71813-4

No. 71813-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD HURN,

Appellant.

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

BRIEF OF APPELLANT

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3. The court erred in failing to suppress the fruits of interrogation which occurred after Mr. Hurn invoked his right to counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of another person's conduct is not, by itself, logically relevant to assess the credibility of a witness at trial. That is especially so where the witness has not placed her credibility at issue by contradicting or recanting earlier statements. ER 404(b) does not permit admission of other acts evidence in that circumstance. Did the court err in admitting evidence of Mr. Hurn's past acts ostensibly as relevant to other witnesses' credibility.

2. Evidence of a person's other acts is not logically relevant unless it tends to make a fact of consequence more or less likely and does so free of its propensity value. Did the court err where the court admitted substantial amounts of other acts evidence under the guise of proving facts which were not relevant to any charged offense and

where the other-acts evidence only established those facts as propensity evidence?

3. A motion to sever should be granted where necessary to ensure a defendant a fair trial. Mr. Hurn moved to sever a charge of communicating with a minor for immoral purposes from other charges noting the inherent prejudice of that single sexual offense on the remaining charges as well as the array of other acts evidence the permitted the State to offer as relevant to that single charge. Did the court err in denying Mr. Hurn's motion to sever?

4. Where a person invokes their right to have counsel present during custodial interrogation no further interrogation can occur until counsel is provided. Mr. Hurn asserted his right to counsel and refused to waive, nonetheless police again initiated interrogation of him without first providing counsel. Did the trial court err in failing to suppress the fruits of that interrogation?

C. STATEMENT OF THE CASE

Afraid she would undergo heroin withdrawals, Karla Barnhardt had persuaded a friend to drive her to her dealer's home. RP 901-02. Unfortunately Ms. Barnhardt confused a Northwest Seattle address with a Northeast Seattle address. RP 902-03. Upon realizing her

mistake, her friend left her in Northeast Seattle in the middle of the night. RP 903.

Still intent on getting heroin, she called her friend, Mr. Hurn, and asked him for a ride. RP 903. Mr. Hurn, who lived a short distance away from Ms. Barnhardt's then location agreed to come get her. *Id.*

Ms. Barnhardt got into the car Mr. Hurn was driving. Mr. Hurn believed she simply wanted a ride to her father's house a short distance away rather than expecting him to drive her across the city to buy drugs. RP 906. Upon realizing her true intent, Mr. Hurn demanded she either pay for the ride or get out of the car. *Id.* Ms. Barnhardt repeatedly refused. RP 907.

According to Ms. Barnhardt she got out of the car only when Mr. Hurn fired a gun through the car's open sunroof. RP 908. A neighbor heard what he thought to be a gunshot and called police. RP 1065-66.

When an officer arrived she saw Ms. Barnhardt seated on the curb. RP 704. Afraid she would be arrested on outstanding warrants, Mr. Barnhardt identified herself as Destiny Corral. RP 911, 913. She initially denied anything had happened then told the officer Mr. Hurn had fired a gun through the sunroof. RP 912-13. She also told the officer a young women was in the car whom she thought was named

"Bridget." RP 904. The officer found a shell casing in the street. RP 713.

Ms. Barnhardt described the car Mr. Hurn was driving that, and Acura, and also a Jeep Cherokee which he normally drove. R 904, 916. She then directed the officers to Mr. Hurn's apartment a few miles away. RP 726-27. Officers confirmed it was Mr. Hurn's address and also saw the Acura in the complex's parking lot. RP 775-76.

Mr. Hurn was stopped and arrested when he was seen walking a short distance away. RP 772-73. After, Ms. Barnhardt identified Mr. Hurn in a show-up procedure, the officer, still unaware of Ms. Barnhardt's true identity, drove her to the home in Northwest Seattle where she had intended to go all along – the home of her heroin dealer. RP 733-34.

Upon his arrest, Mr. Hurn asked officers to retrieve a piece of paper from his pocket which stated in part that he demand all his right and was not waiving any rights. RP 86-7. Some officers at the scene understood this to mean he did not wish to speak with officers. CP 780, RP 81

During booking officers located a United States Treasury check made out to a person other than Mr. Hurn in Mr. Hurn's wallet. RP 784.

Later that day, a police detective interrogated Mr. Hurn, despite his prior invocation of his rights. RP 162. Following that interrogation, officers obtained a search warrant for Mr. Hurn's apartment and the Acura in the parking lot.

In his apartment, police recovered two guns. RP 839-42. One was subsequently determined to have fired the casing located in the street, and was it also discovered the gun was reported stolen along with a Jeep in which it had been stored. RP 1324-26, RP 1389, 1397. Officers also found several identifications including one bearing Mr. Hurn's photo but in another's name, and two picturing the same woman but bearing different names. RP 834-37.

The officers also learned the Acura had been reported stolen. RP 989-90. In the Acura they found a holster which was later identified as belonging to the owner to the stolen gun and Jeep. RP 957-50.

Police subsequently located Bridget Brown who said she was present with Mr. Hurn when he stole the Acura, the Jeep, and another vehicle. RP 1234, 1238, 1243. Ms. Brown also said she was with him when he stole the check from a mail box. RP 1221. She stated that at some point Mr. Hurn made numerous sexual comments to her. RP 1253-60. However, she stated she was not with Mr. Hurn the night Barnhardt claims he fired the gun from the car. RP 1217.

The State charged Mr. Hurn with second degree assault with a firearm enhancement, unlawful possession of a firearm, possession of a stolen firearm, three counts of possession of a stolen vehicle, three counts of second degree identify theft, having vehicle theft tools, tampering with a witness, intimidating a witness and communicating with a minor for immoral purposes. CP 119-21. A jury convicted Mr. Hurn as charged. CP 290-303.

D. ARGUMENT

1. The trial court erred and deprived Mr. Hurn a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

Prior to trial, and over Mr. Hurn's objections, the court ruled the State could introduce a host of irrelevant and prejudicial evidence of Mr. Hurn's past acts Although Mr. Hurn was not facing any drug charges, the court permitted the State to introduce evidence that Mr. Hurn regularly used drugs. CP 788. Although he was not facing any theft charges, the court allowed testimony that Mr. Hurn regularly stole from mailboxes and stole cars. CP 787. Although no witness ever recanted their allegations against Mr. Hurn or otherwise placed their credibility at issue, the court permitted evidence of prior acts to bolster their credibility. CP 787-88. In short what the court permitted was a trial as much about Mr. Hurn's past as about the current offenses.

a. ER 404 bars admission of other-acts evidence offered to prove character.

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a). 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.

"Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

> ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather 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) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

> To admit evidence of other acts the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

> This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) *(*citing *Saltarelli*, 98 Wn.2d at 362).

In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

b. There was no relevant purpose for the evidence.

i. Evidence that Mr. Hurn "stole cars regularly" and "regularly stole from mailboxes" had no relevance beyond its propensity value and was not admissible.

Over defense objection the court permitted to State to elicit testimony from Ms. Brown that Mr. Hurn regularly stole cars. RP 1230-36. The court also permitted her to testify she and Mr. Hurn stole items from mail boxes on several occasions. RP 1220-21.

The court found this evidence "helps prove [Mr. Hurn's] knowledge and method of how he steals cars." Simply saying someone "regularly steals cars" does not prove how the person does it. Even if it did, Mr. Hurn was not charged with a single count of theft of a motor vehicle. Thus his general knowledge of how to steal cars could not be relevant to any element of any charged offense. Mr. Hurn's general knowledge of how to steal a car does not tend to prove his actual knowledge that the cars he possessed were stolen, unless one assumes that because he steals cars he must have stolen these cars as well and therefore knew them to be stolen. Of course that inference is barred by ER 404(a).

Further, his prior theft of cars cannot possibly be relevant to prove his intent to use another's stolen identity to commit a crime. This is simply inviting the jury to conclude a thief is a thief, precisely what ER 404(a) prohibits.

Similarly, the fact that Mr. Hurn stole from mailboxes in no way establishes that his use of another's identity was done with the intent to commit a crime. Evidence that Mr. Hurn stole a specific piece of mail which he then intended to use to commit a crime might be relevant to second degree identity theft. Too, theft of an unrelated person's mail may constitute a crime in itself, RCW 9A.56.380, but it does not make Mr. Hurn's specific intent in any charged crime more or less likely. Except, that is, as propensity evidence.

The court further found this evidence was relevant to "explain the context of the relationship" between Brown and Mr. Hurn which the court in turn found relevant to a host of offenses from identity theft to tampering with a witness. The relationship between the two is not remotely relevant to any of the possession or identity theft counts. Their relationship does not make it more or less likely that he possessed another's identity with intent to commit a crime. Their relationship does not make it more or less likely that Mr. Hurn knew the car he was driving was stolen. Their relationship had no probative value with

regard to any of those offenses. Nor does it make any element of the remaining charges more or less likely. For instance, his "regular" theft from mailboxes does not make it more or less likely that he intimidated or tampered with a witness.

Finally, the court found the evidence was relevant to Ms. Brown's credibility. Presenting evidence that Mr. Hurn is a car thief does not in any way make Brown's testimony more or less credible – except by permitting the jury to conclude that if Mr. Hurn regularly steals cars Brown must be telling the truth when she says he stole the present cars. That is not a proper purpose under ER 404(b), instead it is the singular purpose barred by ER 404(a).

Brown's initial reluctance to speak to police is readily explained by her complicity in the acts – people who have committed numerous crimes are often hesitant to speak with police. There was nothing she could tell the police regarding Mr. Hurn's actions which would not also ultimately inculpate her. She was a "witness" to those events only because she was at minimum an accomplice. In fact this "evidence" was merely the vehicle the State provided Brown to diminish her own culpability for those offenses, offenses for which she apparently was not charged.

Logical relevance is demonstrated if the identified fact for which the evidence is admitted is "of consequence to the outcome of the action" and tends to make the existence of that identified fact more or less probable. *Saltarelli,* 98 Wn.2d at 362–63. Again, it must establish the fact by some logical theory other than propensity. *Wade*, 98 Wn. App. at 334-35. Thus, other-acts evidence offered to establish credibility must make credibility more or less likely free of its use as propensity evidence. The evidence at issue here did not meet this standard as it relied entirely upon its propensity value.

ii. Evidence of that Mr. Hurn previously hit or threatened Brown was not relevant.

The court allowed Brown to testify that Mr. Hurn had hit and spit on her, had threatened to sell her to "the Mexicans," and had once stood outside her window with a gun. CP 787-88; RP 1212. The court posited this evidence was relevant in to explain why she minimized her criminal involvement when first confronted by police. CP 788. The Court also reasoned that "like in domestic violence cases" this evidence explained "the context of their relationship." *Id*.

As addressed above, Brown's testimony regarding the array of criminal offense for which she was never charged lends nothing to her credibility. In another case, it might be argued that inculpating oneself

lends credibility to one's testimony. However, if the person knows they will not be prosecuted for the offense that relevance disappears.

Additionally, the Supreme Court has recently rejected the notion that prior acts evidence is broadly admissible as evidence of the "context" of a relationship. *Gunderson* held that such evidence, if admissible at all, could be admitted as relevant evidence of the witness's credibility but only where the State first established "why or how the witness's testimony is unreliable." 181 Wn.2d at 925. The Court limited this class of evidence to instances in which the State can establish its "overriding probative value." *Id*. Further, the Court indicated that if such evidence is admitted to explain the "dynamics" of a relationship punctuated by violence, it should be admitted only in conjunction with expert testimony which explains the proper evaluation of the evidence. *Id*. at 925 n.4.

The trial court's conclusion here that the prior-acts evidence was admissible as in domestic violence cases misses the point that such evidence is generally not admissible in those cases. The State did not provide any specific basis to conclude Brown's testimony was unreliable. Additionally, the evidence could not be admitted to prove the "context" of the relationship, as that relationship was not relevant. Further, simply allowing the jury to hear of Mr. Hurn's prior acts

without providing any explanation by way of an expert of how to properly evaluate the evidence with respect to the context of the relationship ignores *Gunderson's* limitation. The evidence was not properly admitted.

iii. Claims that Mr. Hurn "hit on" and said "nasty things" and "inappropriate" things to Karla Barnhardt were not admissible.

The court permitted Ms. Barnhardt to testify that on prior unrelated occasions Mr. Hurn had "hit on her" and made inappropriate sexual comments to her. CP 788. The court also permitted her to testify that he threatened to "sell" her and made threats against her. Again the court found this evidence admissible to explain the "context" of her relationship with Mr. Hurn. CP 788. Further the court found the evidence relevant to the "reasonable fear" element of second degree assault.

For the same reasons discussed above, this evidence was not admissible to explain the "context" or "dynamic" of Ms. Barnhardt's relationship with Mr. Hurn. Moreover, there is no logical relevance between Mr. Hurn's "inappropriate" language or acts and his alleged assaultive conduct.

Use of a defendant's prior acts to prove that another's fear of them is reasonable is not a permissible exception under ER 404. *State*

v. Magers, 164 Wn.2d 174, 194-95, 189 P.3d 126 (2008) (Madsen, J., concurring); *id.* at 195-99 (C. Johnson, J., dissenting). In *Magers*, the defendant was accused of holding a sword to the back of the victim's neck and threatening to cut off her head. *Id.* at 179. The State charged him with second-degree assault, and the jury was instructed that "[a]n assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." *Id.* at 183. The victim recanted before trial, and the State offered evidence of the defendant's prior violent acts towards the victim to impeach the victim's credibility as well as other incidents of fighting involving third persons to show her state of mind.

Four justices agreed with the State's position that evidence of prior incidents was relevant and admissible to impeach a recanting victim's testimony, and to show that her "state of mind" satisfied the "reasonable apprehension" definition of assault. *Magers*, 164 Wn.2d at 181-86 (plurality). Three dissenting justices disagreed with the plurality on both issues. *Id.* at 194-99. The concurrence, agreed with the plurality that acts of violence involving the victim were relevant to her credibility. However, even though the State's theory was that the

defendant committed the "reasonable apprehension" type of assault, the defendant's prior acts of violence were not relevant to prove the alleged victim's state of mind as an element of the crime. *Id.* at 194 (Madsen, J., concurring). The concurring justices affirmed the convictions only because the improper admission of that evidence was harmless. *Id.* But there was no question that the admission of the evidence was error. *Id.* The dissent noted, "We should continue to emphasize the constriction of any exception to ER 404(b). … [I]f there is any doubt as to its admission, the scale should be tipped in favor of the exclusion of evidence." *Id.* at 199 (C. Johnson, J., dissenting).

Gunderson has reaffirmed the limited nature of the exceptions under ER 404(b). In short, except in limited circumstance where the witness's statements are internally contradictory, the evidence is not relevant. *Id.* Beyond that, the resulting prejudice outweighs any probative value. *Id*

Given that the evidence of prior acts was held to be inadmissible in *Magers*, it was certainly inadmissible here. Further, no circumstances existed to put Ms. Barnhardt's credibility at issue beyond that of any other witness. This evidence was not admissible.

iv. Evidence of Mr. Hurn's prior drug use was in no way relevant to the charges.

The court permitted both Ms. Brown and Ms. Barnhardt to testify Mr. Hurn regularly used drugs. Thus, Barnhardt was allowed to testify, over objection, that Mr. Hurn "always" had meth. RP 887-9. Brown, in turn, was permitted to testify Mr. Hurn sold meth. RP 1200, 1206.

The court reasoned evidence of "regular drug-use" was relevant to the motive and intent to commit property crimes. CP 788. There was no evidence that Mr. Hurn ever sold a stolen vehicle or committed property crimes to finance a drug habit. That sort of evidence might have been relevant. This finding by contrast is nothing more than speculation. As, with the bulk of the evidence the court admitted, the conclusion could only be drawn based on propensity – that drug users are thieves. That speculative conclusion is barred by ER 404.

Nor was the evidence "integral" in showing the relationship between them and Mr. Hurn. Those relationships were irrelevant to the charged crimes. Moreover, as is now clear, simply saying "context of the relationship" does not open wide the bar on propensity evidence. Finally, the fact that Mr. Hurn or anyone else used drugs does not remotely add to the credibility of any witness.

c. The error in admitting the other-acts evidence requires reversal.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). This standard asks more than simply whether the remaining evidence is sufficient to sustain the convictions. *Gunderson* recognized in that case "[a]lthough the evidence may be sufficient to find Gunderson guilty, it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." 181 Wn.2d at 926.

A large portion of Brown and Barnhardt's testimony at trial focused on Mr. Hurn's prior acts rather than the current offense. For example, Barnhardt's direct testimony regarding the alleged assault spans about eight transcript pages. RP 902-10. Her testimony regarding what bad person Mr. Hurn was covers about 3 times that. The State's case truly became centered on Mr. Hurn's character. Regardless of whether sufficient evidence would still support the convictions; there is a reasonable probability that without the improper evidence the verdict

would have been different. This Court should reverse Mr. Hurn's convictions and remand for a new and fair trial.

2. The trial court erred in denying Mr. Hurn's motion to sever.

a. Mr. Hurn moved to sever the counts in this case.

Prior to trial Mr. Hurn made a motion to sever the multiple charges in this case. RP 200. After, the court denied the motion, RP 219, Mr. Hurn renewed it on subsequent occasions. RP 994. While Mr. Hurn's motion to sever at trial was broader, seeking to sever the multiple counts into three groups, it focused primarily on the prejudice engendered by including Count 12, communicating with a minor for immoral purposes, in a joint trial on the remaining counts. RP 200-03. Regardless of the correctness of the court's ruling on the broader motion, at a minimum the court's failure to sever the Count 12 was erroneous.

b. A court should sever joined offenses where necessary to preserve a fair trial.

The rules governing severance are based on the fundamental concern that an accused person receives "a fair trial untainted by undue prejudice." *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. V, XIV; Const. Art. I, §§ 3, 22; CrR 4.4(b).

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its discretion by using the wrong legal standard or by failing to exercise discretion. *Id*. "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

> Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result."

Fisons, 122 Wn.2d at 339 (quoting *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

An exercise of the trial court's discretion over whether severance is appropriate rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). In this case, the court refused to sever the misdemeanor charge of communicating with a minor for an immoral purpose from the remaining counts. Although

this crime had no effect on the ultimate punishment Mr. Hurn received, it was the vehicle by which the State introduced a substantial amount of other acts evidence wholly irrelevant to the remaining charge if even marginally relevant to the communication charge. Moreover, the communication charge, with the inherent prejudicial sexual underpinnings, had the very real likelihood of tainting the jury's verdicts on the remaining counts.

c. The court's refusal to sever the charges denied Mr. Hurn a fair trial.

Four criteria guide a court in the assessment of whether to sever counts. (1) the relative strength of the evidence on each count; (2) the clarity of defenses; (3) court instructions to the jury to consider each count separately; and (4) the cross-admissibility of evidence of the remaining charges in separate trials. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

Here the State charged Mr. Hurn with communication with a minor for immoral purposes. This misdemeanor added nothing to Mr. Hurn's sentence – it does not count in his offender score and the resulting sentence was concurrent with another misdemeanor conviction and concurrent to the felony convictions. CP 751, 758, 762. As a sex offense, however, it is particularly prejudicial and there is a "recognized danger" that that prejudice will persist even where the jury

is instructed to consider counts separately. *Sutherby*, 165 Wn.2d at 883-84 (citing *Saltarelli*, 98 Wn.2d at 363; *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

Beyond this inherent prejudice, the communication count served as the vehicle by which the State introduced the other acts evidence discussed previously. It was because of the claimed relevance of his relationship with Brown to the communication count, that the court permitted the state to introduce allegations of Mr. Hurn's inappropriate comments to Brown, drug use with Brown, and involving Brown in other criminal acts. Mr. Hurn does not concede the evidence was relevant to the communication charge. Instead, even assuming the nature of their relationship was relevant to the communication count, it was only barely so. As weak as the logical relevance of that evidence is on the communication count, it is nonexistent on the remaining counts. That evidence could not be properly admitted at trial without the communication count. Thus, the prejudicial effect of joining a sex offense in this case was multiplied by the improper impact of the other acts evidence to which it opened the door.

A joint trial on all counts, denied Mr. Hurn a fair trial. The court erred in denying his motion to sever.

3. The State did not prove Mr. Hurn committed second degree assault.

a. The State must prove each element of the charge beyond reasonable doubt.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin,* 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitle[s] a criminal defendant to 'a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. The State did not prove each of the elements of second degree assault.

RCW 9A.36.021 provides;

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> . . .
> (c) Assaults another with a deadly weapon; or
> . . . .

However, the assault statue does not contain all the elements of the crime. Rather, the Supreme Court has long held that the three common law definitions of assault must also be employed in conjunction with the statutory elements. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Those definitions are:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

Id. But beyond simply defining the term, the Court has made clear "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element" of assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). The Court reiterated its holding a year later saying "[a]s we settled in *Byrd*, specific intent represents an 'essential element' and its omission results in manifest error." *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

Here, there is no evidence that Mr. Hurn committed an actual battery. Further, there is no evidence that he intended and attempted to commit a battery but failed. Thus, the State was required to prove he fired the gun through the open sunroof with the specific intent of causing Ms. Barnhardt imminent fear that she would be injured.

He did to point the gun at her. RP 925. He did not fire the gun in her direction. Instead, by her account he simply pointed the gun through the sunroof and fired it. When asked why she thought he did so, Mr. Barnhardt testified over defense objection, she thought he wanted to "show off." RP 908. That may be evidence that he was upset having been dragged out in the middle of the night because she wanted a ride to her dealer's house. It may have even been evidence of the crime of unlawful discharge of a firearm. But it does not establish he specifically intended her to believe she was in imminent danger.

c. This Court should reverse Mr. Hurn's assault conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove the necessary intent it failed to prove first degree assault and the Court must reverse Mr. Hurn's assault conviction.

4. Mr. Hurn invoked his rights including his right have counsel present during any questioning.

a. Where a person invokes their right to counsel, police may not further interrogate them without first providing counsel.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Article I, §section 9, affords no less protection. *City of Tacoma v. Heater*, 67 Wn.2d 733, 736, 409 P.2d 867 (1966). To protect this right *Miranda v. Arizona*, requires that among other advisements, the defendant must be told he is entitled to the presence and appointment of an attorney prior to the interrogation if he desires. 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If the person indicates a desire for an attorney "in any manner" officers must immediately stop asking questions. *Id*. at 444-45.

Once a person indicates his desire for counsel no questioning may occur without first making counsel available to the defendant. *Edwards v. Arizona*, 451 U.S. 477, 483, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Moreover, a waiver is not established "by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id*.

b. Mr. Hurn invoked his right to have counsel present during any interrogation.

While an invocation of the *Miranda* rights must be unambiguous the person "need not 'speak with the discrimination of an Oxford don.'" *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L.Ed.2d 362, (1994). Instead, the question is whether a reasonable police officer would understand the statement to be an assertion of the right. *Id*. at 459.

The form Mr. Hurn provided arresting officers stated: "He demands all his rights at all time and **does not waive any of his rights** . . . **at any time**." CP 59. (Emphasis in original). It plainly stated he was demanding and not waiving "all of his rights." Because the right to have counsel present during interrogation is one of "all his rights" he was demanding it and not waiving it. A reasonable officer would understand that to mean he was invoking his rights including the right to counsel. Indeed, that is precisely what officers at the scene of the arrest thought Mr. Hurn meant by the form. CP 780, RP 81. Nonetheless the trial concluded the assertion was ambiguous. CP 782.

By the court's logic, the officers on the scene who understood this as an invocation were unreasonable as they took the plain language to mean exactly what it said. "[D]oes not waive any of his rights" is not an ambiguous. *See State v. Grieb*, 52 Wn. App. 573, 574-76, 761 P.2d

970 (1988) (Defendant invoked right to silence and counsel when he stated "he did not want to waive his rights"). This statement does not invite someone to wonder what it means. Only where an officer is purposefully seeking ambiguity could that plain statement be unclear.

Mr. Hurn demanded and did not waive "all his rights." Because that included the right counsel, police could not reinitiated questioning until counsel was provided. Nonetheless that is precisely what police did later that day. The statements made during that interrogation and the fruits of that illegality should have been suppressed. This Court should reverse Mr. Hurn's sentence.

E. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court should reverse Mr. Hurn's conviction.

Respectfully submitted this 31st day of March, 2015.

s/ GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71813-4-I
v.	)	
	)	
CHAD HURN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104 [paoappellateunitmail@kingcounty.gov]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] CHAD HURN 884673 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2015.

X_____

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