No. 42895-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Aaron Thomas,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00585-1

The Honorable Judge Anna M. Laurie

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

ASSIGNMENTS OF ERROR

1. Mr. Thomas's convictions for felony violation of a no contact order (VNCO) violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.

2. Mr. Thomas's felony VNCO convictions violated his state constitutional right to notice of the charges against him, under Wash. Const. Article I, Sections 3 and 22.

3. The Information was deficient because it failed to allege an essential element of each felony VNCO charge.

4. Mr. Thomas's convictions for VNCO infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.

5. Mr. Thomas's convictions for VNCO infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crimes.

6. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror with respect to the VNCO charges.

7. The court's instructions relieved the state of its burden to prove that Mr. Thomas violated an order that qualified for prosecution under RCW 26.50.110.

8. The court's instructions relieved the state of its burden to prove that Mr. Thomas had two prior convictions that qualified under RCW 26.50.110 to elevate each charged VNCO to a felony.

9. The trial court erred by giving Instruction No. 11.

10. The trial court erred by giving Instructions No. 12.

11. The trial court erred by giving Instructions No. 13.

12. The trial court erred by giving Instructions No. 14.

13. The trial court erred by giving Instructions No. 15.

14. The trial court erred by giving Instructions No. 16.

15. The trial judge abused her discretion by admitting unduly prejudicial evidence in violation of ER 403 and ER 404(b).

16. Mr. Thomas was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

17. Defense counsel erroneously failed to propose a proper instruction limiting the jury's consideration of prior misconduct evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. The Information charged Mr. Thomas with violation of a no contact order, but failed to allege the kind of order alleged to have been violated. Did the Information omit an essential element of the offense in violation of Mr. Thomas's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

2. To convict Mr. Thomas of felony VNCO, the prosecution was required to show that he violated an order that qualified for prosecution under RCW 26.50.110, and that he had two prior convictions for violating such qualifying orders. Here, the prosecutor did not establish the kind of order violated by Mr. Thomas and failed to prove that his two prior convictions qualified to elevate the current charges to felonies. Did the felony VNCO convictions infringe Mr. Thomas's Fourteenth Amendment right to due process because they were based on insufficient evidence?

3. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed conviction absent proof of the kind of order Mr. Thomas was alleged to have violated.

Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of each charged crime, in violation of Mr. Thomas's Fourteenth Amendment right to due process?

4. To elevate VNCO to a felony charge, the prosecution must prove that the accused person has two prior convictions that qualify under the statute. Here, the court's instructions allowed conviction absent proof that Mr. Thomas's prior convictions qualified to elevate the current charges to felonies. Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of each charged crime, in violation of Mr. Thomas's Fourteenth Amendment right to due process?

5. Evidence of an accused person's prior misconduct may not be admitted in a criminal trial if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the trial judge erroneously admitted evidence that Mr. Thomas had previously assaulted Ms. Taylor. Did the trial court err by admitting irrelevant and unduly prejudicial evidence of criminal propensity without balancing relevant factors on the record?

6. A criminal conviction may not be based on propensity evidence. In this case, Mr. Thomas's assault conviction was based in part on propensity evidence. Did the assault conviction violate Mr. Thomas's Fourteenth Amendment right to due process?

7. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to propose a proper instruction limiting the jury's consideration of prior misconduct evidence. Was Mr. Thomas denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Aaron Thomas had a romantic relationship with Juliana Taylor. RP (11/29/11) 55-56. Her father Steven Taylor did not approve of the relationship, even though Ms. Taylor was 20 years old. RP (11/29/11) 54, 58. Ms. Taylor moved in with Mr. Thomas, over her father's objection. RP (11/29/11) 58, 90.

One day, Mr. Taylor picked up his daughter from work and she said she wanted to move out from Mr. Thomas's home. RP (11/29/11) 61-63. He helped her get her things that day from Mr. Thomas's home, and did not notice any injuries. RP (11/29/11) 61-62. When Ms. Taylor said goodbye to Mr. Thomas, they hugged and kissed. RP (11/29/11) 76.

The next day, Ms. Taylor claimed that Mr. Thomas had assaulted her. At this point, Mr. Taylor saw what he believed were black eyes, and he called the police. RP (11/29/11) 63-65.

Mr. Thomas was charged with Assault in the Second Degree. CP 1-8. The state added five counts of felony Violation of a Court Order (VNCO), alleging that he'd unlawfully had contact with his mother, in violation of a restraining order, and that he'd twice previously been convicted of similar violations. CP 1-8. The operative language of the Information read as follows:

> [The] Defendant, with knowledge that the Kitsap County District Court had previously issued a foreign protection order, protection order, restraining order, no contact order, or vulnerable adult order pursuant to state law in Cause No. 16652723, did [knowingly] violate said order...
> CP 1-8.[1]

Over objection, the prosecution sought to introduce evidence that Mr. Thomas had previously assaulted Ms. Taylor. RP (11/22/11) 35-41; Memorandum of Authorities in Support, Supp. CP. The court admitted the evidence in a pretrial ruling (based on the prosecutor's written offer of proof) and urged the defense to offer a limiting instruction. RP (11/22/11) 42; Memorandum of Authorities in Support, Supp. CP. The evidence was introduced through Ms. Taylor; defense counsel did not request a limiting instruction. RP (11/29/11) 95-98; Defense Proposed Instructions (three sets), Court's Instructions, Supp. CP.

The parties presented a stipulation that Mr. Thomas "is the Respondent in the No Contact Order, order no. 16652723, issued by the Kitsap County District Court," and that he "has more than two prior convictions for violation of a court order." Stipulation, Supp. CP. The court accepted the Stipulation and it was presented to the jury. RP

[1] The charging document also alleged that Mr. Thomas "did have at least two prior convictions for violating the provisions of a court order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, and/or 74.34 RCW..." CP 1-8.

(11/22/11) 29-32; RP (11/29/11) 202; see also Ex. 1, Supp. CP. The prosecution also introduced a copy of the order. Ex. 22, Supp. CP.

The court's instructions included the following definition of felony violation of a no-contact order:

> 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 knowingly violates a provision of the order, and the person has twice been previously convicted for violating the provisions of a court order.
> Instruction No. 11, Supp. CP.

The court's "to convict" instruction outlined the elements as follows:

> (1) That on or about [date], there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
> (4) That the defendant has twice been previously convicted for violating provisions of a court order; and
> (5) That the defendant's act occurred in the State of Washington.
> Instructions Nos. 12-16, Supp. CP

The court did not tell the jury that only certain orders qualified for conviction, or that only certain prior convictions would elevate each offense to a felony. See Court's Instructions, generally, Supp. CP.

The jury convicted Mr. Thomas on all charges. CP 9-19. He timely appealed. CP 20.

ARGUMENT

I. MR. THOMAS'S CONVICTIONS VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH.CONST. ARTICLE I, SECTION 22.

A. Standard of Review

Constitutional questions are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required; no particularized showing of prejudice is required. State v. Courneya, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it failed to properly allege an essential element of each VNCO charge.

The Sixth Amendment to the federal constitution guarantees an accused person the right "to be informed of the nature and cause of the

accusation." U.S. Const. Amend. VI.[2] A similar right is secured by the Washington state constitution. Wash.Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. State v. Johnson, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992).

Mr. Thomas was charged under RCW 26.50.110, which criminalizes violations of orders granted under RCW 26.50, 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW.[3] RCW 26.50.110. The crime is elevated to a felony if the accused person "has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020." RCW 26.50.110(5).

Omitted from both lists are anti-harassment orders issued under RCW 9A.46.040, and RCW 10.14.[4] Because omissions from a statute are

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[2] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

[3] The statute also criminalizes violations of foreign protection orders.

[4] Violation of such orders is criminalized by RCW 10.14.170.

deemed to be exclusions,[5] a conviction for violating an anti-harassment order (issued under RCW 9A.46 or RCW 10.14) cannot be charged as a felony under RCW 26.50.110, even if the accused person has prior qualifying convictions. Compare, e.g., RCW 10.14.170 with RCW 26.50.110.

The Information in this case alleged that Mr. Thomas, acting "with knowledge that the Kitsap County District Court had previously issued a foreign protection order, protection order, restraining order, no contact order, or vulnerable adult order pursuant to state law in Cause No. 16652723, did [knowingly] violate said order..." CP 1-8.[6] Even under a liberal construction of its language, the Information did not specify the statute under which the order had been issued. CP 1-8.

Because the Information did not specify the authority under which the predicate order was issued, it did not include all the essential elements required to charge felony violation of a no contact order under RCW 26.50.110. Accordingly, the Information was deficient, and prejudice is conclusively presumed. McCarty, at 425. Mr. Thomas's VNCO

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[5] See In re Detention of Martin, 163 Wash.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim expressio unius est exclusio alterius); see also Adams v. King County, 164 Wash.2d 640, 650, 192 P.3d 891 (2008).

[6] The charging document also alleged that Mr. Thomas "did have at least two prior convictions for violating the provisions of a court order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, and/or 74.34 RCW..." CP 1-8.

convictions must be reversed and the charges dismissed without prejudice. Id.

II. MR. THOMAS'S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH OFFENSE.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

> Stipulated facts
>
> must include those essential facts necessary to permit a reasoned and informed analysis. If parties stipulate to facts at trial, those facts must be sufficient for a sound legal decision. Further, the stipulated facts must be sufficient for appellate review of issues arising from the decision on the stipulated facts.
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> State v. Wheaton, 121 Wash. 2d 347, 363-64, 850 P.2d 507 (1993).

Any stipulation that certain facts are sufficient for conviction is not binding upon the factfinder. State v. Drum, 168 Wash. 2d 23, 33-34, 225 P.3d 237 (2010). But see State v. Wolf, 134 Wash. App. 196, 197, 139 P.3d 414 (2006).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

C. The prosecution failed to prove that Mr. Thomas violated the terms of an order that qualified for prosecution under RCW 26.50.

The prosecution was required to prove that Mr. Thomas violated "an order... granted under [chapter 26.50 RCW or] chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW..." RCW 26.50.110(1)(a). Instead of introducing evidence on this point, the prosecution relied on a stipulation providing that Mr. Thomas "is the respondent in the No Contact Order, order no. 16652723, issued by the Kitsap County District Court." Stipulation, Supp. CP.

The prosecution did not establish the authority under which the order was granted. Nor did the prosecution show that the order was not an anti-harassment order entered under RCW 9A.46.040 or RCW 10.14.[7]

Because of this deficiency in proof, the evidence was insufficient to establish that Mr. Thomas violated a no-contact order qualifying for prosecution under RCW 26.50. Accordingly, the conviction must be reversed and the charges dismissed with prejudice. Smalis, supra.

D. The prosecution failed to prove that Mr. Thomas's prior "convictions for violation of a court order" were qualifying convictions that elevated the charged offenses to felonies.

To elevate each charged crime to a felony, the prosecution was required to prove that Mr. Thomas had "at least two previous convictions for violating the provisions of an order issued under [chapter 26.50 RCW or] chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW." RCW 26.50.110(5). Instead of introducing evidence on this subject, the prosecution relied on the stipulation, which provides that Mr. Thomas "has more than two prior convictions for violation of a court order."

[7] The Supreme Court has suggested in dicta that these matters relate to questions of admissibility. State v. Miller, 156 Wash. 2d 23, 30-32, 123 P.3d 827 (2005) (holding that the legal validity of an order is an issue of law for the court, not the jury). See also State v. Carmen, 118 Wash. App. 655, 663-68, 77 P.3d 368 (2003). Under this reasoning, a conviction erroneously based on an order issued under RCW 10.14 could not be reversed for insufficient evidence. Instead, reversal could only be predicated on the erroneous admission of irrelevant evidence, and then only if counsel preserved the issue by objecting to admission of the order.

Stipulation, Supp. CP. The prosecution did not establish that these prior convictions were for violations of no-contact orders (as opposed to other court orders), or that the court orders were issued under the listed statutes (as opposed to RCW 9A.46 or RCW 10.14).

Because of this deficiency in proof, the evidence was insufficient to prove felony violations of the order. Accordingly, the convictions must be reversed and the charges remanded for entry of misdemeanor convictions under RCW 26.50.110. Smalis, supra.

III. MR. THOMAS'S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF EACH CRIME CHARGED.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S., at 702. A manifest error affecting a constitutional right may be raised for the first time on review.[8] RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818,

[8] A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008). Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Toth, 152 Wash. App. 610, 614-15, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same

823, 203 P.3d 1044 (2009). The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

Jury instructions are reviewed de novo. State v. Hayward, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. A trial court must instruct the jury on every element of the charged crime.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; State v. Aumick, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. State v. Lorenz, 152 Wash.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the "to convict" instruction as a complete statement of the law. State v. Sibert, 168 Wash.2d 306, 311, 230 P.3d 142 (2010) (plurality).

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result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

An instruction that relieves the prosecution of its burden to prove every element of a crime requires automatic reversal. Id, at 312 (citing State v. Brown, 147 Wash.2d 330, 339, 58 P.3d 889 (2002) (Brown II)). Not every omission from a "to convict" jury instruction relieves the prosecution of its burden; however, the "total omission" of essential elements can do so. Sibert, at 312.

C. The Court's instructions relieved the prosecution of its obligation to prove the essential elements of each charged crime.

As noted above, a conviction for felony violation of a no contact order requires proof that the accused person violated a qualifying order, and that s/he has two prior qualifying convictions for violating similar orders. RCW 26.50.110. Here, the instructions permitted conviction upon proof that Mr. Thomas violated "a no-contact order," and that he had "twice been previously convicted for violating the provisions of a court order..." Instructions Nos. 11-16, Supp. CP.

The "to convict" instruction placed no limitation on the kind of order that would qualify for conviction, or on the kind of prior conviction that would elevate each offense to a felony. Instructions Nos. 12-16, Supp. CP. The same error appeared in the court's instruction defining the offense. Instruction No. 11, Supp. CP. Nor did any of the court's other instructions fill the gap. Court's Instructions, Supp. CP. The "total

omission" of these essential elements requires automatic reversal. Sibert, at 312. Accordingly, Mr. Thomas's convictions must be reversed and the charges remanded to the trial court for a new trial. Sibert, at 312.

IV. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. THOMAS'S PRIOR SEXUAL MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

A. Standard of Review

The correct interpretation of an evidentiary rule is a question of law, reviewed de novo. State v. DeVincentis, 150 Wash. 2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. Id.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. State v. Everybodytalksabout, 145 Wash. 2d 456, 468-69, 39 P.3d 294 (2002).

B. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

Under ER 404(b), "[e]vidence of other... 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) must be read in conjunction with ER 403, which requires that probative value be balanced against prejudicial the danger of unfair prejudice.[9] State v. Fisher, 165 Wash. 2d 727, 745, 202 P.3d 937 (2009).

A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." DeVincentis, at 17-18. The state bears a "substantial burden" of showing admission is appropriate for a purpose other than propensity. DeVincentis, at 18-19. Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. Fisher, at 745. Doubtful cases must be resolved in favor of exclusion. State v. Thang, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002).

[9] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

C. The trial court should have excluded evidence of Mr. Thomas's prior bad acts.

Here, the trial court should have excluded testimony that Mr. Thomas had previously assaulted Ms. Taylor on one occasion during the course of their brief relationship. The evidence of this single prior assault was admitted under ER 404(b), ostensibly to explain the dynamics of the relationship, and to bolster Ms. Taylor's credibility by explaining her delay in reporting the charged assault. RP 41-42; see also Memorandum of Authorities in Support, Supp. CP.

A single assault in the context of a short-term relationship is not necessarily equivalent to domestic violence in a long-term relationship. Accordingly, the accepted rationale for admitting such evidence does not apply in this case. Cf. State v. Magers, 164 Wash. 2d 174, 184-86, 189 P.3d 126 (2008); State v. Grant, 83 Wash.App. 98, 920 P.2d 609 (1996); State v. Ciskie, 110 Wash. 2d 263, 273-80, 751 P.2d 1165 (1988). Nor did the prosecution introduce opinion testimony addressing the psychological effects of a single assault in a short-term relationship. Cf. Grant, at 105-110.

Furthermore, the risk of unfair prejudice was substantial. Courts have long noted that evidence of prior misconduct is highly prejudicial. See, e.g., Magers, at 197 ("This type of evidence is highly prejudicial, and

its admission at trial should be allowed only in the narrowest set of circumstances"); see also State v. Carleton, 82 Wash. App. 680, 684-85, 919 P.2d 128 (1996). Given the dubious value of this highly prejudicial evidence, the testimony should have been excluded. Thang, at 642.

There is a reasonable probability that the error materially affected the outcome of trial. Everybodytalksabout, at 468-69. Accordingly, Mr. Thomas's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. Id.

V. MR. THOMAS'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5 (a)(3); Kirwin, at 823

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment. [10] U.S. Const. Amend. XIV; Garceau v. Woodford, 275 F.3d 769, 775 (9th Cir. 2001), reversed on

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

other grounds at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); see also McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. Garceau, at 776, 777-778; see also Old Chief v. United States, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) ("There is, accordingly, no question that propensity would be an 'improper basis' for conviction...") (citation omitted).

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

> For example, courts, reasoning that jurors may convict an accused because the accused is a "bad person," have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

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

In the absence of a limiting instruction, the jury is likely to use the prior "bad acts" as propensity evidence; this is especially true when jurors are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved..." Instruction No. 1, Supp. CP.

C. Mr. Thomas's convictions were based in part on propensity evidence.

Although the court ruled evidence of the prior assault admissible for a limited purpose, the evidence was admitted without limitation, and the jury was not instructed to consider it solely for its intended purpose. See Court's Instructions, generally, Supp. CP. The court's instructions permitted the jury to consider the evidence for any purpose, including as substantive evidence of guilt. State v. Myers, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997). Furthermore, in light of the court's instruction to "consider all of the evidence," it is highly likely that the jury erroneously used evidence of prior misconduct as propensity evidence. No. 1, Court's Instructions, Supp. CP.

This error was manifest, because it had practical and identifiable consequences at trial. By permitting the jury to consider Mr. Thomas's prior assault as substantive evidence of guilt, the court tipped the balance

in favor of conviction. Accordingly, the error can be reviewed for the first time on appeal. RAP 2.5(a)(3); Nguyen, at 433.

Evidence of Mr. Thomas's prior misconduct suggested that he had a propensity to assault Ms. Taylor. The court's instructions encouraged jurors to convict based (in part) on propensity evidence, in violation of Mr. Thomas's Fourteenth Amendment right to due process. Garceau, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

VI. MR. THOMAS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies

to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." Reichenbach, at 130. Any trial strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an

attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to propose a proper instruction limiting the jury's consideration of evidence admitted under ER 404(b).

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. See, e.g., State v. Tilton, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); State v. Jury, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. State v. Woods, 138 Wash. App. 191, 156 P.3d 309 (2007); see also State v. Rodriguez, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Here, despite the court's invitation, defense counsel failed to propose a proper instruction based on WPIC 5.30 ("Evidence Limited as to Purpose").[11] RP 42. Counsel's error infringed Mr. Thomas's right to

[11] WPIC 5.30 reads as follows: "Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for

effective assistance under the Sixth and Fourteenth Amendments. By failing to propose a proper instruction, counsel's performance fell below an objective standard of reasonableness. Woods, supra. There was no strategic reason justifying the decision to allow the ER 404(b) evidence to be admitted as substantive evidence of guilt. Furthermore, the error prejudiced Mr. Thomas: the court's instructions encouraged jurors to consider uncharged misconduct as propensity evidence, thereby increasing the evidence available to establish guilt and the likelihood that jurors would vote to convict.

Accordingly, Mr. Thomas was deprived of the effective assistance of counsel. Woods, supra. His convictions must be reversed and the case remanded for a new trial. Id.

CONCLUSION

For the foregoing reasons, Mr. Thomas's convictions must be reversed. The VNCO convictions must be dismissed with prejudice, and the assault charge must be remanded for a new trial. In the alternative, if

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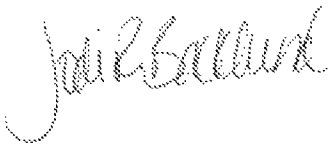
the purpose of ___. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

the VNCO convictions are not dismissed with prejudice, they must either be dismissed without prejudice or remanded for a new trial.

Respectfully submitted on June 29, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Aaron Thomas, DOC #329952
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191 Constantine Way
Aberdeen, WA 98520

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

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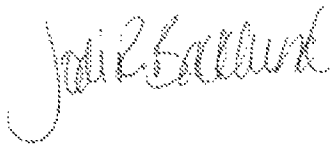
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on June 29, 2012.



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June 29, 2012 - 3:08 PM

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