NO. 72627-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LUIS VELA,

Appellant.

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

The Honorable Monica J. Benton, Judge
The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting ER 404(b) evidence for an improper purpose.

2. The trial court erred in failing to give a limiting instruction on the ER 404(b) evidence.

3. Trial counsel was ineffective in failing to request a limiting instruction for the ER 404(b) evidence.

4. The court erred in admitting ER 404(b) evidence to show the complaining witness's state of mind and delay in reporting without also requiring expert testimony on the dynamics of a domestic violence relationship.

Issues Pertaining to Assignments of Error

1. The trial court admitted ER 404(b) evidence that appellant had allegedly assaulted the complaining witness during several uncharged incidents. Is reversal required when the court admitted this domestic violence evidence for an improper purpose?

2. Did defense counsel provide ineffective assistance in failing to request a limiting instruction for the ER 404(b) evidence?

3. Did the trial court err in admitting ER 404(b) evidence of past acts of domestic violence between appellant and the complaining

witness without also requiring an expert to explain the dynamics of a domestic violence relationship?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Luis Vela with one count each of second degree assault – domestic violence, unlawful imprisonment – domestic violence, and third degree assault – domestic violence. CP 11-12; 1RP[1] 117-19.

A jury found Vela guilty. CP 62-64; 1RP 516-17. The jury also returned special verdicts finding that Vela and the complaining witness were members of the same household, and that Vela committed the second degree assault with a deadly weapon. CP 65.

The trial court sentenced Vela to concurrent prison sentences of 20 months for second degree assault, 16 months for unlawful imprisonment, and 16 months for third degree assault. The trial court also imposed a consecutive 12-month deadly weapon enhancement. CP 100-07; 1RP 531-32. Vela timely appeals. CP 109-17.

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – September 10, 2013, October 29, 2013, June 3, 2014, June 6, 2014, August 6, 2014, August 11, 2014, August 12, 2014, August 13, 2014, August 14, 2014, August 15, 2014, October 10, 2014; 2RP – August 12, 2014 (voir dire).

2. Trial Testimony

Vela met Veronica Lopez-Nunez on an internet dating website at the beginning of 2013. 1RP 184-85, 227, 365. Their relationship became romantic about one month later. 1RP 185-86, 227, 365-68. Vela and Lopez-Nunez continued to live separately. 1RP 186.

Vela eventually spent the night at Lopez-Nunez's apartment at her invitation. 1RP 371-72. On other occasions, Vela slept in his car in the apartment parking lot out of respect for Lopez-Nunez's daughters. 1RP 187, 228, 372, 396-97. As the relationship continued, Vela "partially" moved into Lopez-Nunez's apartment. 1RP 187.

Lopez-Nunez said that about one month into the relationship, Vela took her cell phone and did not give it back. Vela would hit Lopez-Nunez if she tried to use another phone. 1RP 184-85, 227. Vela also hit Lopez-Nunez in the stomach and threatened to kill her and throw her body in Lake Washington. 1RP 191-92, 221, 230. On one occasion, Vela hit Lopez-Nunez very hard in the head which prevented her from walking for a few weeks. 1RP 221. Lopez-Nunez quit her job when Vela became jealous that she was talking with male co-workers. 1RP 187-89.

At the apartment, Vela forced Lopez-Nunez to stay in her bedroom. 1RP 193. Vela threatened to contact immigration and have her daughters taken away if Lopez-Nunez left the apartment without his

permission. 1RP 192, 208. Lopez-Nunez explained that she did not call police, and stayed with Vela because she was afraid. Vela said he would find Lopez-Nunez wherever she went if she left him. 1RP 194-95, 197.

At the end of April 2013, Lopez-Nunez used her daughter's phone to call her brother. 1RP 200. Vela became upset when he found out and hit Lopez-Nunez and pulled her hair. 1RP 202. Lopez-Nunez said Vela took a knife from the kitchen and slightly penetrated her vagina with the point of the knife. 1RP 198-202, 208. Vela said using the knife would not hurt him at all. 1RP 199. Lopez-Nunez was not cut and the knife left no physical marks. 1RP 202.

That same evening, Vela told Lopez-Nunez to take her clothes off and stand naked in front of the bedroom window. 1RP 200-01. Lopez-Nunez stood at the window for several hours. Vela would not let Lopez-Nunez leave the bedroom to use the bathroom. Vela told Lopez-Nunez "things would go badly," if she sat or lied down. 1RP 201-03. Lopez-Nunez had to promise not to bathe, talk to other people, or leave the apartment without him. 1RP 203-04.

Lopez-Nunez wanted to end the relationship with Vela after the April incident. Vela threatened to contact immigration and have her daughters taken away if Lopez-Nunez ended the relationship. 1RP 208.

After the April incidents, Vela also pointed a gun at Lopez-Nunez's head and told her he could kill her at any moment. 1RP 213-14.

About one week later, Lopez-Nunez used the telephone to verify how much money was left on her food stamp card. Vela appeared upset. 1RP 209-10, 212. As a result, Lopez-Nunez moved all the knives and scissors from the kitchen to the laundry basket in her daughter's bedroom. Lopez-Nunez also changed the location of the gun Vela kept at the apartment. Lopez-Nunez intended to have her daughter's call the police if Vela asked for the gun. 1RP 212-13, 217-18.

Vela asked Lopez-Nunez for the gun. Lopez-Nunez told her daughter to call police. Lopez-Nunez took the gun to Vela in the bedroom. 1RP 218-19. In the bedroom, Vela hit Lopez-Nunez in the head four or five times with a bottle. 1RP 220. The bottle did not break. Lopez-Nunez suffered no injuries. 1RP 221.

Police arrived at the apartment a short time later. 1RP 221. Police heard no noises coming from inside the apartment. 1RP 332-34. Lopez-Nunez saw Vela grab the gun and heard a plastic bag as police called for them to exit the bedroom. Lopez-Nunez did not see what happened to the gun. 1RP 222.

Lopez-Nunez and Vela eventually exited the bedroom. 1RP 31-17, 341. Police handcuffed and searched Vela. Vela was cooperative and police found no weapons on him. 1RP 317, 344.

Police found a gun inside a shopping bag in the courtyard of the apartment building. 1RP 318-20, 331-32. The gun had no bullets in the chamber. 1RP 320. Testing showed the gun was not operable. 1RP 322-23. Lopez-Nunez showed police an empty bottle and knives in her daughter's clothes hamper. 1RP 326-27. No fingerprint or DNA testing was done on the gun, knives, or bottle. 1RP 333. Police did not speak with any other residents of the apartment complex. 1RP 333.

Police observed Lopez-Nunez's face and neck were red and swollen. Lopez-Nunez had bruises on her upper arms and a scratch on her lower forearm. Lopez-Nunez's hair was wet and her scalp appeared to missing hair in certain areas. 1RP 324-25, 350-52. Lopez-Nunez declined medical attention. 1RP 336.

Lopez-Nunez's daughter, J.C., also noticed bruises and cuts on her mom's arms. Lopez-Nunez told J.C. the injuries were from working in the kitchen. 1RP 242, 249. J.C. never saw any injuries to Lopez-Nunez's head. 1RP 261.

J.C. observed that Lopez-Nunez and Vela spent a lot of time in the bedroom when they were dating. 1RP 245, 262. J.C. never saw any

violence between Lopez-Nunez and Vela. 1RP 247, 259, 267. Vela was never violent towards J.C. or her sister, W.C. 1RP 249, 259. J.C. sometimes heard Lopez-Nunez yell but thought it was laughter. 1RP 247, 267.

J.C. explained that Vela paid for everything when he and Lopez-Nunez were dating. 1RP 261. The day of the incident, J.C. called 911 when her mother told her to. J.C. told police Lopez-Nunez was afraid of her security. 1RP 253. J.C. did not personally see anything that caused her to believe Lopez-Nunez was in danger. 1RP 252.

Lopez-Nunez also told her daughter, W.C., that the injuries to her arms were from working. She saw no bruises on Lopez-Nunez's face. 1RP 301, 308. Although W.C. saw that Lopez-Nunez and Vela spent a lot of time in the bedroom together, Lopez-Nunez would also come out of the bedroom to talk with her daughters. 1RP 282, 300, 306. W.C. never heard screaming, crying, or punching sounds coming from the bedroom. 1RP 304. W.C. noticed that Lopez-Nunez and Vela rarely spent time apart inside the apartment. 1RP 294-95, 302. Lopez-Nunez and Vela shared one phone. 1RP 295, 307.

W.C. saw Lopez-Nunez and Vela talking "normally" to one another. She heard them discussing marriage. W.C. never heard Vela say anything to Lopez-Nunez about deportation. 1RP 308.

Vela's testimony differed from Lopez-Nunez's account of what happened during the incidents in April and May, 2013. Vela explained that he tried to end the relationships with Lopez-Nunez after he learned about his own daughter's struggles academically. 1RP 374-75. In response, Lopez-Nunez scratched her own arm with a piece of broken glass and ripped hair out of her head. 1RP 375-76, 381-82, 390, 409. Lopez-Nunez also tried to cut herself with a knife. 1RP 378-79, 381. Lopez-Nunez ripped the phone out of the wall when Vela tried to call 911. 1RP 379. Vela decided to stay with Lopez-Nunez as a result and did not leave the apartment for fear that Lopez-Nunez would harm herself. 1RP 377-79, .

On May 5, Vela told Lopez-Nunez that he did not have feelings for her and was ending the relationship. 1RP 385-86, 398-99, 401. Vela went to the apartment to retrieve the gun and clothing he had left there. 1RP 386-87, 401-02. Lopez-Nunez was upset and told Vela that if he was not there for her then he would not be there for anyone. 1RP 391. Vela threw the gun out the window because Lopez-Nunez was trying to grab it. 1RP 392, 394-95, 410. Vela had never loaded the gun and did not know whether it was operable. 1RP 389-90, 394.

Vela acknowledged following Lopez-Nunez to the bathroom when she asked him to do so. 1RP 397. During the relationship Lopez-Nunez

and Vela had an agreement to keep each other's cell phones. 1RP 392-93. Vela acknowledged bruising Lopez-Nunez's arm when he tried to stop her from hurting herself. 1RP 396.

Vela denied ever threatening or harm Lopez-Nunez with a knife, gun, or bottle. Vela never forced Lopez-Nunez to stay in the apartment or bedroom against her will and never forced her to stand naked in front of the window. 1RP 361-62, 380, 395. Vela also never threatened to call immigration, have Lopez-Nunez deported, or have her children removed. 1RP 382-83.

3. 404(b) Evidence

Before trial, the State moved to admit evidence of several uncharged domestic violence acts between Vela and Lopez-Nunez. Supp. CP ___ (sub no. 63, State's Trial Memorandum, filed 8/1//14, at 5-9). The prosecutor offered Vela's alleged acts of physical violence, threats about deportation and removing Lopez-Nunez's children, controlling behavior, and jealous behavior toward Lopez-Nunez's interactions with male co-workers for several reasons. 1RP 97-100; Supp. CP ___ (sub no. 63, State's Trial Memorandum, filed 8/1//14, at 5-9). The prosecutor described the uncharged acts as "basically what would amount to fourth-degree assault incidents[.]" 1RP 100.

The prosecutor argued the uncharged acts were relevant to the jury's assessment of the element of reasonable fear for the second degree assault charge. 1RP 99, 101; Supp. CP ___ (sub no. 63, State's Trial Memorandum, filed 8/1//14, at 6-8). The prosecutor also argued the uncharged acts were relevant to explain Lopez-Nunez's delay in reporting the charged incidents, and "relevant to her [Lopez-Nunez] credibility as the jury's trying to asses, again, whether or not they can rely upon her testimony when she failed to report it previously." 1RP 101; Supp. CP ___ (sub no. 63, State's Trial Memorandum, filed 8/1//14, at 8-9). Finally, the prosecutor further argued the uncharged acts were necessary to explain the dynamics of a domestic violence relationship to the jury:

> They are also relevant to explain what might be unusual behavior to jurors who aren't experienced with issues of domestic violence, which is to say, having been the victim of this assault, a particularly bad assault on April 30th, she still remained with the Defendant up through the May 5th incident for a few days, and in fact, was voluntarily still with the Defendant's company, doing things like going to the movies and going shopping with him on May 30th.

1RP 99. The prosecutor acknowledged he was not offering the prior uncharged acts on the basis of res gestae. 1RP 113.

Defense counsel objected, arguing the uncharged acts were not relevant to the element of reasonable fear because the assault was charge was predicated upon a completed unlawful touching. 1RP 102-03; CP 25-

26. In response, the trial court stated "let's assume the Court's not persuaded on that prong, but rather on the question of delay and credibility." 1RP 103. Defense counsel argued the uncharged acts were not relevant to Lopez-Nunez's delay in reporting or her credibility because she was consistent and had never recanted her allegations. 1RP 103-04; CP 26-27.

Defense counsel further argued admission of the uncharged acts was prejudicial to Vela because the case was a "swearing contest" between Vela and Lopez-Nunez and there was no expert witness who could explain the dynamics of a domestic violence relationship to the jury. Absent an expert witness the jury was free to speculate as to "why a person may have done what they did." 1RP 104-06; CP 26-27.

Finally, defense counsel argued "controlling behaviors," was too nebulous a term for admission of the evidence without a further offer of proof from the State. 1RP 108-12.

The trial court granted the prosecutor's request. The court found by a preponderance of the evidence that the alleged physical violent acts between Vela and Lopez-Nunez occurred and were admissible. 1RP 113-14. The court further explained the uncharged acts offered by the prosecutor were admissible for several reasons:

> The deportation allegations, the following her within the apartment and without, refusing to permit to her have a cell phone, keeping her in the bedroom. I mean all of those, I think, are pretty clearly, I think, 404(b), and they address the elements the State has to prove, which is whether or not she felt intimidated, whether she would report the assault, the deportation threat being the overarching one, together with any further violence.

1RP 113-14.

Defense counsel failed to request a limiting instruction, propose her own, or explain he did not want an instruction.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING ER 404(b) DOMESTIC VIOLENCE EVIDENCE FOR AN IMPROPER PURPOSE.

The trial court admitted several alleged uncharged domestic violence incidents between Vela and Lopez-Nunez. The trial court admitted this ER 404(b) domestic violence evidence for an improper purpose. Given the fact that proof of Vela's guilt was not overwhelming, coupled with the lack of a limiting instruction, the error was prejudicial and this Court should reverse.

a. Admitting the ER 404(b) Evidence was Error.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." This rule applies to evidence of other acts

regardless of whether they occurred before or after the charged crime. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989).

However, such evidence may 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). Before admitting ER 404(b) evidence, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudice. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). This analysis must be conducted on the record. Id. at 922.

The State sought to admit the alleged uncharged acts of domestic violence to explain Nunez-Lopez's credibility, proof of elements of the crimes charged, and to help explain to the jury "what might be unusual behavior to jurors who aren't experienced with issues of domestic violence[.]" 1RP 98-101. The court in turn found the uncharged acts were relevant to Nunez-Lopez's delay in reporting, credibility, and to address the elements of the crimes charged. 1RP 113-15.

In State v. Magers, the court held that prior acts of domestic violence are admissible under ER 404(b) "to assist the jury in judging the

credibility of a recanting victim." 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (plurality opinion); id. at 194 (Madsen, J., concurring). However, the Court recently declined to extend Magers to cases where the complaining witness "neither recants nor contradicts prior statements." Gunderson, 181 Wn.2d at 925.

Gunderson was charged with felony violation of a no-contact order based on an altercation between him and his ex-girlfriend, Christina Moore. Id. at 918-20. Moore's testimony at trial regarding the incident was not inconsistent with any prior statements she made to police or the prosecutor. Id. at 920. Nonetheless, the trial court admitted evidence of two prior incidents between Gunderson and Moore for the purpose of impeaching Moore's credibility. Id. at 920-21. The Supreme Court reversed, agreeing with Gunderson that the significant prejudicial effect of the prior acts outweighed their probative value. Id. at 923-24. The Court explained: "the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable." Id. at 924-25.

The Gunderson court further held:

> Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high. To guard against this heightened prejudicial effect,

> we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

Id. at 925 (citations omitted). The trial court therefore abused its discretion in admitting evidence of Gunderson's past domestic violence. Id.

Other acts of domestic violence may also be admissible to show the complaining witness's state of mind. Magers, 164 Wn.2d at 182-83. For instance, Magers's prior violent misconduct was properly admitted to show the complaining witness's "reasonable fear of bodily injury." Id. at 183. Importantly, the complaining witness's fear of bodily injury was an element the State needed to prove to convict Magers of assault. Id.

Evidence of prior physical abuse may also be admissible for the limited purpose of explaining delayed reporting. State v. Fisher, 165 Wn.2d 727, 745-46, 202 P.3d 937 (2009). In Fisher, the trial court ruled that evidence of Fisher's alleged physical abuse of his former stepchildren was admissible in his child molestation prosecution, but only if defense counsel made an issue of the complaining witness's delayed reporting. 165 Wn.2d at 746. The Supreme Court affirmed, holding that the trial court did not err in ruling that Fisher's physical abuse "was admissible

conditioned upon the defense's making an issue of [the complaining witness's] delayed reporting." Id., 165 Wn.2d at 746.

Here, each of the charges included an allegation of domestic violence. Moreover, the State sought to admit the uncharged incidents to help explain to the jury "what might be unusual behavior to jurors who aren't experienced with issues of domestic violence[.]" 1RP 99. The uncharged acts therefore constitute domestic violence, bringing it within Gunderson's gamut.

Given the clear holdings in Magers and Gunderson, no proper purpose supported admission of the uncharged incidents between Vela and Lopez-Nunez. First, Lopez-Nunez was not a recanting witness like in Magers. Her testimony was not inconsistent with prior statements. 1RP 103-04.

Second, unlike in Magers, Lopez-Nunez's state of mind or "reasonable fear" was not relevant to the charged assaults or unlawful imprisonment under the specific facts of this case. As the State conceded a trial, "...reasonable fear is not an element of the offense [of unlawful imprisonment] [.]" Supp. CP ___ (sub no. 63, State's Trial Memorandum, filed 8/1//14, at 8). Nor was Lopez-Nunez's "reasonable fear" relevant to the charged second and third degree assaults which were predicated upon a completed unlawful touching; specifically, the alleged placing of the

knife inside Lopez-Nunez's vagina and the alleged striking of Lopez-Nunez's head with a bottle. 1RP 468; See also State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (prior misconduct evidence only admissible to prove relevant mens rea when proof of doing the charged act does not itself conclusively establish the mens rea); Compare State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000), State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1994) (knowledge of defendant's prior violent acts was relevant to the reasonable fear element of harassment).

Finally, unlike in Fisher, here the alleged prior misconduct was not conditioned upon the defense's making an issue of Lopez-Nunez's delayed reporting. Rather, evidence of Lopez-Nunez's delayed reporting was introduced and explained in the State's case-in-chief. See 1RP 188-95.

It was manifestly unreasonable, and therefore an abuse of discretion, for the trial court to admit evidence of alleged uncharged acts between Vela and Lopez-Nunez. Gunderson, 181 Wn.2d at 925.

b. The Error was Prejudicial.

Improper admission of ER 404(b) evidence should lead to reversal where there is a reasonably probability the outcome of the trial would have been different without the inadmissible evidence. Gunderson, 181 Wn.2d at 926; State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

Here, the outcome of Vela's trial was materially affected by evidence of the prior acts.

Evidence of other misconduct is prejudicial because it "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195-96, 738 P.2d 316 (1987), overruled on other grounds by, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). This is especially true in domestic violence cases where the "risk of unfair prejudice is very high." Gunderson, 181 Wn.2d at 925.

The State's proof of guilt in this case was not overwhelming. There were no eyewitnesses to any of the charged incidents. Neither of Lopez-Nunez's daughters witnessed Vela threatening or being violent toward Nunez-Lopez. 1RP 247, 259, 267, 308. W.C. denied ever hearing screaming, crying, or punching sounds coming from the bedroom Vela and Lopez-Nunez shared. 1RP 304. Similarly, there is no evidence any neighbors reported seeing or hearing any acts of violence between Vela and Lopez-Nunez. 1RP 333.

Thus, the credibility of Lopez-Nunez vis-à-vis that of Vela was crucial to the jury's determination of guilt. Vela denied assaulting or

unlawfully imprisoning Lopez-Nunez and there was evidence casting doubt on her credibility. 1RP 361-62, 380, 395-96.

The admission of the evidence unfairly prejudiced Vela because it allowed the jury to infer that Vela had a propensity for violence against Lopez-Nunez. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020 (1991). By allowing the jury to also consider evidence of other alleged uncharged acts of domestic violence between Vela and Lopez-Nunez, jurors were even more likely to conclude Vela was predisposed to commit the charged acts, thereby undermining his defense.

This prejudice was further compounded by the lack of a relevant limiting instruction. Gunderson, 181 Wn.2d at 923 ("The trial court must also give a limiting instruction to the jury if the evidence is admitted."). The jury was left to consider the uncharged acts of alleged domestic as evidence of Vela's propensity to commit the alleged charged crimes. This Court should reverse and remand for a new trial. Id. at 926-27.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR THE ALLEGED PRIOR MISCONDUCT EVIDENCE

Even if this Court concludes the trial court did not err in admitting the uncharged acts evidence, it should still reverse Vela's convictions. Trial counsel deprived Vela of his rights to effective representation and a fair trial by failing to request an instruction directing jurors to consider the ER 404(b) evidence solely to assess Lopez-Nunez's credibility and state of mind at the time of the charged crime.

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's Failure to Demand an Instruction was Deficient.

An accused is entitled to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). A limiting instruction must be provided if evidence of other crimes, wrongs, or acts is admitted. Gunderson, 181 Wn.2d at 923; State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). 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 Vela's case, there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the uncharged domestic violence evidence. Had counsel requested an instruction, the court would have been required to give one. Defense counsel's decision not to request an instruction, or to propose a limiting instruction of his own, is puzzling since he acknowledged the credibility of Lopez-Nunez vis-à-vis that of Vela was crucial to the jury's determination of guilt. 1RP 105.

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 Vela allegedly committed other uncharged acts of domestic violence toward Lopez-Nunez was not of a type the jury could be expected to forget or minimize. Lopez-Nunez repeatedly mentioned the other uncharged incidents during her testimony. 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 Lopez-Nunez's testimony and the State's case.

b. Counsel's Deficient Performance Prejudiced Vela.

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including as proof that Vela was a violent person, especially toward Lopez-Nunez. Indeed, the jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822; 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).

In State v. Cook,[2] the trial court admitted evidence of Cook's prior abuse against complainant O'Brien to assess O'Brien's state of mind in recanting her prior statement that Cook had broken her finger during the charged assault. Cook, 131 Wn. App. at 854. The trial court's instruction informed the jury it could consider the prior abuse to assess O'Brien's credibility, but failed to eliminate the possibility the jury would consider the evidence for improper propensity purposes. Cook, 131 Wn. App at 847. The Court of Appeals found the limiting instruction inadequate and reversed Cook's conviction. The Court concluded that because the instruction was erroneous the jury was free to focus on Cook's prior abuse and assume "because he did it before, he did it now." Cook, 131 Wn. App at 853.

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[2] State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), overruled on other grounds by, State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).

The same danger exists here. Absent a limiting instruction, a reasonable juror would probably conclude Vela's violent nature toward Lopez-Nunez made it more likely he would commit the charged domestic violence crimes. Counsel's failure to request the instruction therefore undermines confidence in the outcome of Vela's case. This Court should reverse his convictions.

3. THE TRIAL COURT ERRED IN ADMITTING ER 404(b) EVIDENCE WITHOUT REQUIRING AN EXPERT TO EXPLAIN THE DYNAMICS OF DOMESTIC VIOLENCE RELATIONSHIPS.

Assuming arguendo, this Court decides the trial court did not error in admitting ER 404(b) domestic violence evidence for an improper purpose, this Court should still reverse the convictions because the ER 404(b) evidence was admitted without expert testimony to explain the dynamics of a domestic violence relationship.

There is no dispute that Nunez-Lopez did not recant her allegations regarding Vela and the alleged incidents. Nonetheless, the State sought to admit uncharged alleged incidents of domestic violence between Vela and Lopez-Nunez, in part to help explain to the jury "what might be unusual behavior to jurors who aren't experienced with issues of domestic violence[.]" 1RP 99.

It was error, however, for the court to admit this evidence without expert testimony explaining the dynamics of domestic violence

relationships. The Gunderson court noted "it may be helpful to explain the dynamics of domestic violence when offered in conjunction with expert testimony to assist the jury in evaluating such evidence." Id. at 925 n.4 (citing State v. Grant, 83 Wn. App. 98, 108, 920 P.2d 609 (1996)). But expert testimony is not just helpful, it is necessary to explain the complicated, counterintuitive dynamics of domestic violence relationships. Without it, there is too great a risk the jury used Vela's prior crimes as propensity evidence. See arguments one and two, supra. This is improper and requires reversal. Id. at 927.

Expert testimony is required where the reasons for an individual's conduct are beyond the common knowledge of an average lay person. See State v. Ciskie, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988); State v. Stumpf, 64 Wn. App. 522, 526-27, 827 P.2d 294 (1992). For instance, a diminished capacity defense requires expert testimony to establish the existence of the alleged mental disorder, as well as the requisite casual connection between the disorder and the diminished capacity. Stumpf, 64 Wn. App. at 526. By contrast, a voluntary intoxication defense does not require an expert because the effects of alcohol are commonly known. State v. Kruger, 116 Wn. App. 685, 692-93, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (203).

Several cases are instructive in this regard. In Ciskie, the court held that expert testimony on battered woman syndrome was properly admitted to explain the victim's counterintuitive behavior in staying with an abusive partner and failing to report violent incidents to the police. 110 Wn.2d at 270-80. The court reasoned that though domestic violence is widely prevalent, the "'general public is unaware of the extent and seriousness of the problem of domestic violence.'" Id. at 272-73 (quoting United States Comm'n on Civil Rights, The Federal Response to Domestic Violence 77 (1982)). It was therefore likely the jury had "little awareness" of battered woman syndrome:

> The State noted before the trial court that for those not personally affected by a battering relationship or otherwise specially informed, it is difficult to believe that so many women are victims of their mates' physical abuse. Even more counterintuitive and difficult to understand is the ongoing nature of these relationships. The average juror's intuitive response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of the incidents and consensual participation.

Id. at 273-74. In State v. Allery, the court likewise recognized this "phenomenon" was "not within the competence of an ordinary lay person." 101 Wn.2d 591, 597, 682 P.2d 312 (1984) .

In Grant, the State sought to introduce prior acts of domestic violence through testimony of the complaining witness's therapist. 83

Wn. App. at 109. In concluding the evidence was admissible under ER 404(b), the court looked to scholarship on the dynamics of domestic violence relationships. Id. at 107 n.5 (quoting Anne L. Ganley, Domestic Violence: The What, Why and Who, as Relevant to Civil Court Domestic Violence Cases, in DOMESTIC VIOLENCE CASES IN THE CIVIL COURT: A NATIONAL MODEL FOR JUDICIAL EDUCATION 20 (1992)). Summarizing this research, the court explained, "victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." Id. at 107. Thus, "[e]xpert testimony would have shown that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim." Id. at 109.

The dissent in Magers also recognized expert testimony was required for prior acts of domestic violence to be admissible. 164 Wn.2d at 197-98 (C. Johnson, J., dissenting). It is not self-evident why victims in abusive relationships may often change their testimony. Id. at 197. Therefore, "expert testimony is necessary to establish why, in the context of the victim's relationship with the defendant, these inconsistencies may exist." Id. at 197-98. Such testimony helps the jury determine whether this type of relationship actually existed and then properly consider inconsistencies in the complaining witness's testimony. Id. at 197.

Without expert testimony, "the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant's past." Id. at 198. This is precisely what ER 404(b) is designed to prevent. Expert testimony is therefore a "necessary safeguard[]." Id.

The risk of unfair prejudice is "very high" when prior acts of domestic violence are admitted. Gunderson, 181 Wn.2d at 925. While some jurors are undoubtedly familiar with the complicated dynamics of domestic violence relationships, they are beyond the common knowledge of the average lay person. The prosecutor acknowledge as much. 1RP 99. This is evidenced by Courts' own reliance on scholarly work to explain why prior acts of domestic violence are relevant to a recanting victim's credibility and state of mind. Expert testimony is therefore necessary to prevent jurors from using prior acts as propensity evidence. Because no expert testified here, this Court should reverse Vela's conviction and remand for a new trial.

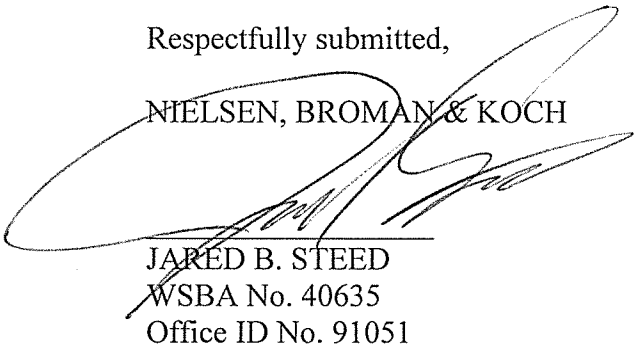
D. CONCLUSION

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

DATED this 29th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72627-7-I
	)	
LUIS VELA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 29TH DAY OF JUNE 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LUIS VELA
DOC NO. 378661
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2015.

X Patrick Mayovsky