COA No.45173-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BARON DELL ASHLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable David Gregerson

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

WASHINGTON CASES

A. ASSIGNMENTS OF ERROR

1. In Baron Ashley's trial on a charge of unlawful imprisonment, the trial court erred in admitting ER 404(b) evidence.

2. The trial court erred in calculating Mr. Ashley's offender score.

3. The trial court erred in ordering Mr. Ashley to pay Legal Financial Obligations (LFO's).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in admitting ER 404(b) evidence where the evidence was dubious as to whether the prior acts occurred, where the alleged acts were not relevant to an essential element of the crime, and where the acts were very prejudicial?

2. Did the trial court err in calculating Mr. Ashley's offender score where it included a 1999 conviction for attempted assault in the second degree on the ground it is a "violent" offense, but the SRA provides that only inchoate offenses of Class A are violent offenses?

3. Did the trial court err in ordering Mr. Ashley to pay Legal Financial Obligations where it required him to establish inability to

pay, and/or failed to find Mr. Ashley had an ability to pay, and/or erroneously found that he did have the ability to pay?

C. STATEMENT OF THE CASE

1. Trial. Baron Ashley was charged by an amended information with Unlawful Imprisonment pursuant to RCW 9A.40.040(1), along with an allegation that the crime was one of domestic violence pursuant to RCW 10.99.020. CP 50. Vancouver Police Department officers, who were investigating earlier offenses allegedly involving Mr. Ashley and his sister Marquetta Jackson, arrived at her residence, where Mr. Ashley was staying. Officers knocked repeatedly, but received no response at the door. CP 2-3. When they announced that they had obtained the key from the building manager, and were going to employ a police dog, one Makayla Gamble, Mr. Ashley's ex-girlfriend, met the officers downstairs. When questioned about why no one had come to the door, Gamble claimed that Mr. Ashley had intimidated her into staying quietly in the upstairs bathroom, so that police would think no one was home and would leave. Ms. Gamble was not arrested for obstructing and later, at trial, she denied that her story was an effort to avoid her from being arrested. CP 2-3; RP 1A at 143-45, 160-62.

At trial, one of the officers, Sergeant Andy Hamlin, denied that the police had threatened Ms. Gamble that she was at risk of being arrested for obstructing. RP 1A at 161-62.

Ms. Gamble claimed to the jury that she and Mr. Ashley were inside the two-story apartment when they heard police cars arrive. RP 1B at 191-92. Mr. Ashley told Makayla that her children were being too loud and told them to go upstairs, which they did. RP 1B at 193. Then, Ms. Gamble claimed, she felt intimidated and Mr. Ashley told her to stay in the bathroom, occasionally shutting the door when she tried to open it. RP 1B at 194-95. She testified that she stated twice that she wanted to leave the bathroom. RP 1B at 195.

Based on a pre-trial ER 404(b) hearing, Ms. Gamble was also permitted to testify that Mr. Ashley had abused her physically in the past, and because of this, she felt that the mere way he looked at her that day, meant she would be harmed if she did not stay in the bathroom. RP 1B at 194-99. She also admitted, however, that Mr. Ashley in fact had never threatened her to make her stay in the bathroom. RP 1B at 202.

Ms. Gamble also admitted that when the police were talking to her outside the apartment, she thought they were angry at her for

not opening the door, and she was worried that she would be arrested for obstructing their arrest effort. RP 1B at 209-11. Detective Hamlin was questioning her and asking, "Why are you trying to save him?" RP 1B at 217. It was then that she told the officers her account of being prevented from leaving the bathroom. RP 1B at 214-15.

Ms. Gamble also claimed at trial that she was "only" allowed to leave the upstairs bathroom when the police entered the apartment. RP 1B at 199-200. However, C. Ashley, the 7-year old daughter of Mr. Ashley and Ms. Gamble, stated that she and her mother were standing around downstairs when the police came in the door. RP 1A at 181-82.

2. Verdict and sentencing. The jury found Mr. Ashley guilty. CP 74-75. At sentencing, he was ordered to serve 33 months incarceration based on an offender score of 7. CP 91.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING ER 404(B) EVIDENCE

a. Pre-trial ER 404(b) hearing. Prior to trial, the State sought to introduce evidence of Mr. Ashley striking Ms. Gamble in the past, stating that it was offered in order to show that she was kept in the bathroom without her consent. RP 1A at 84-96. The

trial court ruled that there was a history of abuse of Ms. Gamble which included a black eye and a ruptured eardrum, which was proved by a preponderance. The Court indicated that the prior act evidence went to the question whether the restraint was without Ms. Gamble's consent, and held it was not prejudicially inadmissible. RP 1A at 97-98.

b. Character and propensity evidence is inadmissible and was improperly admitted in this case. Under ER 404(b) evidence may not be admitted "to prove the character of the accused in order to show that he acted in conformity therewith." When the decision whether to admit prior bad acts is a close one, "the scale must tip in favor of the defendant and the exclusion of the evidence." State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1996); State v. Thang, 145 Wn. 2d 630, 642, 41 P.3d 1159, 1165 (2002) (citing Smith); State v. Nelson, 131 Wn. App. 108, 115, 125 P.3d 1008, 1012 (2006). If the evidence is admitted, a limiting instruction must be given to the jury. State v. Foxhoven, 161 Wn. 2d 168, 175, 163 P.3d 786, 790 (2007).

Washington courts use a four part test to determine if ER 404(b) evidence is admissible:

> We have held that when the State seeks admission of evidence under ER 404(b), that the defendant has

> committed bad acts that constitute crimes other than the acts charged, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

State v. Kilgore, 147 Wn. 2d 288, 292, 53 P.3d 974, 976 (2002).

The evidence proffered by the State in this case did not satisfy this inquiry. Ms. Gamble had no police or medical documentation of the incidents and admitted that she had not called the police except for one of the incidents, which she did not pursue, rendering it untenable in Mr. Ashley's view to conclude that these incidents occurred. RP 1A at 71-72, 76-77; see RP 1A at 90-92.

Further, as Mr. Ashley argued ER 404(b) evidence can only be admitted if it goes to an element of the crime. RP 1A at 88. In addition, this sort of prior act evidence is appropriate in cases where the alleged victim recants, to show why she might do so out of fear, which was not the circumstance here. RP 1A at 89-91; State v. Magers, 164 Wn. 2d 174, 189 P.3d 126 (2008), cf. State v. Baker, 162 Wn. App. 468, 475, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011).

Finally, the alleged incidents had occurred during the parties' dating relationship, in the year 2000, but the most recent incident was in 2008. The incidents were too remote to be probative, in contrast to their prejudicial propensity effect on the jury and the risk that the defendant would be convicted for a series of claimed physical abuses in the past. RP 1A at 71-83; see State v. Bowen, 48 Wn. App. 187, 195-96, 738 P.2d 316 (1987). As Mr. Ashley argued below, he contends on appeal that all four criteria for admitting ER 404(b) evidence were not satisfied. RP 1A at 90-91

2. THE SENTENCING COURT MISCALCULATED MR. ASHLEY'S OFFENDER SCORE.

a. Scoring. The trial court calculated Mr. Ashley's offender score as "7" based on arguments by the State which included advocacy for inclusion of a 1999 juvenile attempted assault in the second degree. CP 93, 101-02. The score of 7 resulted in a standard range of 33 to 43 months, based on which the trial court ordered Mr. Ashley to serve 33 months. RP 1B at 314; CP 91.

b. The defendant may challenge his offender score calculation on appeal. A defendant cannot waive a challenge to an offender score calculation that contravenes the offender scoring rules of the SRA as a matter of law. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

c. <u>The inclusion of Mr. Ashley's 1999 juvenile disposition for Attempted Assault in the Second Degree was erroneous</u>. Mr. Ashley argues that the trial court erred in including the 1999 juvenile disposition for Attempted Assault in the Second Degree. RP 1B at 304; CP 93, 101-02.

RCW 9.94A.525 subsection (21), which is applicable to general nonviolent[1] offenses where domestic violence has been plead and proved, provides for certain scoring multipliers for prior domestic violence crimes (not applicable to the 1999 juvenile attempted assault), but otherwise requires that prior offenses be scored pursuant to subsections (7) through (20) of the section, as applicable.

All the specified subsections involve current offenses inapplicable by title to the present case except subsection (7), which applies to present convictions for nonviolent offenses, including unlawful imprisonment (RCW 9.94A.030(33) and (54), <u>supra</u>). The subsection provides that prior juvenile convictions for nonviolent felonies count as ½ point.

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[1] Unlawful imprisonment is a nonviolent offense. Under RCW 9.94A.030(33), a nonviolent offense is an offense which is not a violent offense. Under RCW 9.94A.030(54), "violent offense" means any completed or attempted class A felony, or a solicitation or conspiracy to commit a class A felony, in addition to certain enumerated other offenses which list does not include unlawful imprisonment. RCW 9.94A.030(54). Unlawful imprisonment is a class C felony. RCW 9A.40.040(2); RCW 9A.20.021(1)(c).

> (7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

RCW 9.94A.525 subsection (7). Mr. Ashley's 1999 juvenile conviction for attempted second degree assault is a nonviolent offense because it is not a violent offense. RCW 9.94A.030(33) and (54), supra. Subsection (54) includes, within the list of violent offenses, certain crimes that are "attempted" or otherwise inchoate, but only if they are class A felonies, which second degree assault is not. RCW 9.94A.030(54)(a)(i) and (ii); see RCW 9A.36.021(2) (second degree assault is a class B felony); RCW 9A.28.020(3)(c) ("An attempt to commit a crime is a: . . . (c) Class C felony when the crime attempted is a class B felony.").

Therefore, the 1999 crime counts for only ½ point. Because offender scores totaling a number of points and ½ are rounded down, RCW 9.94A.525 (preamble), Mr. Ashley's offender score was one point too high under this error.

Notably, it is true that two statutes in RCW 9.94A.525, which establish a broad general rule, indicate that prior convictions for

attempted and other inchoate crimes should be treated as the completed crime for purposes of offender scoring:

> (4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.
>
> * * *
>
> (6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

RCW 9.94A.525(4) and (6). However, Mr. Ashley's 1999 juvenile conviction for attempted second degree assault is specifically not a violent offense, as a result of .525 subsection (7) that relies on the SRA's careful categorization of attempted crimes as being harmful enough to be deemed "violent" when the crime is any Class A felony, but limits all other classes to their completed form. RCW 9.94A.030(33) and (54), supra. Subsection (7) of the scoring statute governs, because of its specificity and because, accordingly, it is subsequent in the statute to subsections (4) and (6). State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010) (Legislature intended that rules for calculating offender scores in .525 are "to be applied in the order in which they appear").

Furthermore, applying subsections (4) or (6) to the 1999 attempt would ignore subsection (7) and its reliance on subsection (54)'s categorization scheme in its entirely, and would therefore be untenable. In construing subsection (7), the Court's primary objective is to carry out the intent of the Legislature. City of Seattle v. Shepherd, 93 Wn.2d 861, 866, 613 P.2d 1158 (1980). The Washington Courts specifically do not read the SRA in a manner that would frustrate the Legislature's intent. In re Pierce, 173 Wn.2d 372, 387, 268 P.3d 907 (2011).

Statutes are also read to give effect to all language used, rendering no portion meaningless or superfluous. City of Seattle v. State, 136 Wn.2d 693, 698, 965 P.2d 619 (1998). And importantly, "[a] statute cannot be construed so that an entire provision is meaningless, unless necessary to save the statute or act from constitutional infirmity, or to reconcile conflicting statutes." (Emphasis added.) Childers v. Childers, 89 Wn.2d 592, 596-97, 575 P.2d 201 (1978).

The definition at .030(54) expressly limits the category of offenses that are violent offenses, when they are only attempted, to class A felonies. RCW 9.94A.030(54)(a)(i) and (ii). Subsection (7) of .525 expressly provides for weighted scoring of violent and

nonviolent offenses, referencing that definition. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) (legislative definitions are controlling). Thus, including Mr. Ashley's 1999 offense on the basis of earlier subsections (4) and (6) would therefore not only contravene the Supreme Court's reading of .525, doing so would require this Court to render the entire definitional provision of subsection (54) meaningless. This would be contrary to the Legislature's weighted scoring of violent and nonviolent offenses, and its considered categorization of certain crimes, and only certain *attempted* crimes, as "violent."

Importantly, where there is a seeming conflict in statutes, they must be reconciled and effect given to each if this can be achieved with no distortion of the language used. State v. Edwards, 53 Wn. App. 907, 771 P.2d 755, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Under similar reasoning as above, application of RCW 9.94A.525(4) and (6) to Mr. Ashley's offender scoring would completely defeat the intent of the Legislature in enacting RCW 9.94A.030(54), because the plain language of (54) indicates specific inclusion of attempts when the felony is class A, and thus specific exclusion of attempts to commit

felonies of other classes. In sharp contrast, applying the plain language of subsection .030(54) in no way renders meaningless the broad rule of .525(4) and (6) that treats current and prior attempt convictions as completed crimes for general scoring purposes.

Subsection 54 applies and Mr. Ashley's offender score was 1 point too high. He must be resentenced.

3. THE SENTENCING COURT ERRED IN ORDERING MR. ASHLEY TO PAY LEGAL FINANCIAL OBLIGATIONS.

a. <u>Legal Financial Obligations imposed</u>. At sentencing, defense counsel argued that Mr. Ashley was unable to pay Legal Financial Obligations including the fees, fines and costs, not simply based on the order of indigency for purposes of appeal, but because he had four children, had been incarcerated since his arrest in May of 2013, and currently still owed Legal Financial Obligations from a 2006 case, a 2008 case, and owed other amounts that were the subject of support orders or obligations imposed in district court matters, in amounts totaling approximately 643 dollars. RP 1B at 319-20.

In response, the court stated that Mr. Ashley might later need a showing of inability to work and "future inability to pay" but

stated that "[t]hat showing has not been made at this point." RP 1B at 321. The court therefore imposed costs and fees in the judgment and sentence of several thousand dollars. CP 91-100; RP 1B at 318-20.

b. The trial court erred in requiring Mr. Ashley to prove *inability* to pay, and/or in 'deferring' any finding regarding ability to pay, and/or in finding he had an ability to pay based on no evidence, and reversal of the LFO assessment is required. The allowance and recovery of costs is entirely statutory. State v. Nolan, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs unless it finds that the defendant "is or will be able to pay them." The sentencing court must make that determination, taking into consideration the

financial resources of the defendant and the burden imposed by ordering payment of court costs. RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3)

Here, the trial court erred in either requiring Mr. Ashley to prove *inability* to pay, and/or in 'deferring' any finding regarding ability to pay. The court itself must find an ability to pay. If a sentencing court orders LFOs, it must make an adequate record for the Court of Appeals to conclude it had a sufficient "factual basis" to do so, and some evidence is required. State v. Bertrand, 165 Wn. App. 393, 404 and n. 13, 267 P.3d 511 (2011); State v. Baldwin, 63 Wn. App. 303, 311-12, 818 P.2d 1116, 837 P.2d 646 (1991), review denied, 175 Wn.2d 1014 (2012). Further, if the trial court is deemed by this Court to have "made" a finding of ability to pay, that finding was clearly erroneous. Bertrand, 165 Wn. App. at 403-04. The only evidence on the issue was proffered by the defense, and demonstrated an inability to pay.

Finally, with regard to imposing recoupment for attorney's fees, certain similar factors must be considered or imposition of

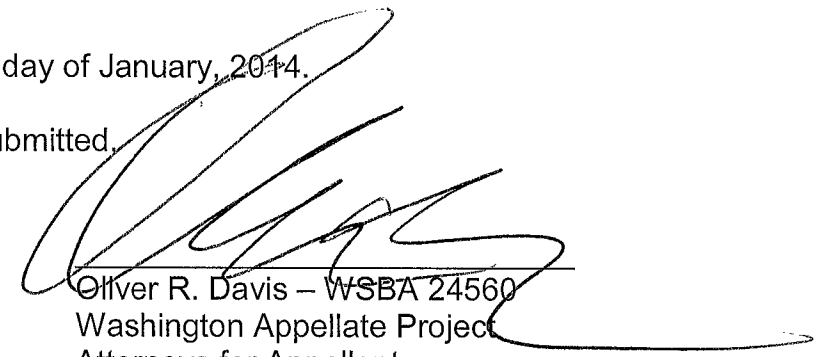
recoupment violates equal protection, including whether defendant "is or will be able to pay." State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1977) (citing Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)); U.S. Const. amend. 14. Here, the court required proof of inability to pay, failed to find ability to pay, and the court's finding of ability to pay, if any, was in error. The portion of Mr. Ashley's judgment and sentence ordering payment of Legal Financial Obligations should be vacated.

E. CONCLUSION

Mr. Ashley asks that this Court reverse his judgment and sentence.

Dated this 31 day of January, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45173-5-II
v.	)	
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	)	
Appellant.	)	

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