probative value against any unfair prejudicial effect. Id. at 421. "Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

In a series of cases, this Court and the Washington Supreme Court have addressed the application of ER 404(b) in prosecutions involving

allegations of domestic violence: State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008); and State v. Baker, 162 Wn. App. 468, 259 P.3d 270 (2011).[4] The trial court's ruling was based on these cases. CP 77; 7/9/13RP 64-65.

Grant was prosecuted for violating a court order that forbade him from contacting his wife. Grant, 83 Wn. App. at 101-02. His wife testified that Grant hit her while she was driving a car. Id. at 101. When speaking with the police in Grant's presence, his wife did not identify Grant. Id. at 102. When Grant was removed from her presence, she accused Grant of attacking her. Id. at 102. After the wife received a letter from Grant, who was in jail, she later contacted Grant's defense attorney. Id. at 108. The State sought to admit evidence of prior assaults by Grant against his wife through an expert witness, the wife's therapist. Id. This Court held the evidence was admissible under ER 404(b), reasoning that the evidence was relevant to prove the alleged assault and for the jury to assess the wife's credibility. Id. at 108-09. The evidence explained his wife's "inconsistent statements and conduct." Id. at 109.

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[4] Our Supreme Court is currently reviewing a conviction for felony violation of a court order where the trial court admitted evidence of prior assaults under ER 404(b). State v. Gunderson, 179 Wn.2d 1013, 319 P.3d 800 (2014) (granting review). Oral argument was held on May 13, 2014, and a decision is pending.

Magers involved a prosecution for assault, unlawful imprisonment, and a misdemeanor violation of a no-contact order. Magers, 164 Wn.2d at 177-78. According to a police officer, Magers' girlfriend told the officer that she was afraid of Magers, that Magers had threatened to kill her with a sword, and that he had not allowed her to leave the home. Id. at 179. After Magers was charged, the girlfriend sent a letter to the prosecutor's office recanting what she had told police. Id. At trial, her testimony was generally consistent with her recantation letter. Id. at 180. A fractured majority on the Court held that the admission of evidence of prior domestic violence was permissible under ER 404(b) to help the jury assess the credibility of the recanting girlfriend. Magers, 164 Wn.2d 186 (plurality opinion); Magers, 164 Wn.2d at 195 (Madsen, J., concurring).

In Baker, the State charged Baker with assault. Baker, 162 Wn. App. at 470. The court admitted evidence of two previous assaults by Baker against the alleged victim, Baker's girlfriend. Id. at 470, 472. At trial, the girlfriend testified that she had not contacted police after being assaulted before and that she was afraid of repercussions. Id. at 475. This Court held evidence of the two previous assaults were relevant to show Baker's motive, to prove lack of accident or mistake, and to aid the jury in their assessment of the girlfriend's credibility. Id. at 474-75.

c. The trial court erred in admitting the evidence of a prior assault to assess the girlfriend's credibility.

Interpretation of an evidentiary rule is reviewed de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the trial court properly interpreted the rule, a trial court's decision on whether to admit the evidence is reviewed for an abuse of discretion. Id. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. Id.

The trial court committed legal error in admitting the evidence of a previous assault under ER 404(b) because it was pure propensity evidence, making it legally irrelevant. ER 404(a), (b). The court admitted the evidence for the purpose of assisting the jury in evaluating Hensel's credibility and explaining any inconsistencies in her testimony. CP 38, 77. The evidence, however, did not assist in any credibility determination and did not explain any "inconsistency" in her testimony. Hensel simply did not remember what happened inside the store. 7/11/13RP 124-25. Neither did she remember exactly what she told police afterward. 7/11/13RP 128. Hensel's lack of memory was not implausible given the

all the evidence that she was highly intoxicated. 7/11/13RP 64-65, 72, 122, 145, 162, 168; 7/15/13RP 14. A lack of memory is not "inconsistent."

This case is not analogous to Grant, Magers, or Baker. Hensel, unlike the witnesses in Grant and Magers, did not change her story and recant. There was also no evidence, unlike in Magers and Baker, that she feared the defendant or any reprisals. Neither was there a defense of accident or mistake as in Baker.

It could be argued that the evidence tended to show that Hensel was not telling the truth when she testified she did not remember what happened. This argument would be misplaced. It does not logically follow that because Wilhelm assaulted Hensel before, that Hensel was dishonest about her memory. As for explaining inconsistencies, this assumed that Wilhelm's testimony was inconsistent and that she had, in fact, been assaulted. Absent some inherent contradiction about Hensel's memory, the evidence of a previous assault was not relevant. It was impermissible propensity evidence. The court erred in admitting it.

Even assuming that the evidence was legally relevant, the trial court's balancing of the probative value versus unfair prejudicial impact was manifestly unreasonable. Hensel readily admitted that she had not cooperated with police because she was aware of the court orders

forbidding Wilhelm from contacting her. 7/11/13RP 125-26. Thus, there was probative evidence tending to show that Hensel had a motive to "forget" what happened. Assuming that the evidence of the assault tended to establish that Hensel was purposefully forgetting what happened, it added little to nothing. In contrast, the possibility of the evidence unfairly prejudicing Wilhelm was overwhelming. Wilhelm was charged with an assault against Hensel. Evidence that he had previously assaulted her was damning evidence. The danger that the jury would impermissibly use it for propensity evidence was high. It is a classic example of what ER 404(b) is designed to prohibit. Thus, even assuming the evidence was relevant, the trial court abused its discretion in admitting it.

d. Admission of the prior assault was prejudicial error requiring reversal of the convictions.

An evidentiary error is prejudicial if there is a reasonable probability that it materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). There was a reasonable probability that the error was prejudicial as to both the assault conviction and the felony violation of a court order conviction.

The evidence that Wilhelm assaulted Hensel was weak. Hensel did not remember being assaulted by Wilhelm. 7/11/13RP 124-25. The video did not show Wilhelm assaulting Hensel. Ex. 2. The evidence that

an assault occurred was based on the testimony from Wilmore and Morrison. Wilmore was the only eyewitness who testified to seeing Wilhelm throw grocery items at Hensel. But she was admittedly drunk and uncertain of events. 7/11/13RP 101, 109. She also gave inconsistent accounts about what happened, ranging from not seeing anything, to seeing multiple items thrown at Hensel, to seeing a single box making contact with Hensel. 7/11/13RP 105-07. She also did not see where Hensel's head injury came from. 7/11/13RP RP 108. As for Morrison, he only saw the altercation between Wilhelm and Keitt. 7/11/13RP 48. It is unsurprising that the jury acquitted Wilhelm of the charge of third assault. CP 26. Given the evidence, it is likely that the evidence of a prior assault by Wilhelm against Hensel tipped the balance on the lesser offense of fourth degree assault.

The limiting instruction does not make the error harmless. The court instructed the jury that it could only use the evidence of the prior assault to assess Hensel's credibility and to explain inconsistencies in her testimony:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consist[s] of a prior assault conviction of Mr. Wilhelm and may be considered by you only for the purpose of assessing the credibility of Leah Hensel and explaining the inconsistencies in her testimony. You may not consider it for any other purpose. You may not consider it to determine if an assault occurred on this

> case. Any discussion of the evidence during your deliberations must be consistent with this instruction.

CP 38. While the instruction states the jury could not use the evidence to determine if an assault occurred in the case, this is what a jury would logically use the evidence for if Hensel was not credible about her memory. Even assuming there was no logical problem, it would be extremely difficult for the jury to put aside the evidence of a prior assault. See State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) (explaining the dangers of ER 404(b) propensity evidence) (abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)); Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citation omitted). The trial court recognized as much in stating that the evidence was highly prejudicial. 7/9/13RP 62

Under this record, Wilhelm shows there is a reasonable probability that the error affected the outcome. The conviction for fourth degree assault[5] should be reversed.

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[5] "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041.

Additionally, because one of the predicates for convicting Wilhelm of felony violation of a court order was an assault, that conviction should also be reversed.[6] The to-convict instruction for felony violation of a court order required that the jury find that "(a) the defendant's conduct was an assault that did not amount to assault in the first or second degree, or (b) the defendant has twice been previously convicted for violating the provisions of a court order." CP 44 (emphasis added).[7] Under the

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[6] RCW 26.50.110(1), (3), (4). The jury was instructed that: "A person commits the crime of felony violation of a court order when he or she knows of the existence of a no-contact order and knowing violates a provision of the order, and the person's conduct was an assault or the person has twice been previously convicted for violating the provisions of a court order." CP 41 (emphasis added).

[7] The to-convict instruction on this offense, in its entirety, read:

> To convict the defendant of the crime of felony violation of a court order as charged in Count I, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 11, 2013, there existed two no-contact orders applicable to the defendant;
>
> (2) That the defendant knew of the existence of these orders;
>
> (3) That on or about said date, the defendant knowingly violated a provision of these orders;
>
> (4) That
>
> (a) the defendant's conduct was an assault that did not amount to assault in the first or second degree, or

instruction, the jury did not have to be unanimous as to the alternatives. CP 44-45. The jury was given a general verdict form on the charge, not a special verdict form that would have shown the vote count on the means the jury found. CP 25. Thus, under this record, there is a reasonable probability that the error in admitting evidence of a prior assault under ER 404(b) affected the jury's decision on the charge of violating a court order.

> (b) the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the defendant's act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.
>
> If you find the evidence that elements (1), (2), and (3) and (5) and either of the alternative elements (4)(a), or (4)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty as to Count I.

CP 44-45.

2. The defendant received deficient representation where counsel obtained an instruction that told the jury that the alleged victim's testimony was inconsistent.

Based on the court's admission of the prior assault under ER 404(b), defense counsel proposed a limiting instruction to tell the jury that the assault could not be used as evidence to find that Wilhelm committed the assault at issue. CP 19; 7/15/13RP 59. The court gave the proposed instruction. CP 38; 7/15/13 RP 89. This instruction, however, commented on the evidence by telling the jury that the assault could be used to explain "the inconsistencies" in Hensel's testimony. CP 38. Because counsel's performance was not reasonable in this regard and Wilhelm was prejudiced by his counsel's performance, this Court should reverse.

a. The Washington constitution prohibits trial judges from commenting on the evidence.

In jury trials, the Washington constitution prohibits trial judges from commenting on the evidence: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16. The purpose of this provision "is to prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted." State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). This provision enshrines the principal that the "jury [is] the exclusive judge[] of the credibility of witnesses and the

weight to be given their testimony." Peizer v. City of Seattle, 174 Wash. 95, 99, 24 P.2d 444 (1933). It forbids "words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." Jacobsen, 78 Wn.2d at 495. Accordingly, a judge errs in instructing the jury "that matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

b. The instruction commented on the evidence by telling the jury that the girlfriend's testimony was inconsistent.

The limiting instruction improperly told the jury that it could consider the evidence of a prior assault conviction for the purpose of explaining "the inconsistencies" in Hensel's testimony:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consist[s] of a prior assault conviction of Mr. Wilhelm and may be considered by you only for the purpose of assessing the credibility of Leah Hensel and explaining the inconsistencies in her testimony. You may not consider it for any other purpose. You may not consider it to determine if an assault occurred on this case. Any discussion of the evidence during your deliberations must be consistent with this instruction.

CP 38 (emphasis added); see also RP 89 (court's giving of this instruction orally).

This was a comment on the evidence because it told the jury that Hensel's testimony was inconsistent. But whether Hensel's testimony was

consistent or inconsistent was a factual matter for the jury to decide. Moreover, by instructing the jury that Hensel had given inconsistent testimony, the court incorrectly told the jury that Hensel was not credible (a witness who gives inconsistent testimony is generally not credible). This was wrong. Hensel's credibility was for the jury to decide.

c. Defense counsel's performance was deficient in seeking the flawed instruction.

To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Id. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. Id. at 863.

Defense counsel had no tactical reason for wanting the jury to find that Hensel was not credible or that her testimony was inconsistent. Hensel testified that she did not remember being assaulted by Wilhelm. Based on this testimony, the jury could have found reasonable doubt given the lack of evidence of an assault against Hensel. However, if her

testimony was viewed as inconsistent or not credible, the jury would logically infer that Hensel was dishonest and actually did remember being assaulted by Wilhelm. The jury would thus use Hensel's testimony as evidence that she was assaulted. The prosecutor argued as much during closing:

> There's a lot on the line for Leah Hensel here, and the bottom line is that she didn't black out. She didn't become intoxicated and simply conveniently forget the assault that happened that night. She didn't suddenly selectively forget only the moments that night where the defendant did something to hurt her. She told you that she didn't see what happened because she doesn't want to see what happened.

RP 105.

Accordingly, the court's instruction, by telling the jury that Hensel's testimony was inconsistent and that she was not credible, made it easier for State to convict Wilhelm of the charges. "There is no legitimate strategic reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof." In re Personal Restraint Pet. of Wilson, 169 Wn. App. 379, 391, 279 P.3d 990 (2012). Because the erroneous language in the instruction made it easier for the jury to convict Wilhelm, it cannot be deemed a legitimate tactic or strategy. See Kyllo, 166 Wn.2d at 868–69 (counsel deficient in proposing erroneous instruction that lowered the State's burden of proof).

d. Counsel's deficient performance prejudiced the defendant.

Prejudice occurs where there is a "reasonable probability" that absent counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 687. A judicial comment in a jury instruction is presumed to be prejudicial. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Ordinarily, the burden is on the State to show that the defendant was not prejudiced. Id.

Where the defendant receives constitutionally deficient performance, the defendant must establish prejudice to obtain relief. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Wilhelm meets this burden. As explained earlier, if Hensel's testimony was inconsistent, that meant she was not credible. If she was not credible, then the jury would infer that she was dishonest about her memory and that she was covering for Wilhelm. The court's comment in the instruction was thus damning evidence that Wilhelm was guilty of assaulting Hensel. There was no comparable evidence. Wilhelm has established prejudice.

Accordingly, the assault conviction should be reversed. Because assault was a predicate for the charge of felony violation of a court, it should also be reversed for the reasons explained earlier in the context of the ER 404(b) issue.

3. The trial court erred in not bifurcating the trial on the charge of felony violation of a court order.

Before trial, Wilhelm moved to bifurcate the proceedings on the violation of a court order charge. RP 47. He proposed that the jury would decide the issue of whether he had two previous convictions for violating a court order in a second proceeding. RP 47. The jury would decide the other elements of the crime first. RP 47. Bifurcating the proceedings would have ensured that the jury did not use Wilhelm's prior convictions as propensity evidence.

The State argued bifurcation was inappropriate because the existence of prior convictions were elements and that the "case law" established it should not be bifurcated. 7/9/13RP 48. The State did not cite any specific authority. 7/9/13RP 48.

The court denied Wilhelm's request to bifurcate, reasoning that "the case law is against that position at this point in time . . . ." 7/9/13RP 49. The court explained that "the [S]tate is allowed to admit the priors in its case-in-chief because they are an alleged element of the crime." 7/9/13RP 49. Like the State, the court did not specify what case law forbade bifurcation. 7/9/13RP 49.

The trial court has broad discretion to control the order and manner of the proceedings. State v. Monschke, 133 Wn. App. 313, 334-35, 135

P.3d 966 (2006). This Court reviews a decision on bifurcation for abuse of discretion. Id. at 335. A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Id. "Failure to exercise discretion is an abuse of discretion." Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999). A ruling based on an erroneous legal understanding is necessarily an abuse of discretion. Fisons, 122 Wn.2d at 339. Here, the court's ruling demonstrates a misunderstanding of the law and a failure to exercise discretion.

"Courts should strive to afford defendants the fairest trial possible." State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). "[I]f an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime." Id. at 198. This kind of evidence is potentially very prejudicial. Id. Accordingly, trial courts have "discretion to reduce unnecessary prejudice where practical." Id.

In Roswell, the Court rejected an argument that a trial court must grant a request for bifurcation when an element of crime is a prior conviction. Id. at 196-98. The Court, however, did not hold the procedure was forbidden. Id. Indeed, the Court previously held that a bifurcated

trial on a felony violation of a no contact order was not impermissible in State v. Oster, 147 Wn.2d 141, 143, 52 P.3d 26 (2002). Under Roswell and Oster, the trial court's rationale for rejecting bifurcation was erroneous.

Based on its misunderstanding of the law, the trial court abdicated its responsibility to exercise sound judgment on whether to grant or deny Wilhelm's motion to bifurcate. Here, bifurcation would have been practical and would not have prejudiced the State or hindered judicial economy. The State did not argue that it needed the evidence of prior convictions for any other purpose than to prove the elements of the crime. If Wilhelm was not acquitted in the first phase of proceeding, the following proceedings would have not been burdensome or repetitive. See In re Det. of Mines, 165 Wn. App. 112, 125, 266 P.3d 242 (2011) (trial court did not abuse discretion in not bifurcating sexually violent predator trial because it would have required two nearly identical, lengthy trials.). The State would have likely only needed to call a single witness to make its case on the two prior convictions. Arguments by counsel would have short and different. Appropriate instructions could have been crafted.[8]

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[8] While the existence of the two prior convictions were elements and not aggravators, the pattern instructions on aggravators outline bifurcated proceedings and could have served as a model. See 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300 (3d Ed).

Because the court incorrectly believed the law did not permit bifurcation, the trial court abused its discretion in denying Wilhelm's motion to bifurcate. This Court should reverse the conviction for violation of a court order and instruct the trial court to reconsider Wilhelm's motion to bifurcate.

4. The prosecutor's improper closing argument shifted the burden of proof violating the defendant's right to a fair trial.

In arguing that Wilhelm was guilty of felony violation of a court order, the prosecutor argued that the jury could not find reasonable doubt on the elements that the court orders were in effect and that Wilhelm knew they were because there was no evidence the orders had been revoked. Wilhelm's objection that this argument shifted the burden was overruled, leaving the jury with the impression that Wilhelm had to prove that the orders were not in effect. Because there is a substantial chance that the prosecutor's improper burden shifting argument affected the jury, this Court should reverse the conviction for violation of a court order.

The right to a fair trial is a fundamental liberty secured by the constitutions of the United States and Washington State. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S.

Const. amend. 14; Const. art. 1, § 3. Improper argument by the prosecutor may deprive defendants of their constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04. Shifting the burden of proof is just such an improper argument. Id. at 713. Due process requires the State to prove, beyond a reasonable doubt, all the elements of the alleged crime. Id.

Under the jury instructions, the State was required to prove that the two no-contact orders existed on March 11, 2013, and that Wilhelm knew about these orders. CP 44.[9] In arguing that these elements were satisfied during closing argument, the prosecutor argued that these elements were met because the jury had copies of two certified court orders signed by Wilhelm that did not expire until 2014. 7/15/13RP 110; Ex. 14, 15. However, the prosecutor crossed the line by arguing it had therefore met its burden because Wilhelm had not offered evidence that the orders were changed:

> There is no evidence you've heard in this trial that anyone ever tried to change or lift those orders. The information says that they don't expire until next year.

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[9] The State probably only needed to prove that there was one court order in existence. However, the to-convict instruction required both. Under the law of the case doctrine, the State must prove all the elements in the to-convict instruction, even unnecessary elements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

7/15/13RP 110. Wilhelm immediately objected that the prosecutor was shifting the burden, but was overruled. 7/15/13RP 111.

The court erred by overruling the objection. The State's argument improperly implied that Wilhelm had the burden to prove that the orders were not in existence. It told the jury that it could not find reasonable doubt because Wilhelm had not presented evidence that the orders had been revoked. But Wilhelm had no burden or duty to present evidence. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

When an objection to an improper prosecutorial argument is overruled, this Court must reverse if there is a substantial likelihood that the misconduct affected the jury's decision. State v. Reed, 102 Wn.2d 140, 145, 148, 684 P.2d 699 (1984). Here, the evidence tending to show that the court orders were in existence on March 11, 2013 and that Wilhelm had knowledge of the orders (which were admitted) were the actual orders and Detective Brian Horn's testimony. Horn testified that Wilhelm had no-contact orders in effect on March 11, 2013. 7/15/13RP 51. On cross-examination, however, the detective admitted that he did not know if Wilhelm knew about the orders. 7/15/13RP 59. He then admitted that sometimes a protected party goes to court and has the order recalled. 7/15/13RP 60-61. This is consistent with the actual orders, which both implicitly recognized that they could be changed by the court upon written

application. Ex 14, 15 ("Only the court can change the order upon written application."). Horn further testified that sometimes the recall orders do not show up in the computer system used to determine the existence of an order. 7/15/13RP 61.

Based on Horn's testimony and the language in the orders recognizing that they could be changed, a jury could have reasonably determined the State failed to meet its burden to establish that the orders were in existence on March 11, 2013 and that Wilhelm knew of the orders. The prosecutor's improper burden shifting argument precluded the jury from finding reasonable doubt on these elements. This is especially likely because in overruling of Wilhelm's objection, the jury was left with the incorrect impression that Wilhelm had to provide evidence that the orders were not in effect. Thus, there is a substantial likelihood the misconduct affected the jury's determination. This Court should reverse the conviction for violation of a court order.

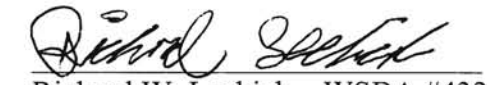
F. CONCLUSION

The Court erred in admitting the evidence of the prior assault under ER 404(b). The evidence was not relevant as to Hensel's credibility. Because the error was prejudicial as to both convictions, the convictions should be reversed and the case remanded for a new trial. Alternatively, the convictions should be reversed for ineffective assistance

counsel, abuse of discretion in denying the motion to bifurcate, and prosecutorial misconduct.

DATED this 22nd day of May, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. DAMIAN WILHELM, Appellant.	)	NO. 70704-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF MAY, 2014.

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