SUPREME COURT NO. 89872-3
NO. 68814-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD GRAY, III,

Petitioner.



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

The Honorable Leroy McCullough, Judge

# PETITION FOR REVIEW

JENNIFER L.DOBSON
DANA M. NELSON
Attorneys for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner, Ronald Lee Gray III, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Donald requests review of the Court of Appeal's decision in State v. Gray, No. 68814-6-I, entered on December 23, 2013.[1]

C. ISSUES PRESENTED FOR REVIEW

1. May a criminal defendant present reverse-404(b) evidence[2] as part of his defense so long as it is admissible under ER 401 and ER 403?

2. When determining whether a defendant has received ineffective assistance of counsel due to counsel's failure to request an instruction, is the appellate court to view the supporting evidence in the light most favorable to the defendant?

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[1] The decision is attached as Appendix A.

[2] "Reverse-404(b) evidence" is evidence involving a third-party's misconduct that is offered by a criminal defendant that moves through a propensity inference but is offered as a means of negating his guilt. E.g. U.S. v. Montelongo, 420 F.3d 1169, 1174 (10th Cir. 2005).

D. GROUNDS FOR REVIEW

1. Reverse-404(b) Evidence

Review should be granted under RAP 13.4(b)(3) and (4). The issue presented here raises a significant question of law under both the state and federal constitutions – namely, whether ER 404's exclusion of propensity evidence applies to a defendant who seeks to introduce reverse-404(b) evidence as part of his defense.[3] This is an issue of first impression in Washington. The federal circuit courts are split as to whether reverse-404(b) evidence is admissible when proffered by a criminal defendant. The Court of Appeals adopted the minority view, which applies a strict textual analysis of ER 404(a) and 404(b) to limit the scope of a criminal defendant's constitutional right to present a defense and does not give due consideration to whether the exclusionary impact of the rule is disproportionate to the purpose the rule is designed to serve.

There is a substantial public interest in having this Court review the Court of Appeals decision and determine whether

[3] The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee a defendant the right to defend against the State's allegations.

reverse-404(b) evidence is admissible. The legal issue raised is not isolated to the facts of this case. Indeed, it is the subject of a recently published Washington case that is currently being petitioned to this Court.[4] Indeed, these two decisions will limit the constitutional rights of others who seek to introduce relevant and not overly prejudicial reverse-404(b) evidence as a means of defending themselves against the State's charges.

2. Ineffective Assistance

Review should be granted because, when evaluating whether Gray received ineffective assistance of counsel, the Court of Appeals did not view the supporting evidence in the light most favorable to Gray (the party that should have requested the instruction). This conflicts with this Court's holding that, when determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. E.g., State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Thus, review should be granted under RAP 13.4(b)(1).

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[4] State v. Donald, __ Wn. App. __, __ P.3d __ 2013 WL 6410340 (Wash.App. Div. 1, No. 68429-9-I).

E. RELEVANT FACTS

On August 7, 2011, around 10:30 p.m., Gray and his friends moved through an Auburn neighborhood while being verbally disruptive. 2RP 41, 83; 4RP 113. At that time, Leroy Travers and his girlfriend Coral Williams were returning from a rafting trip and unloading the car. 4RP 112. Travers told Gray to leave. 4RP 113. A physical confrontation ensued during which Travers punched Gray to his knees and then kicked him down to the ground. 4RP 114-16, 159. Travers claimed Gray hit him first, but no other witness corroborated this claim. 4RP 144.

Travers and Gray began to separate, but both continued to yell aggressively toward one another. 3RP 17, 38, 41, 42, 79. Gray walked away and was no longer a physical threat to Travers. 3RP 64. Eventually, when Gray was approximately 120 feet away, he said something inflammatory to Travers. 3RP 18, 69, 71; 4RP 117. Travers – whose adrenaline was pumping – came running across the street and grabbed Gray's shoulders. 3RP 20, 42-43, 58; 4RP 146, 164; 5RP 6. While holding Travers off, Gray stabbed Travers several times. 3RP 72, 89-90.

Gray was charged with one count of first degree assault while armed with a deadly weapon and one count of attempted

murder in the first degree. CP 1-5, 8-9.

Prior to trial, defense counsel sought to have Travers' prior assault convictions admitted in support of Gray's self-defense theory.[5] 1RP 109. The State argued the convictions should be excluded under ER 404(b). 1RP 110. The trial court agreed and excluded the evidence under ER 404(b)'s bar on propensity evidence. 1RP 111.

At trial, defense counsel asked that the jury be given a self-defense instruction. 5RP 21-22. The trial court agreed. 5RP 24. In response, the State asked for a first-aggressor instruction. 5RP 46. Defense counsel objected, arguing that after the fist-fight Gray had retreated, and it was Travers who chased Gray down after only a verbal provocation and when Gray was no longer a physical threat. 5RP 47-49, 52. The trial court granted the State's request to give the first-aggressor instruction. 5RP 54-55. Defense counsel did not ask for a revived self-defense instruction (revival instruction) to counter the first-aggressor instruction. 5RP 55.

During closing argument, defense counsel asserted that Travers instigated and dominated the fist-fight, beating Gray to the ground and kicking him. 5RP 97, 99, 100. Defense counsel also

[5] This is the reverse-404(b) evidence at issue.

briefly suggested, even if Gray had thrown the first punch, it did not matter because the fist-fight constituted a separate altercation from the stabbing incident. RP 97-98. Defense counsel pointed out, after the fist-fight, Gray had collected himself and moved 120 feet away before the stabbing altercation. 5RP 96, 99, 106, 109-110. While Gray and Travers were still engaged in a shouting match across the distance, defense counsel explained that words alone are not sufficient provocation entitling Travers to come rushing across the 120-feet gap to where Gray had retreated. 5RP 99, 108. Defense counsel asserted that once Gray had retreated and Travers rushed across the 120 feet gap to start the new physical altercation, Gray was lawfully permitted to defend himself from another brutal beating. 5RP 105-06.

Gray appealed, arguing the trial court erred in excluding the reverse-404(b) evidence and Appellant was denied effective assistance of counsel when defense counsel failed to request a revival instruction. Brief of Appellant (BOA) at 5-19; Reply Brief of Appellant (RBOA) at 1-11; Supplemental Brief of Appellant (SBOA) at 1-8. The Court of Appeals held that, under the plain language of ER 404(a) and 404(b), the propensity bar applies to all parties and

mandates the exclusion of reverse-404(b) evidence.[6] Appendix A at 4. Also, after weighing the evidence in the light most favorable to the State, it concluded Gray's actions did not communicate clearly to Travers his intention to withdraw from further conflict and, thus, defense counsel did not fall below an objective standard of reasonableness when he failed to request a revival instruction. Appendix A at 15.

F. ARGUMENT IN SUPPORT OF REVIEW

I. REVIEW SHOULD BE GRANTED SO THIS COURT MAY DECIDE WHETHER AN ACCUSED PERSON MAY PRESENT REVERSE-404(b) EVIDENCE WHEN IT IS RELEVANT TO HIS DEFENSE AND NOT OVERLY PREJUDICIAL.

The right to defend against the State's allegations is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). The heart of the debate over reverse 404(b) evidence is whether a criminal defendant's constitutional right to present a complete defense is violated when the trial court uses ER 404(a) and 404(b) to exclude reverse-404(b) evidence.

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[6] The Court of Appeals did not undertake a complete analysis of this issue but, instead, adopted its reasoning in State v. Donald, __ Wn. App. __, __ P.3d __ 2013 WL 6410340 (Wash.App. Div. 1, No. 68429-9-I). Consequently, appellant has attached a copy of the Donald opinion as Appendix B.

As the Court of Appeals correctly points out, ER 404 explicitly excludes propensity evidence regardless of who offers it. Appendix B at 6-7. However, even well-established evidence rules are subject to constitutional review, and evidence rules yield to legitimate constitutional rights where they are in conflict. See, e.g., Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006) (concluding a rule that excluded evidence implicating third parties violated the defendant's right to have a meaningful opportunity to present his defense); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (holding unconstitutional a rule prohibiting hypnotically refreshed testimony); see also, State v. Hedge, 297 Conn. 621, 653-54, 1 A.3d 1051 (2010) (holding exclusion of reverse-404(b) evidence resulted in an unconstitutional restriction of the defendant's right to present his defense).

As one Washington Court has recently explained:

> The right to present a complete defense, including a third party culpability defense, does not mean that a defendant may introduce whatever evidence he wishes, but it does mean that state-law evidentiary restrictions that are "arbitrary" or "disproportionate to the purposes they are designed to serve" must yield to a defendant's right to present a defense.

State v. Sanchez, 171 Wn. App. 518, 554, 288 P.3d 351, 368 (2012) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Thus, if a court rule unreasonably restricts a defendant's constitutional right to present a defense, the rule is inapplicable. In such circumstances, admissibility can be fairly determined through the application of ER 401 and 403. Holmes, 547 U.S. at 326.

Whether ER 404(b)'s exclusion of reverse-404(b) evidence is disproportionate to the purpose the rule is designed to serve is a question of first impression in Washington. Thus, the Court of Appeals correctly looked to federal authority. See, State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) (interpretation FRE 404(b) is instructive). Unfortunately, it chose to follow the minority view, which applies a strict textual analysis of the evidentiary rule rather than looking at whether the exclusionary impact of the rule is an unreasonable restriction on an accused's right to present a complete defense. Appendix B at 8-9.

Unlike the Court of Appeals, the majority of federal circuit courts have concluded the admissibility of reverse-404(b) evidence

is not governed by Rule 404, but it is instead determined under a straightforward balancing test under FRE 401 and 403.[7]

In reaching its conclusion to the contrary, the Court of Appeals suggests Gray misread the majority cases when suggesting a straightforward balancing applies. Appendix B at 10-13. However, the Seventh Circuit very recently summed up the majority view as follows:

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[7] This approach is adhered to by the First, Second, Fifth, Seventh, Tenth and Eleventh Circuits. United States v. Seals, 419 F.3d 600, 606–07 (7th Cir.2005) (holding courts must balance the evidence's probative value under FRE 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under FRE 403); U.S. v. Reed, 259 F.3d 63 (7th Cir. 2001) (same)*; Montelongo, 420 F.3d at 1174 (10th Cir. 2005) (same); U.S. v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir.1987) (same); Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311 (11th Cir. 1987) (holding that Rule 404(b) did not apply and instead applying a relevance/prejudice balancing approach); U.S. v. Aboumoussallem, 726 F.2d 906 (2d Cir.1984) (same); United States v. Krezdorn, 639 F.2d 1327 (5th Cir.1981) (concluding that 404(b)'s prohibition on propensity evidence does not apply when the evidence will not impugn the defendant's character); see also, Wynne v. Renico, 606 F.3d 867, 874 (6th Circuit 2010) (Martin, J. concurring) (departing from the majority on grounds that reverse-404(b) evidence is not subject to 404(b)'s exclusion of propensity evidence); United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004) (Rosen J. concurring) (same).

*Seals and Reed represent a departure from the Seventh Circuit's earlier ruling in Agushi v. Duerr, 196 F.3d 754, 759–761 (7th Cir.1999), where the Court called for a traditional 404(b) analysis regardless of who was offering the evidence.

> A defendant can introduce evidence of a government witness's prior bad acts if that evidence tends to negate the defendant's guilt. When a defendant seeks to admit this "nondefendant" or "reverse" 404(b) evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under Rule 403. We have noted that in most cases the only serious objection to reverse 404(b) evidence is that its probative value is slight, as it may just amount to pointing a finger at someone else who, having a criminal record, might have committed the crime the defendant is accused of committing.

U.S. v. Johnson, 729 F.3d 710, 716 (7th Cir. 2013) (internal quotes and citations omitted). This view is echoed by the majority of circuits. See, Zachary El-Sawaf, Incomplete Justice: Plugging The Hole Left By The Reverse 404(B) Problem, 80 UCINLR 1049, 1056-58 (2012) (surveying reverse-404(b) cases and presenting the majority view in similar terms as Johnson).

The rationale for the majority view is that the prohibition against propensity evidence in a criminal trial is primarily designed to bar evidence of a defendant's other crimes because there is a fear the jury might convict a person who has a propensity to commit crimes without worrying too much about whether the government

has proved his guilt of the crime of which he is currently accused.[8] These courts have determined that when the government, rather than the defendant, invokes Rule 404(b) the policy concern with the poisonous effect on the jury is negligible. Id. The majority concludes that since the jury is not being asked to judge the other-suspect's guilt, the primary evil that may result from admitting bad-acts evidence — i.e. tainting the defendant's character and securing a conviction based on propensity alone — is not present. Thus, the policy behind the rule does not support its application to exclude reverse 404(b) evidence and, instead, a straight-forward balancing analysis applies. Id. at 1058.

In sum, the majority of courts looking at the reverse-404(b) issue have instinctively worked within the framework set forth by the United States Supreme Court for assessing when the right to present a defense trumps the application of an exclusionary evidence rule. Holmes, 547 U.S. at 326. In so doing, they have concluded that FRE 404(b)'s bar against propensity evidence is

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[8] This Court has recognized a similar policy, concluding ER 404(b) is designed "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

disproportionate to the purpose of the rule. Instead, the admissibility of reverse-404(b) evidence is governed by FRE 401 and 403.

By contrast, a minority of federal circuits have held FRE 404(b) applies to all parties regardless of whether the evidence is being offered to support an accused's defense.[9] However, this approach "mechanistically" applies the rule to defeat the defendant's efforts to present a complete defense and thus is in conflict with the Unites States Supreme Court's caution against such a narrowing of constitutional rights. See, Chambers, 410 U.S. at 302. By adopting this minority approach in its published opinion, the Court of Appeals has determined that reverse-404(b) evidence is inadmissible in Washington. In so doing, it failed to give meaningful consideration to the interplay between this rule and an accused person's right to present evidence in his defense.

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[9] This approach is adhered to by the Third, Sixth, and Ninth Circuits. See, United States v. Williams, 458 F.3d 312, 315-17 (3d Cir.2006) (holding FRE 404(b) applies to all regardless of whether evidence is offered by the government or the defendant)*; United States v. Lucas, 357 F.3d 599, 605 (6th Cir.2004) (same). U.S. v. McCourt, 925 F.2d 1229 (9th Cir. 1991) (same).

*This represents a narrowing of the Third Circuit's prior holding which appeared only to call for a relevancy/prejudice balancing. See, Stevens, 935 F.2d 1380.

The Court of Appeals also misread the case law Gray cited. In rejecting Gray's arguments, the Court of Appeals specifically states: "None of the federal cases that [Gray] cites recognizes a criminal right to present third-party propensity evidence to infer how the third party acted. [Gray]'s reliance on federal case law fails." Appendix B at 13. This reading is incorrect. For example, in Montelongo, 420 F.3d at 1171, the Tenth Circuit applied a straight-forward balancing test when it held reverse-404(b) was admissible, despite the fact that its relevance was dependent upon the fact-finder inferring that a third-party had acted in conformity with his prior bad acts.

Montelongo was charged with trafficking marijuana when police found ninety-three kilograms of marijuana in the sleeping compartment of the semi-truck that the defendants were driving. Id. The essence of Montelongo's defense was that the marijuana belonged to the truck owner who had made Montelongo an unknowing transporter of the marijuana. Id. at 1172. Montelongo sought to introduce evidence of an incident which occurred a few months before his arrest and which involved marijuana that was found in the sleeping compartment in a different semi-truck that the truck owner possessed – the inference being that because the truck

owner had previously acted to transport hidden marijuana in the sleeping compartment of one of his trucks, he must have acted in conformity therewith in regards to the current marijuana case. Id. The trial court excluded the evidence under FRE 404(b). Id.

The Tenth Circuit reversed. Id. at 1171. It explained that evidence of a witness' other wrongs, acts, or crimes is admissible "for defensive purposes if it tends, alone, or with other evidence, to negate the defendant's guilt of the crime charged against him." Id. at 1174. The Tenth Circuit noted that "[o]ther circuit courts addressing the issue hold that admissibility of reverse 404(b) evidence depends on a 'straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues.'" Id. (quoting United States v. Stevens, 935 F.2d at 1404–1405). The Tenth Circuit concluded that the evidence of the marijuana previously found in another truck owned by the truck owner was relevant to the defendant's defense that he had no knowledge of the marijuana packed in the truck. Id. at 1174.

The Tenth Circuit then weighed the probative value of the evidence against any prejudice. It concluded that the probative value of the proffered evidence was "not substantially outweighed

by the risk of confusing the jury or the potential for waste of time." Id. at 1175. It noted that there was no danger of the jurors being distracted from the real issues in the case, explaining: "To the contrary, [the reverse-404(b) evidence] would have highlighted the central issue at trial – namely, which man was responsible for the contraband." Id.

The only way the Tenth Circuit could have reached this conclusion was for it to infer from the truck driver's prior bad act that the truck owner acted in conformity in regard to the marijuana at issue in Montelongo's case. Only then could the jury logically conclude from the evidence that the truck driver was responsible for the contraband. Thus, contrary to the Court of Appeals' claim, this is an example of a federal decision cited by Gray where the circuit court permitted the use of propensity evidence to infer how the third party acted as a means of negating a defendant's guilt.

In sum, the Court of Appeals applied a narrow textual analysis of ER 404(b) when it held that this rule applies to exclude reverse-404(b) evidence, regardless of whether it is relevant and not overly prejudicial. This is contrary to the majority view, which concludes ER 404(b)'s restriction against propensity evidence is disproportionate to the purpose it is designed to serve and instead

calls for a straightforward balancing test to determine admissibility when offered by a defendant.

Given the constitutional importance of this legal issue presented, the divergence in persuasive authority, and the broad application of the Court of Appeals decision to the rights of other accused persons, this Court should grant review. RAP 13.4(b)(3), (4).

## II. REVIEW SHOULD BE GRANTED BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH THIS COURT'S PREVIOUS CASES REQUIRING THE COURT TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY.

The Court Of Appeals held Gray was not denied effective assistance of counsel because he was not entitled to a revival instruction in the first place. A defendant demonstrates ineffective assistance of counsel by proving: (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986).

On Appeal, Gray argued it was objectively unreasonable for his counsel to fail to request a revival instruction. He explained the theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the conflict. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Thus, even after acting as the first aggressor, a person may again claim self-defense if the person withdraws from combat. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Gray explained that once defense counsel lost the argument against giving the first aggressor instruction, there was no tactical reason not to request the revival instruction and the failure to do so resulted in prejudice. SBOA at 1-8.

Although the Court of Appeals recognized an attorney's failure to propose a legally adequate jury instruction can constitute ineffective assistance, Appendix A at 14 (citing State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001)), it determined that counsel's performance was not deficient because the evidence did not support a revival instruction. Appendix A at 14. It concluded Gray's actions did not communicate clearly his intention to withdraw from further physical conflict. Id. However, the court did so only

after reviewing the evidence in the light most favorable to the State. Id. at 14-15.

This approach is inconsistent with this Court's decisions establishing that when determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the supporting evidence in the light most favorable to the party that requested the instruction. E.g. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). As explained in Gray's supplemental brief, had the evidence been viewed appropriately, it would have support Gray's position that he received ineffective assistance of counsel when counsel failed to request the revival instruction. SBOA at 5-8.

Because the Court of Appeals applied an approach to reviewing the evidence that is inconsistent with this Court's former decisions, this Court should grant review to remedy the conflict. RAP 13.4(b)(1).

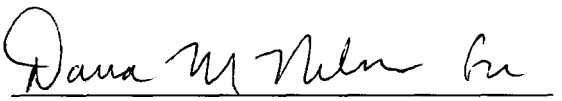
G. CONCLUSION

Because this case raises a significant question of law under the state and federal constitutions, involves an issue of substantial public interest that should be determined by this Court, and presents a conflict between the Court of Appeals and this Court, appellant respectfully asks this Court to grant review. RAP 13.4(b)(1), (3), (4).

Dated this 22nd day of January, 2014.

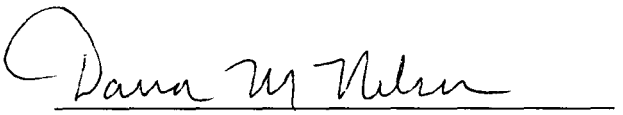
Respectfully submitted

NIELSEN, BROMAN & KOCH



JENNIFER L. DOBSON,

WSBA 30487



DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Petitioner

# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**



| | | |
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| STATE OF WASHINGTON, Respondent, v. RONALD LEE GRAY III, Appellant. | ) | NO. 68814-6-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: December 23, 2013 |

LEACH, C.J. — Ronald Gray III appeals his conviction for attempted murder in the first degree while armed with a deadly weapon. He claims that the trial court violated his constitutional right to present a defense when it excluded evidence of the complaining witness's criminal history. Gray also alleges a Brady[1] violation, fabrication of evidence, prosecutorial misconduct, erroneous exclusion of evidence, newly discovered evidence, ineffective assistance of counsel, and an unfair trial. Because the court properly excluded Gray's proffered witness's criminal history as propensity evidence barred by ER 404(b) and we find no merit in Gray's remaining arguments, we affirm the conviction.

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

FACTS

On August 7, 2011, around 10:30 p.m., Gray and two friends tried to pick fights with others outside of a convenience store. After leaving the store, they walked down the street and attempted to start a fight with three teenagers. One of the teenagers, Jordan Kirk, went into his house and told his father, Matthew Kirk, about the harassment. Matthew Kirk told Gray and his friends to stay away and threatened to shoot them if they stepped into his yard. Gray and his friends yelled and grabbed their waists as if they had guns. Jordan called the police, and Gray and his friends left and continued to walk down the street. Gray, who was wearing blue shorts and a white T-shirt, continued yelling as he walked down the street. Numerous residents in the area called 911.

The group approached Leroy Travers and Coral Williams, who were unloading their car after returning from a rafting trip, and yelled, "I am a Crip" and "fuck you, nigger." Travers told them to leave. They called Williams names and made comments about shooting Travers and Williams. Travers told them that he did not believe they had a gun. He approached Gray, who punched him in the face. Travers punched Gray, threw Gray to the ground, and kicked him with his bare foot. Before turning to walk away, Travers also shoved one of Gray's friends and told him to stay back.

After Gray got up, he reached into his pants and threatened Travers, saying, "That's okay, I know where you live" and telling Travers that he would "kill your whore." Travers, who had no weapons, ran back toward Gray. The men engaged, and Gray stabbed Travers four times.

The State charged Gray by amended information with attempted murder in the first degree and assault in the first degree while armed with a deadly weapon. Gray requested a pretrial ruling on the admissibility of Travers's criminal history to support his self-defense claim. The court excluded this evidence under ER 404(b).

A jury convicted Gray as charged and also returned a special verdict that he was armed with a deadly weapon. The court imposed a standard range sentence.[2] Gray appeals.[3]

ANALYSIS

Witness's Criminal History Evidence

Gray first claims, "[T]he essential question here is whether a traditional ER 404(b) applies when evidence is offered by a defendant in support of his defense, or whether a straightforward relevancy/prejudice inquiry applies." He

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[2] The jury convicted Gray of attempted murder in the first degree and assault in the first degree while armed with a deadly weapon. The court vacated the assault conviction on the basis that conviction for both counts would violate double jeopardy principles.

[3] We include other relevant facts in the discussion below as necessary.

alleges that the trial court "denied his constitutional right to present a defense" when it excluded evidence of Travers's criminal history under ER 404(b). He contends, "Travers' prior aggressive contacts tended to make it more probable that he, not Gray, was the aggressor and that he was someone to be feared." Gray argues that this propensity evidence would support his assertion that he acted in self-defense when he stabbed Travers.

The parties dispute the standard for our review of the court's application of ER 404(b). Gray contends that we should conduct a de novo review because the trial court's ruling denied his constitutional right to present a defense. The State counters that we should review for an abuse of discretion because the proper application of the rules of evidence involves the trial court's exercise of discretion. We need not resolve this question because the court properly excluded the evidence under either standard of review.

We recently considered and rejected Gray's constitutional and ER 404(b) interpretation claims in State v. Donald.[4] We held that ER 404(b) requires exclusion of evidence of any person's other crimes, wrongs, or acts to show that he acted consistent with his character on a particular occasion.[5] We also held

[4] No. 68429-9-I (Wash. Ct. App. Dec. 9, 2013).
[5] Donald, slip op. at 7.

that this requirement does not violate an accused's constitutional right to present a defense.[6]

ER 404(a)(2) allows the admission of evidence of "a pertinent trait of character of the victim offered by an accused." Gray makes no argument that the trial court should have admitted Travers's criminal history under this rule. The criminal history proffered to the trial court would not support such an argument. The trial court did not err when it excluded the proffered evidence of Travers's criminal history.

Brady Violation

In a statement of additional grounds, Gray alleges that the prosecutor improperly withheld evidence. Gray asserts that he requested video surveillance from the convenience store and that "[i]n the E-mail to Mr. Gray[']s trial counsel the prosecutor stated 'there[']s no outside video of the mart' indicating he rendered the surviellance [sic] material worthless." Gray claims, "[I]t was mentioned in the police report that a copy was to be at the police headquarters putting it in the prosecutor[']s constructive possession." Gray argues, "The video if produced would have shown Mr. Gray was not acting aggressive toward anyone at the mart, rebutting the prosecutor[']s giving of the first aggressor instruction."

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[6] Donald, slip op. at 1.

In Brady v. Maryland, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[7] Evidence is material only if there is a reasonable probability that had prosecution disclosed the evidence to the defense, the proceeding would have had a different result.[8] The record does not contain the referenced police report or e-mail or any evidence of a surveillance video from the convenience store. Additionally, nothing in the record indicates that Gray interacted with Travers at or near the store. Because Gray fails to show a reasonable probability that disclosing this evidence, if it exists, would have led to a different result, he fails to show a violation of the Brady rule.

Fabrication of Evidence

Gray further alleges, "The prosecutor also fabricated evidence by stating the defendant had the folding knife at the ready as he taunted 'the victim' in an attempt to get him to re-engage." "In the criminal law context, the deprivation of

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[7] Brady, 373 U.S. at 87.

[8] State v. Thomas, 150 Wn.2d 821, 850, 83 P.3d 970 (2004) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)).

liberty based on fabricated evidence is a violation of a person's constitutional right to due process."[9]

To support his assertions, Gray cites testimony from witnesses Coral Williams and Ryan Leverenz, who said that they observed no weapons. Gray does not dispute that he was involved in an altercation with Travers or that Travers was stabbed. Witness Leo Mattox testified that Gray screamed to Travers that he was going to "kill his whore." Although Gray claims that he had no weapon, Mattox testified, "I seen a knife come out and what appeared to be punching or stabbing, at that point, I couldn't clearly define it that night, you know, until later." Mattox also told the court that he saw Gray throw something that hit a neighbor's shed as Gray ran away from the scene[10] and that Mattox found a knife near the shed the next day. A forensic scientist from the Washington State Patrol Crime Laboratory testified that although she could not clearly determine a single person's DNA (deoxyribonucleic acid) profile on the knife handle, the knife's blade contained Travers's blood. Because evidence elicited at trial supports the prosecutor's argument, we reject Gray's fabrication claim.

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[9] Jones v. State, 170 Wn.2d 338, 350, 242 P.3d 825 (2010).
[10] The court admitted the knife into evidence.

Prosecutorial Misconduct

Gray also alleges prosecutorial misconduct. He claims that the prosecutor improperly expressed his personal opinions to the jury. Additionally, Gray contends that during the State's closing argument, the prosecutor violated the pretrial order precluding the use of the word "victim."

To succeed on a claim of prosecutorial misconduct made for the first time on appeal, an appellant must establish that the prosecutor's behavior was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[11] To prove prosecutorial misconduct, an appellant must show both improper conduct and resulting prejudice.[12] Conduct is not flagrant and ill-intentioned where a curative instruction could have cured any error.[13] "But the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect."[14] "Mere appeals to a jury's passion and prejudice are inappropriate."[15] Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict.[16] The prosecutor has wide latitude in closing

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[11] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).
[12] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).
[13] State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), review denied, 177 Wn.2d 1026 (2013).
[14] Walker, 164 Wn. App. at 737.
[15] State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001).
[16] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

argument to draw reasonable inferences from the evidence and to express such inferences to the jury.[17] We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence, and the jury instructions.[18]

During the State's closing argument, the prosecutor commented, "He turns him and pushes against him onto the ground, and luckily that's when the officer arrived, because I am pretty sure Leroy Travers would not be here today if that officer had not arrived." He also remarked, while referring to Gray, "[P]robably embarrassed him in front of his friends that he got knocked down, and he's going to finish the job. So first aggressor. That alone eliminates self—self-defense." Even if the prosecutor's statements were improper, Gray fails to show a substantial likelihood that they affected the verdict. Viewed in the context of the total argument, the prosecutor recited the law directly from the jury instructions and noted that the State bears the burden of proof. The State also presented a strong case. Mattox testified that Gray attempted to pick fights and was yelling as he walked down the street. He also testified that Travers ran at Gray after Gray threatened Travers and Williams, the two men "grabbed each other equally," and then Gray stabbed Travers. Ryan Leverenz, another witness,

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[17] State v. Magers, 164 Wn.2d 174, 192, 189 P.3d 126 (2008) (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

[18] Emery, 174 Wn.2d at 764 n.14.

testified that he heard Gray yelling threats to "shoot a house up" and threats to Travers's girl friend before the men engaged and Gray stabbed Travers. Travers testified that Gray threatened to shoot him and his girl friend and that Gray punched Travers. Travers also testified that after he punched Gray, threw him on the ground, and kicked him, Gray got up and continued to threaten Travers, Travers ran at Gray, and then Gray stabbed Travers. The contrary evidence primarily concerned the witnesses' credibility. Because Gray fails to demonstrate prejudice, we reject his argument.

Gray also fails to show that he was prejudiced from the prosecutor's use of the word "victim" approximately seven times during closing, despite the court's pretrial order granting Gray's motion in limine to preclude the State from referring to Travers as "the victim."[19] Even if this conduct was improper, Gray does not show a substantial likelihood that these comments affected the verdict.

Exclusion of Evidence

Gray also claims that the court erred when it excluded an out-of-court statement that Travers purportedly made to Mattox. The stabbing occurred on August 7. On October 3, Travers allegedly told Mattox, while referring to Gray, "Yeah, I probably would have done the same thing if I'd been in his circumstances."

[19] The record does not contain this motion in limine.

Gray contends that Travers's statement was not hearsay.[20] In ruling that Mattox could not testify to Travers's statement, the court reasoned,

> This conversation which took place about 30 days after, and within which the individuals are sharing opinions about what could have and should have happened and—and after they've reflected on this and so forth and so on is not relevant to this case, in my opinion. And to the degree that it is, Evidence Rule 403 would keep it out because of the danger of confusion of the issues and so forth, and misleading the jury.
>
> The jury's job is to determine what happened there on the scene. The jury's job is not to determine what post—in a post-reflective state the parties thought was going to go—what the parties thought should have happened. And it is, I think, absolutely inappropriate for the record to reflect this information inasmuch as the jury's job is to determine whether or not the situation was one which required—which called for the action that brings Mr. Gray to the scene right now—brings him to the attention of the Court.
>
> So what two fellows, two friends are talking about later, 30 days later about this is not considered appropriate under 403 or under 401.[21]

We agree with the trial court. Even if we were to conclude that evidence of this statement is not hearsay, Gray fails to show how this statement is relevant or that the danger of misleading the jury when asked to consider Gray's and Travers's conduct at the time of the incident would not substantially outweigh its probative

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[20] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801. Gray alleges that the prosecutor committed misconduct by objecting to this evidence. The State's objection cannot form the basis of a prosecutorial misconduct claim. Although the State objected to the statement's admission on the basis that it was hearsay and irrelevant, the court addressed only the relevancy objection.

[21] The court appears to have erred in stating "30 days." The transcript indicates that the conversation took place almost two months after the stabbing.

value. Thus, the trial court did not abuse its discretion in excluding evidence of this conversation.

Newly Discovered Evidence

Gray also alleges that he "had a friend with him by the name of Tony Goodnow, who was a witness to Mr. Gray[']s self defense act. He was interviewed after the trial by Mr. Gray[']s sentencing counsel Lisa Mulligan." Gray argues, "His statement would shed new light on the first aggressor issue, so it could change the result of the verdict." Because reviewing this claim on direct appeal would require us to consider matters outside the trial record, we decline to address it.[22]

Ineffective Assistance of Counsel

Gray also claims that his trial counsel, Kris Jensen, was ineffective because he "failed to conduct a pre-trial interview" with witness Matthew Kirk and because he did not call James Star to testify. Gray asserts, "Matt is the only witness who says Mr. Gray was aggressive prior to the incident, though he says there was [sic] two people wearing white t-shirts, one was aggressive, I was the only one in a white[]t-shirt."

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[22] See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("Where . . . the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." (citing State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977))).

We review ineffective assistance of counsel claims de novo.[23] To prevail, a defendant must show both deficient performance and resulting prejudice.[24] Counsel's performance is deficient if it fell below an objective standard of reasonableness.[25] Our scrutiny of defense counsel's performance is highly deferential, and we employ a strong presumption of reasonableness.[26] "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"[27] To establish prejudice, a defendant must show a reasonable probability that the trial's outcome would have been different absent counsel's deficient performance.[28] Failure on either prong of the test defeats an ineffective assistance of counsel claim.[29] "'The decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.'"[30]

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[23] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[24] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[25] Stenson, 132 Wn.2d at 705.

[26] Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 335-36.

[27] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

[28] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

[29] Strickland, 466 U.S. at 697.

[30] State v. Statler, 160 Wn. App. 622, 636, 248 P.3d 165 (quoting State v. Kolesnik, 146 Wn. App. 790, 812, 192 P.3d 937 (2008)), review denied, 172 Wn.2d 1002 (2011).

The record shows that although Jensen did not conduct a pretrial interview with Kirk, Jensen effectively cross-examined Kirk at trial. Gray does not show that Jensen's failure to interview Kirk before trial prejudiced him. Jensen's choice not to call Star as a witness was a legitimate trial strategy.

Gray also claims that he received ineffective assistance of counsel because his attorney "failed to request an additional jury instruction explaining that withdrawing from the altercation revives the right to self-defense." Counsel's failure to propose a legally adequate jury instruction can constitute ineffective assistance.[31] Sufficient jury instructions permit each party to argue its theory of the case and properly inform the jury of the applicable law.[32]

An initial aggressor who provoked the altercation cannot successfully invoke the right to self-defense to justify or excuse causing bodily harm to the other person engaged in the conflict "unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action."[33] Here, Gray argues that he withdrew "when he abandoned the fist-fight [sic] and physically retreated 120 feet away from

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[31] State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

[32] State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)).

[33] State v. Craig, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973) (citing State v. Wilson, 26 Wn.2d 468, 174 P.2d 553 (1946)).

Travers." The trial court gave Gray's requested self-defense jury instruction, as well as the State's requested first aggressor instruction.

Witnesses testified that Gray and Travers separated physically after the fistfight. But Williams testified that as Gray walked away, he reached into his pants, "acting like he had something," and made verbal threats to Williams and Travers. Mattox testified that Gray "made a motion that he was pulling a gun out from behind his back" as the men were separating, that "as they were separating, the volumes were getting louder," that Gray made "a statement about killing [Travers's] whore," and that Gray was "being more aggressive as [Travers] was being coached away from the situation." Although Gray's theory of the case was self-defense, Gray's actions did not communicate clearly to Travers his intention to withdraw from further conflict. Thus, under the circumstances here, defense counsel's performance did not fall below an objective standard of reasonableness and did not prejudice Gray's trial.

Fair Trial

Gray also claims,

> While the jury was present, the honorable judge called Mr. Gray up for a sidebar, as Mr. Gray rose up the correctional officer stood up and yelled "what are you doing, sit down."
>
> This led the jury to see that Mr. Gray was in custody which is a violation of his rights, and serves also as a basis for [a] new trial.

"Every criminal defendant is entitled to a fair trial by an impartial jury."[34] The presumption of innocence is a basic component of a fair trial.[35] To give effect to this presumption, the court has a duty to be "alert to any factor that could 'undermine the fairness of the fact-finding process.'"[36]

The record contains no indication that the jury was aware of Gray's custodial status at the time of trial.[37] Although the record does not contain the statement that Gray cites, this incident would demonstrate merely that the court officer was maintaining order in the courtroom. Therefore, we reject this claim.

CONCLUSION

ER 404(b) requires excluding evidence of any person's other crimes, wrongs, or acts to show that he acted consistent with his character on a particular occasion. Gray fails to show that the State withheld material evidence or fabricated evidence. He also fails to establish that the prosecutor's statements

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[34] State v. Gonzalez, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citing U.S. CONST. amends. VI, XIV § 1; WASH. CONST. art. I, §§ 3, 21, 22).

[35] Gonzalez, 129 Wn. App. at 900 (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996)).

[36] Gonzalez, 129 Wn. App. at 900 (quoting Williams, 425 U.S. at 503).

[37] The trial transcript indicates that Gray was concerned that the jurors saw him wearing a jail bracelet. The prosecutor stated, "The Defendant, as your Honor well knows, was wearing a fairly longsleeved jacket with a regular suit. And that bracelet would probably not even be visible from clear across the courtroom to the jurors. And even if they did see that bracelet, it would look something like a small medical bracelet." Defense counsel did not question the jurors about their ability to see the bracelet.

during closing were prejudicial. The court properly excluded Travers's out-of-court statement. We do not consider if Tony Goodnow's testimony is newly discovered evidence. Gray fails to show that defense counsel's conduct was improper or prejudicial, and no evidence shows that the jury was aware of Gray's custodial status at the time of trial. For these reasons, we affirm Gray's conviction.

Leach, C.J.

WE CONCUR:

Verellen, J.

Spearman, J.

# APPENDIX B

--- P.3d ----, 2013 WL 6410340 (Wash.App. Div. 1)
**(Cite as: 2013 WL 6410340 (Wash.App. Div. 1))**

**C**
Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Harold Clayton DONALD, Appellant.

No. **68429-9-I.**
Dec. 9, 2013.

**Background:** Defendant was convicted in the Superior Court, King County, Michael C. Hayden, J., of first-degree assault and attempted robbery. He appealed.

**Holdings:** The Court of Appeals, Leach, C.J., held that:
(1) as a matter of apparent first impression, exclusion of propensity evidence of alternative suspect's criminal history did not violate defendant's constitutional right to present a defense;
(2) as a matter of apparent first impression, exclusion of expert witness testimony on alternative suspect's mental health did not deny defendant right to present defense; and
(3) defendant failed to preserve alleged instructional error for review.

Affirmed.

West Headnotes

**[1] Criminal Law 110 ⇐359**

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k359 k. Incriminating others. Most Cited Cases

Excluding defendant's proffered propensity evidence of alternative suspect's criminal history did not unreasonably restrict his constitutional right to present defense that alternative suspect acted alone in alleged assault and attempted robbery of victim, since prohibition on admissibility of third-party propensity evidence was neither arbitrary nor unreasonably related or disproportionate to ends it was designed to serve; excluding suspect's criminal history did not significantly undermine any fundamental element of defense, criminal history was not relevant to show likelihood that suspect acted alone, and rule preserving admissibility of evidence of earlier misconduct expressly prohibited admission of suspect's criminal history to show propensity. U.S.C.A. Const.Amend. 6; ER 404(b).

**[2] Criminal Law 110 ⇐661**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and scope of proof. Most Cited Cases

State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials; however, criminal defendant's constitutional right to a meaningful opportunity to present a complete defense limits this latitude. U.S.C.A. Const.Amend. 6.

**[3] Criminal Law 110 ⇐661**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and scope of proof. Most Cited Cases

Evidence rule abridges defendant's right to meaningful opportunity to present a complete defense when it infringes upon a weighty interest of defendant and is arbitrary or disproportionate to purpose it was designed to serve. U.S.C.A. Const.Amend. 6.

**[4] Criminal Law 110 ⇐661**

110 Criminal Law
110XX Trial

110XX(C) Reception of Evidence
110k661 k. Necessity and scope of proof. Most Cited Cases

Defendant's right to a meaningful opportunity to present a complete defense is subject to reasonable restrictions and must yield to established rules of procedure and evidence designed to assure both fairness and reliability in ascertainment of guilt and innocence. U.S.C.A. Const.Amend. 6.

**[5] Criminal Law 110 ⚿359**

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k359 k. Incriminating others. Most Cited Cases

Exclusion of expert witness testimony that alternative suspect experienced "command hallucinations" that ordered him to hurt other people did not deny defendant the right to present defense that alternative suspect acted alone in alleged assault and attempted robbery of victim, despite contention that testimony was relevant to show motive; exclusion of evidence did not significantly undermine any fundamental element of defense, since evidence already admitted gave defendant sufficient opportunity to present defense, evidence was not more than minimally relevant, and trial court expressed reasonable concern about confusion of issues and possible delay in presenting testimony. U.S.C.A. Const.Amend. 6; ER 404(b).

**[6] Criminal Law 110 ⚿1038.1(5)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(5) k. Evidence and witnesses. Most Cited Cases

Defendant failed to preserve argument for appeal that jury should not have been instructed that it had a "duty" to convict if elements of crime were proved beyond reasonable doubt, since defendant failed to object to instruction below and did not demonstrate prejudice. RAP 2.5.

Dana M. Nelson, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Prosecuting Atty King County, Erin Hairopoulos Becker, King County Prosecutors Office, Seattle, WA, for Respondent.

LEACH, C.J.

***1** ¶ 1 As a matter of apparent first impression, we consider whether the exclusion of evidence of any person's other crimes, wrongs, or acts to show that he acted consistent with his character on a particular occasion, as required by ER 404(b), violates an accused's constitutional right to present a defense. Because ER 404(b) is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject the constitutional challenge to it.

¶ 2 Harold Donald appeals his convictions for first degree assault and attempted robbery. At trial, Donald argued that an accomplice, Lorenzo Leon, acting alone, committed the crimes. Donald contends that the trial court violated his constitutional right to present a defense by refusing to admit his proffered evidence of Leon's criminal history and mental health to support this defense. For the first time on appeal, Donald also alleges an instructional error. Because the court did not abuse its discretion by excluding Donald's proffered propensity evidence or evidence of Leon's mental illness and because he did not preserve the alleged instructional error for review, we affirm.

FACTS

¶ 3 Harold Donald and Lorenzo Leon assaulted Gordon McWhirter one night as McWhirter stepped outside his apartment to smoke a cigarette. A

neighbor called 911. When police responded, they found McWhirter lying in the grass, naked and bloody. His injuries included a lacerated spleen, several fractured ribs and facial bones, a fractured toe, and a serious head wound. Police followed a blood trail back to McWhirter's vehicle, where they discovered that someone had broken into the vehicle and ripped out the ignition.

¶ 4 DNA (deoxyribonucleic acid) and fingerprint evidence connected both Donald and Leon to the attack. Donald denied knowing Leon and denied being in the area on the night of the attack. However, several of Donald's family and friends reported seeing the two men together on that day, and Donald's mother told police that Donald gave her a bathrobe matching the description of the one McWhirter had worn the night of the attack.

¶ 5 Leon pleaded guilty to one count of attempted robbery in the first degree. Although he agreed to testify against Donald, neither party offered his testimony at trial. The State tried Donald on charges of assault in the first degree, attempted robbery in the first degree, and possession of a stolen vehicle. Donald presented an alternate suspect defense, arguing that Leon alone committed the crimes. The court refused to allow Donald to present evidence of Leon's criminal history and limited the mental health history he sought to present to support this defense. Specifically, the court refused to allow evidence of Leon's prior convictions for violent crimes. It admitted some mental health evidence showing that Leon faked his mental illness but excluded evidence that Leon experienced "command hallucinations," in which a voice ordered him to hurt or kill people.

***2** ¶ 6 A jury convicted Donald of assault and attempted robbery. The court sentenced him to an exceptional sentence of 397 months, based partly on a rapid recidivism aggravator. Donald appeals.

STANDARD OF REVIEW

¶ 7 The parties dispute the proper standard for review. Donald asserts that this court should review the evidentiary issues de novo because the court's challenged rulings denied Donald his constitutional right to present a defense. The State counters that we should apply an abuse of discretion standard because the proper application of the rules of evidence involves the trial court's exercise of discretion. We do not resolve this dispute because the court did not err under either standard.

DISCUSSION

¶ 8 Donald contends that the court erred by excluding evidence relevant to his "other suspect" defense. Specifically, Donald offered—and the trial court rejected—evidence of Leon's extensive criminal history of violent crimes. He asserts the jury could have concluded from Leon's propensity to commit violent crimes that he acted alone when he assaulted McWhirter. Donald acknowledges that ER 404(b) bans this pure propensity evidence but argues that this ban impermissibly impairs his Sixth Amendment right to present a defense. We disagree.

¶ 9 We begin our analysis with some general observations about character evidence. Character evidence might be considered relevant on four theories: (1) as circumstantial evidence that a person acted on a particular occasion consistently with his character, often called propensity evidence; (2) to prove an essential element of a crime, claim, or defense; (3) to show the effect that information about one person had on another person's state of mind; and (4) other purposes, such as identity or lack of accident.[FN1] Application of the rules for character evidence depends in part upon the identity of the person the evidence relates to and his or her role in the lawsuit.

¶ 10 We next review the applicable Washington Rules of Evidence. ER 402 makes all relevant evidence admissible, unless a constitutional requirement, statute, rule, or regulation applicable in Washington State courts limits its admission. ER 401 defines "relevant

evidence" as evidence having a tendency to make the existence of any fact consequential to the resolution of a lawsuit more or less probable than it would be without the evidence. ER 404 and ER 405 address the admissibility of character evidence for substantive purposes. ER 404 controls the admissibility of character evidence, and ER 405 controls the method of proving character when evidence of character is admissible. ER 608 and ER 609 address the admissibility of character evidence to impeach a witness. Here, we need to consider only the rules for character evidence offered for substantive purposes.

¶ 11 ER 404 provides,

**RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

***3 (a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.** 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.

The plain language of ER 404(a) prohibits the use of character evidence to show circumstantially that a person acted on a particular occasion consistently with his character, with two exceptions that apply only in criminal cases. ER 404(a)(1) and (2) address character evidence of the defendant and the victim. Neither exception applies in this case. ER 404(a)(3) addresses character evidence relating to a witness by reference to ER 607, 608, and 609. Those three rules authorize only the admission of character evidence, in limited circumstances, to attack or support a witness's credibility. Thus, consistent with the general rule,[FN2] Washington courts reject the use of evidence of a witness's character to show that the witness acted consistently with that character on a particular occasion.

¶ 12 ER 404(b) addresses a specialized application of ER 404(a)'s general rule excluding circumstantial use of character evidence. ER 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Consistent with ER 404(a)'s general rule, ER 404(b) excludes a specific category of evidence, any person's other crimes, wrongs, or acts, to prove that person's character to provide circumstantial evidence that he acted consistently with that character on a particular occasion. The second sentence of ER 404(b) preserves the admissibility of this evidence of earlier misconduct to prove other matters, including those described in the rule.

¶ 13 Thus, ER 404(b) expressly prohibits admission of Leon's criminal history to prove his character for the purpose of proving that Leon acted consistently with that history the day he assaulted McWhirter. Furthermore, if ER 404(b) does not apply, the general rule found in ER 404(a)'s first sentence prohibits the admission of any evidence of Leon's character for this purpose.

***4** ¶ 14 Donald first argues that his constitutional right to present a defense and the policy behind ER 404(b) should cause us to construe the plain language of ER 404(b) prohibiting propensity evidence inapplicable when a defendant offers this evidence to support his defense.[FN3] Instead, the court should adopt a "straightforward relevance/prejudice analysis" to determine the admissibility of propensity evidence offered by a criminal defendant to prove a third party's conduct.[FN4] He contends that a majority of federal circuit courts have adopted this approach. Because ER 404(b) is substantially the same as Fed.R.Evid. 404(b) and no Washington case resolves the issue, Donald suggests that we should follow them. We disagree with his reading of his cited cases and find the approach adopted by the Ninth Circuit Court of Appeals persuasive.

¶ 15 In *United States v. McCourt,*[FN5] Kevin McCourt attempted to defend against charges of tax fraud with evidence of an alternate suspect's criminal history to show that someone else filed the fraudulent returns. The trial court sustained the government's Fed.R.Evid. 404(b) objection. [FN6] On appeal, McCourt argued that Rule 404(b) excluded only prior bad acts of the accused.[FN7] The Ninth Circuit disagreed, holding "that Rule 404(b) applies to 'other crimes, wrongs, or acts' of third parties." [FN8] The court explained,

> As a whole, the rules on character evidence use explicit language in defining to whom they refer. Rule 404(a) ... provides that evidence of " *a person's* " character is not admissible for the purpose of proving action in conformity therewith except for pertinent character traits of an " *accused,* " a " *victim,* " or a " *witness.* " It therefore appears that Congress knew how to delineate subsets of "persons" when it wanted to, and that it intended "a person" and "an accused" to have different meanings when the Rules speak of one rather than the other. Because Rule 404(b) plainly proscribes other crimes evidence of "a person," it cannot reasonably be construed as extending only to "an accused." [[[FN9]

¶ 16 The court further explained that its interpretation of Rule 404(b) "is consistent with the scheme" of the rules on character evidence, which "specifically set out what character and misconduct evidence is admissible, and who may introduce it." [FN10] The court observed, "None of these rules permits evidence of prior bad acts when the sole purpose is to show propensity toward criminal conduct. The Rules therefore provide no basis for [the defendant's] proffered use of propensity evidence of a third party." [FN11]

¶ 17 The Sixth Circuit adopted a similar interpretation of rule 404(b) in *United States v. Lucas,*[FN12] where it also addressed the issue of applying a relevance/prejudice balancing test:

> There is ... some merit in considering the admissibility of such 404(b) evidence as depending on a straightforward balancing of the evidence's probative value under Rule 401 against Rule 403's countervailing considerations of "prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ... However, in assessing the probative value of such evidence we must also recall that the Advisory Committee Notes following Rule 401 explain that rules such as Rule 404 and those that follow it are meant to prohibit certain types of evidence that are otherwise clearly "relevant evidence," but that nevertheless create more prejudice and confusion than is justified by their probative value. In other words, we affirm that prior bad acts are generally not considered proof of *any*

person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity.

***5** ¶ 18 The Third Circuit also has adopted a similar approach. In *United States v. Williams,* [FN13] it explained its earlier holding in *United States v. Stevens,*[FN14] in which the court applied a relevance/prejudice balancing test. In *Williams,* the court emphasized that the evidence in *Stevens* was admissible for a proper rule 404(b) purpose—to show identity.[FN15] The Third Circuit stated, "This Court has never held that Rule 404(b)'s prohibition against propensity evidence is inapplicable where the evidence is offered by the defendant." [FN16] In *Williams,* the court held,

> [W]e do not begin to balance the evidence's probative value under Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions. That the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered is evident from Rule 404(b)'s plain language.[FN17]

¶ 19 Donald argues that the Ninth Circuit wrongly decided *McCourt* and adopted a minority position among federal courts. Although Donald cites numerous federal cases to support his argument, none of them recognizes a constitutional right to admit propensity evidence. In *United States v. Krezdorn,*[FN18] the Fifth Circuit acknowledged, "Arguably, [evidence of extraneous offenses allegedly committed by a person other than the defendant] is not the kind of evidence to which Rule 404(b) applies." But the court concluded that it "need not decide, however, whether Rule 404(b) applies to this situation" because the evidence, which showed a common plan, was admissible "whether or not Rule 404(b) applies." [FN19]

¶ 20 The Second Circuit, in *United States v. Aboumoussallem,*[FN20] affirmed the exclusion of coconspirators' prior bad acts evidence under Fed.R.Evid. 403 but noted that the evidence could be admissible under rule 404(b) to prove a common plan or scheme. The court did recognize that "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." [FN21] But it made this statement in the context of examining evidence admissible under Fed.R.Evid. 404(b). It did not recognize any right of a defendant to the admission of propensity evidence contrary to 404(b)'s prohibition.

¶ 21 The First Circuit, in *United States v. Gonzalez–Sanchez,*[FN22] suggested, in dicta, that rule 404(b) "does not exclude evidence of prior crimes of persons other than the defendant" but affirmed the trial court's admission of the challenged evidence as relevant to the defendant's lack of knowledge. Donald also cites *Glados, Inc. v. Reliance Insurance Co.,* [FN23] in which the Eleventh Circuit applied the balancing test and admitted the proffered evidence to show motive and plan. More recently, the Seventh [FN24] and Tenth [FN25] Circuits relied on *Stevens* in balancing the evidence's probative value against the risk of prejudice, but these cases all involved evidence offered for one of the "other purposes" listed in ER 404(b).[FN26] None applies the "straightforward," pure balancing test that Donald advances.

***6** ¶ 22 None of the federal cases that Donald cites recognizes a criminal defendant's right to present third party propensity evidence to infer how the third party acted. Donald's reliance on federal case law fails.

[1] ¶ 23 Donald next argues that excluding his proffered propensity evidence unreasonably restricted his constitutional right to present a defense. He relies primarily upon four cases to support this argument, *Washington v. Texas,*[FN27] *State v. Hudlow,*[FN28] *State v. Gallegos,*[FN29] and *State v. Hedge.*[FN30] Because ER 404's prohibition on the admissibility of third party propensity evidence is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject Donald's constitutional

challenge.

[2][3][4] ¶ 24 State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. [FN31] However, a criminal defendant's constitutional right to "a meaningful opportunity to present a complete defense" limits this latitude. [FN32] An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve.[FN33] But the defendant's right to present a defense also has limits. The defendant's right is subject to reasonable restrictions [FN34] and must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." [FN35]

¶ 25 A brief review of five pertinent Supreme Court cases illustrates the application of these principles. *Washington v. Texas* involved a Texas law that barred a person charged as a participant in a crime from testifying on behalf of another alleged participant unless the witness had been acquitted. [FN36] The Court held that the law violated the Sixth Amendment because it arbitrarily excluded whole categories of defense witnesses from testifying, based upon a presumption they were unworthy of belief.[FN37] The Court characterized the law as absurd. It noted that the law left a witness free to testify when he has a great incentive to perjury but barred his testimony in situations where he has a lesser motive to lie.[FN38]

¶ 26 *Chambers v. Mississippi*[FN39] involved a Mississippi law prohibiting a party from impeaching its own witness and a state hearsay rule that did not include an exception for statements against penal interest. Chambers, charged with murder, unsuccessfully sought to treat as an adverse witness a person who repudiated an earlier sworn confession to the murder. These rules operated to exclude Chambers's cross-examination of the recanting witness and to exclude three witnesses who would have discredited the repudiation and demonstrated the witness's complicity.[FN40] The Court held that the application of the rules violated Chambers's due process rights but emphasized that its decision did not establish any new principle of constitutional law and that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." [FN41] The Court noted that Mississippi had not attempted to defend or explain the underlying rationale for its "voucher rule." [FN42]

*7 ¶ 27 In *Crane v. Kentucky*,[FN43] the trial court prevented Crane from presenting evidence about the environment in which the police secured his confession because the court earlier had found the confession to be voluntary. Crane sought to introduce this evidence to cast doubt on his confession's credibility and validity.[FN44] The Supreme Court held that excluding this evidence denied Crane his fundamental constitutional right to a fair opportunity to present a defense.[FN45] The Court noted that neither the Kentucky Supreme Court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." [FN46] Finally, the Court cautioned, "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." [FN47]

¶ 28 *Rock v. Arkansas*[FN48] involved an Arkansas law that excluded all hypnotically refreshed testimony. As applied, this law prevented Rock, accused of a killing to which she was the only eyewitness, from testifying about certain relevant facts, some of which suggested the killing was accidental. The Court held that a per se rule excluding all posthypnosis testimony infringed impermissibly upon Rock's fundamental constitutional right to testify on her own behalf. [FN49] The Court stated that Arkansas could not

exclude all criminal defendants' posthypnosis testimony in the absence of clear evidence repudiating the validity of all posthypnosis recollections.[FN50]

¶ 29 The last case, *United States v. Scheffer,* [FN51] involved a rule that made polygraph evidence inadmissible in court-martial proceedings. Scheffer, an Air Force airman, unsuccessfully sought to introduce polygraph test results to support his claim that he did not knowingly use drugs. Scheffer claimed that the exclusionary rule unconstitutionally abridged his constitutional right to present a defense.[FN52] The Court rejected this claim, holding the exclusion of all polygraph evidence "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." [FN53]

¶ 30 The *Scheffer* Court began its analysis by noting that a defendant's right to present relevant evidence is subject to reasonable restrictions. [FN54] "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules." [FN55] The Court stated that the challenged rule served legitimate interests in the criminal process. These interests include ensuring the reliability of evidence introduced at trial, preserving the fact finder's role in determining credibility, and avoiding litigation collateral to the primary purpose of the trial.[FN56]

***8** ¶ 31 The *Scheffer* Court distinguished *Rock, Washington,* and *Chambers* because "[t]he exclusions of evidence ... declared unconstitutional in those cases significantly undermined fundamental elements of the defendant's defense." [FN57] In *Washington,* the Court noted, " '[T]he State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed.' " [FN58] In *Rock,* the Court concluded, "[T]he rule [barring hypnotically refreshed recollection] deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts" and also infringed upon the "particularly significant" interest of the defendant "in testifying in her own defense." [FN59] The Court described *Chambers* as confined to the specific " 'facts and circumstances' presented in that case." [FN60]

¶ 32 In contrast, *Scheffer* declared that the rule excluding polygraph evidence "does not implicate any significant interest of the accused." [FN61] At the court-martial, "the court members heard all the relevant details of the charged offense from the perspective of the accused." [FN62] Excluding polygraph evidence did not keep the defendant "from introducing any factual evidence" but prevented him only "from introducing expert opinion testimony to bolster his own credibility." [FN63]

¶ 33 Although not addressed in *Scheffer,* the exclusion of evidence in *Crane* also significantly undermined a fundamental element of Crane's defense. It denied Crane the opportunity to show why he confessed to a crime that he claimed he did not commit.

¶ 34 We find *Scheffer* most similar to this case. Excluding Leon's criminal history did not significantly undermine any fundamental element of Donald's defense. It did not exclude any witness with knowledge of any fact of the alleged crimes or any part of that witness's testimony. It did not exclude any testimony from Donald. He still could present all of the facts relevant to Leon's involvement in the assault upon McWhirter. ER 404(b) prevented him only from presenting propensity evidence the common law generally excludes because it is distracting, time-consuming, and likely to influence a fact finder far beyond its legitimate probative value.[FN64] Exclusion of propensity evidence furthers two goals that *Scheffer* recognized as reasonable. It ensures the reliability of evidence introduced at trial and avoids litigation collateral to the primary purpose of the trial. As

with polygraph evidence in *Scheffer,* the per se exclusion of propensity evidence to prove how a person acted on a particular occasion is not disproportionate to the ends it is designed to serve.

¶ 35 Although not dispositive, we note that ER 404(b) reflects the general rule.[FN65] This strongly suggests that the Washington Supreme Court did not act arbitrarily when it adopted the rule. It also suggests that the rule is not disproportionate to the ends it is designed to serve.

***9** ¶ 36 Additionally, the evidence of Leon's criminal history that Donald proffered does not appear to be relevant. Donald offered this evidence to prove that Leon acted alone in the assault upon McWhirter. At oral argument, counsel agreed that the criminal history evidence offered by Donald described Leon's earlier criminal convictions but did not indicate if he committed these crimes alone or with others. Evidence of Leon's participation in other crimes without information about the number of participants in them does not make the claim that Leon acted alone more or less likely. Therefore, it is not relevant to this claim.

¶ 37 The state cases cited by Donald do not dictate a different result. In *State v. Hudlow,* our Supreme Court affirmed the trial court's application of our State's rape shield statute [FN66] to exclude evidence of a rape victim's prior sexual behavior. [FN67] The Court identified two separate rights granted by the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. [FN68] It recognized that these rights had limits and adopted a rule requiring that any limitation on a defendant's right to present relevant evidence be justified by a compelling state interest. [FN69] The Court concluded that the State had a compelling interest in preventing prejudice to the truth-finding process and encouraging victims to report and prosecute sex crimes to justify exclusion of minimally relevant evidence.[FN70] In dicta, the Court stated that no state interest can be compelling enough to justify exclusion of "evidence of high probative value." [FN71] Because Donald fails to show that propensity evidence is more than minimally relevant, the *Hudlow* dicta provides no support for his constitutional challenge.

¶ 38 *State v. Gallegos*[FN72] involves a straightforward application of *Hudlow* in a rape case. Similarly, it provides no support for Donald's position.

¶ 39 In *State v. Hedge,* Hedge unsuccessfully proffered evidence that a convicted drug offender had driven the vehicle Hedge was driving within 24 hours of Hedge's arrest and, on previous occasions, had left drugs and money in the vehicle.[FN73] The court adopted the construction of ER 404(b) urged by Donald, which we have rejected.[FN74] As an alternative basis for its decision, the court, without any analysis of the United States Supreme Court cases discussed above, held that the exclusion of Hedge's proffered evidence violated his Sixth Amendment right to present a defense.[FN75] We do not find this case persuasive.

[5] ¶ 40 Next, Donald contends that the court denied his right to present a defense when it excluded testimony that Leon experienced "command hallucinations" that ordered him to hurt other people. This evidence, Donald argues, was relevant to show Leon had a motive to act alone. We hold that the court here did not err by excluding this evidence.

***10** ¶ 41 Donald's expert witness testified that Leon was malingering—faking a mental illness to escape punishment. The court admitted several jail phone calls between Leon and his mother discussing his plan to fake a mental illness. Donald wanted to argue, in the alternative, that Leon was either malingering or was actually mentally ill, but that either alternative showed that he assaulted McWhirter on his own. The court refused to admit expert witness testimony about Leon's "command hallucinations," fearing that it would lead to a

minicompetency trial and create unnecessary confusion among the jurors.

¶ 42 We assume that evidence of Leon's mental illness meets the general ER 401 relevance standard; however, the court expressed a reasonable concern about the confusion of issues and possible delay. Further, the evidence already admitted gave Donald sufficient opportunity to present his alternate suspect defense. The parties dispute if the court properly balanced the relevance of the evidence with its prejudicial, confusing, or delaying effects. However, under the authorities discussed previously, excluding evidence for these reasons does not impermissibly impair Donald's right to present a defense because it did not significantly undermine any fundamental element of Donald's defense. Donald fails to show that the trial court abused its discretion in determining the evidence to be confusing, unfairly prejudicial, or likely to produce unreasonable delay. He also fails to show that the evidence was more than minimally relevant.

[6] ¶ 43 Finally, Donald alleges that the court erred by instructing the jury, "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." Because the common law grants the jury the right to acquit even in the face of proof beyond a reasonable doubt, Donald claims that the jury should not have been told it had a "duty" to convict. Donald failed to object to this instruction below and does not demonstrate prejudice. Thus, under RAP 2.5, he failed to preserve the error for appeal. We decline to consider his request that we reverse our decision in *State v. Meggyesy.*[FN76]

CONCLUSION

¶ 44 Because ER 404(b) is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject Donald's constitutional challenge to it. We reject his proposed construction of ER 404(b), which would exclude its application to evidence offered by a defendant. Further, the court did not abuse its discretion by excluding evidence of an alternative suspect's mental health history and criminal history, and Donald failed to preserve his alleged instructional error for review. Therefore, we affirm.

WE CONCUR: VERELLEN, and COX, JJ.

FN1. 3 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 14:4 (7th ed.1998).

FN2. 3 FISHMAN, § 14:1.

FN3. Donald's briefing does not address expressly the general prohibition contained in ER 404(a), but we assume that he intends his argument to apply to that rule as well.

FN4. Donald, and a number of cases, label this evidence "reverse 404(b) evidence." We do not find this relabeling of propensity evidence helpful to our analysis. Therefore, we do not adopt it.

FN5. 925 F.2d 1229, 1230, 1233 (9th Cir.1991).

FN6. *McCourt,* 925 F.2d at 1233.

FN7. *McCourt,* 925 F.2d at 1230.

FN8. *McCourt,* 925 F.2d at 1230.

FN9. *McCourt,* 925 F.2d at 1231–32 (citations omitted).

FN10. *McCourt,* 925 F.2d at 1232; see Fed.R.Evid. 404, 607, 608, 609.

FN11. *McCourt,* 925 F.2d at 1232–33.

FN12. 357 F.3d 599, 605 (6th Cir.2004).

FN13. 458 F.3d 312 (3d Cir.2006).

FN14. 935 F.2d 1380 (3d Cir.1991).

FN15. *Williams,* 458 F.3d at 317.

FN16. *Williams,* 458 F.3d at 317.

FN17. *Williams,* 458 F.3d at 317.

FN18. 639 F.2d 1327, 1332 (5th Cir.1981).

FN19. *Krezdorn,* 639 F.2d at 1333. More recently, in *United States v. Reed,* 715 F.2d 870, 872 (5th Cir.1983), the State charged the defendants with conspiring to commit extortion against a man named Wolfe after Wolfe allegedly raped Burton. The defendants sought to introduce evidence of Wolfe's prior arrests for rape to impeach his assertion that Burton consented to have sex with him. The Fifth Circuit affirmed the district court's decision to exclude the evidence, in part on rule 404(b) grounds, reasoning, "Because the defendants' purpose in attempting to introduce such evidence was precisely what is forbidden under this rule." *Reed,* 715 F.2d at 876.

FN20. 726 F.2d 906, 911–13 (2d Cir.1984) .

FN21. *Aboumoussallem,* 726 F.2d at 911.

FN22. 825 F.2d 572, 583 (1st Cir.1987).

FN23. 888 F.2d 1309, 1311 (11th Cir.1987); *see also United States v. Cohen,* 888 F.2d 770, 776 (11th Cir.1989) (recognizing that rule 404(b) "is one of inclusion" that allows admitting evidence of other crimes, wrongs, or acts "unless it tends to prove only criminal propensity").

FN24. *United States v. Seals,* 419 F.3d 600, 606–07 (7th Cir.2005) (ultimately excluding proffered modus operandi evidence as irrelevant).

FN25. *United States v. Montelongo,* 420 F.3d 1169, 1174 (10th Cir.2005) (admitting the proffered evidence as relevant to the defendants' defense of lack of knowledge).

FN26. *See also United States v. Alayeto,* 628 F.3d 917, 921 (7th Cir.2010) ("While admission of propensity evidence is generally prohibited, Rule 404(b) allows the introduction of an individual's other acts for a variety of other purposes." (citing *United States v. Murray,* 474 F.3d 938, 939 (7th Cir.2007) (Although "[c]oncern with the poisonous effect on the jury of propensity evidence is minimal" when a defendant attempts to employ reverse 404(b) evidence, "unless the other crime and the present crime are sufficiently alike to make it likely that the same person committed both crimes, so that if the defendant did not commit the other crime he probably did not commit this one, the evidence will flunk."))). *Murray,* 474 F.3d at 939.

FN27. 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

FN28. 99 Wash.2d 1, 659 P.2d 514 (1983).

FN29. 65 Wash.App. 230, 828 P.2d 37 (1992).

FN30. 297 Conn. 621, 1 A.3d 1051 (2010).

FN31. *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

FN32. *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

FN33. *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

FN34. *Scheffer,* 523 U.S. at 308, 118 S.Ct. 1261.

FN35. *State v. Finch,* 137 Wash.2d 792, 825, 975 P.2d 967 (1999) (citing *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ).

FN36. *Washington,* 388 U.S. at 16–17, 87 S.Ct. 1920.

FN37. *Washington,* 388 U.S. at 22–23, 87 S.Ct. 1920.

FN38. *Washington,* 388 U.S. at 22–23, 87 S.Ct. 1920.

FN39. 410 U.S. 284, 291–93, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

FN40. *Chambers,* 410 U.S. at 291–94, 93 S.Ct. 1038.

FN41. *Chambers,* 410 U.S. at 302–03, 93 S.Ct. 1038.

FN42. *Chambers,* 410 U.S. at 297, 93 S.Ct. 1038.

FN43. 476 U.S. 683, 685–86, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

FN44. *Crane,* 476 U.S. at 686, 106 S.Ct. 2142.

FN45. *Crane,* 476 U.S. at 687, 106 S.Ct. 2142.

FN46. *Crane,* 476 U.S. at 691, 106 S.Ct. 2142.

FN47. *Crane,* 476 U.S. at 690, 106 S.Ct. 2142.

FN48. 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

FN49. *Rock,* 483 U.S. at 62, 107 S.Ct. 2704.

FN50. *Rock,* 483 U.S. at 61, 107 S.Ct. 2704.

FN51. 523 U.S. 303, 305, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

FN52. *Scheffer,* 523 U.S. at 305, 118 S.Ct. 1261.

FN53. *Scheffer,* 523 U.S. at 312, 118 S.Ct. 1261.

FN54. *Scheffer,* 523 U.S. at 308, 118 S.Ct. 1261.

FN55. *Scheffer,* 523 U.S. at 309, 118 S.Ct. 1261.

FN56. *Scheffer,* 523 U.S. at 309, 118 S.Ct. 1261.

FN57. *Scheffer,* 523 U.S. at 315, 118 S.Ct. 1261.

FN58. *Scheffer,* 523 U.S. at 316, 118 S.Ct. 1261 (second alteration in original) (quoting *Washington,* 388 U.S. at 23, 87 S.Ct. 1920).

FN59. *Scheffer,* 523 U.S. at 315, 118 S.Ct. 1261.

FN60. *Scheffer,* 523 U.S. at 316, 118 S.Ct. 1261 (quoting *Chambers,* 410 U.S. at 303, 93 S.Ct. 1038).

FN61. *Scheffer,* 523 U.S. at 316–17, 118 S.Ct. 1261.

FN62. *Scheffer,* 523 U.S. at 317, 118 S.Ct. 1261.

FN63. *Scheffer,* 523 U.S. at 317, 118 S.Ct. 1261.

FN64. 3 FISHMAN, § 14:1.

FN65. 3 FISHMAN, § 14:1.

FN66. Former RCW 9.79.150 (1975), *recodified as* RCW 9A.44.020.

FN67. *Hudlow,* 99 Wash.2d at 19, 659 P.2d 514.

FN68. *Hudlow,* 99 Wash.2d at 14–15, 659 P.2d 514.

FN69. *Hudlow,* 99 Wash.2d at 15–16, 659 P.2d 514.

FN70. *Hudlow,* 99 Wash.2d at 16, 659 P.2d 514.

FN71. *Hudlow,* 99 Wash.2d at 16, 659 P.2d 514.

FN72. *Gallegos,* 65 Wash.App. at 236–37, 828 P.2d 37.

FN73. *Hedge,* 297 Conn. at 629.

FN74. *Hedge,* 297 Conn. at 649–52.

FN75. *Hedge,* 297 Conn. at 652–53.

FN76. 90 Wash.App. 693, 958 P.2d 319 (1998).

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## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>RONALD GRAY,<br><br>Petitioner. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | SUPREME COURT NO. _____<br>COA NO. 68814-6-I |

**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 22ND DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD GRAY
DOC NO. 345750
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

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

X Patrick Mayovsky