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RECORD

62746-5

DEC 04 2009

CLERK OF COURT
APPELLATE

NO. 62746-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER FUALAAU,

Appellant.

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

The Honorable Mary E. Roberts, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE TRIAL COURT ERRED UNDER ER 404(b) WHEN IT PERMITTED EVIDENCE OF FUALAAU'S PRIOR CRIMES	1
2. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW	5
a. <u>Conflict of Interest</u>	5
b. <u>Complete Communication Breakdown</u>	12
B. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Fualaau</u> 142 Wn. App. 1026, 2008 WL 116274 (2008)	3
<u>State v. Perkins</u> 32 Wn.2d 810, 204 P.2d 207 <u>cert. denied</u> , 338 U.S. 862, 70 S. Ct. 97 (1949)	4
<u>State v. Regan</u> 143 Wn. App. 419, 177 P.3d 783 <u>review denied</u> 165 Wn.2d 1012 (2008)	5, 6, 12
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> , 514 U.S. 1129 (1995)	1, 2
<u>State v. Thang</u> 145 Wn.2d 630, 41 P.3d 1159 (2002)	1
<u>FEDERAL CASES</u>	
<u>Cuyler v. Sullivan</u> 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).....	5
<u>Mickens v. Taylor</u> 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).....	5
<u>United States v. Ettinger</u> 344 F.3d 1149 (11th Cir. 2003)	9, 10
<u>Winkler v. Keane</u> 7 F.3d 304 (2nd Cir. 1993)	5

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

People v. Doolin
45 Cal. 4th 390, 198 P.3d 11 (2009) 10

People v. Roldan
35 Cal. 4th 646, 110 P.3d 289
cert. denied, 546 U.S. 986 (2005) 10, 11

State v. Thompson
597 N.W.2d 779 (1999) 8

RULES, STATUTES AND OTHER AUTHORITIES

ER 404 3, 4, 13

GR 14.1 3

U.S. Const. Amend. VI 5, 7, 11

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED UNDER ER 404(b)
WHEN IT PERMITTED EVIDENCE OF FUALAAU'S
PRIOR CRIMES

The State concedes intent was not an issue at Fualaaau's trial. Brief of Respondent, at 17 n.4. Therefore, the trial court erred when it found evidence of Fualaaau's 2002 conduct toward Phadnis relevant to establish his intent in 2007.

As to identity, the State concedes "some differences between Fualaaau's assaults on Phadnis and Hough," but argues these distinctions are insufficient to undermine the trial court's finding of signature crimes. Brief of Respondent, at 23-25. Specifically, the State cites State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995), for the proposition that "[c]rimes need not be identical in every way to meet the standard for 'signature' crimes." Brief of Respondent, at 24. This is true. But the presence of "several dissimilarities between the two crimes," even when there are several shared features, undermines a finding that the two crimes "are so unusual and distinctive to be signature-like." See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002).

In Russell, which involved the sexual assault and murder of three women, neither the defense, the trial court, nor the Supreme Court focused on differences in the three murders. Rather, the defense argued that the *similarities* in the cases were not so unique as to constitute signature crimes. Russell, 125 Wn.2d at 67. In rejecting that argument, the Supreme Court reasoned:

We find that the factors cited by the trial court support the finding that certain evidence in this case was quite unique. Each count involved a victim killed by violent means who was then sexually assaulted and posed, naked, with the aid of props. The murders occurred within a few weeks of one another in a small geographic area. We agree with the trial court and with the expert witnesses that these similarities were not due simply to coincidence. . . .

Russell, 125 Wn.2d at 68. While the State, in its brief in Fualaau's case, now attempts to focus on certain differences in the three murders in Russell, this was not the focus of the parties or the courts in that case.

As discussed in Fualaau's opening brief, there are several important differences between the assault of Phadnis and the assault and kidnapping of Hough, including a five-year period between crimes. See Brief of Appellant, at 21 (discussing six distinctive features). Regarding this five-year gap, the State notes that on February 21, 2003, Fualaau received a 60-month

exceptional sentence for a 2001 crime, suggesting Fualaaau had little opportunity between 2002 and 2007 in which to commit another crime, thereby diminishing the importance of the gap. See Brief of Respondent, at 24 n.5 (citing CP 126-133). But Fualaaau's standard range for the 2001 offense was only 26 to 34 months, and his exceptional sentence was reversed on appeal. CP 127; State v. Fualaaau,¹ 142 Wn. App. 1026, 2008 WL 116274 (2008). The best that can be said on this record is that it is unclear how much time Fualaaau actually served during the five-year period between the two offenses. Whether in custody or out, however, he avoided any conduct similar to that in 2002.

The State also briefly addresses motive as a basis for admitting the evidence under ER 404(b), arguing "Fualaaau was motivated in each instance by the perception that the victim had wronged his family, and that the assaults against both Hough and Phadnis were committed in retaliation for these perceived wrongs." Brief of Respondent, at 25. But if jurors believed Hough, motive

¹ Undersigned counsel is aware of the prohibition against citing unpublished opinions as legal authority. See GR 14.1(a). The opinion in Mr. Fualaaau's earlier appeal is not cited as authority. Rather, it is simply cited to demonstrate his exceptional sentence was reversed. This Court can take judicial notice of its own files. See State v. Perkins, 32 Wn.2d 810, 872, 204 P.2d 207, cert.

was already apparent without evidence of the Phadnis assault. His testimony indicated that Fualaau was upset that his brother had been charged for possessing a firearm Hough provided. See 7RP 16.

The State does not contend that this tenuous motive connection would have been sufficient, absent the court's finding of signature evidence, to allow admission of the prior crimes in light of the substantial resulting prejudice. Rather, the State recognizes that "identity was the primary basis upon which Fualaau's [prior] testimony was admitted[.]" Brief of Respondent, at 25. Thus, admission of the evidence under ER 404(b) rises or falls on its qualifying as "signature crime" evidence, which it does not.

Because there was no proper purpose for admission of the prior crime evidence, and because the prejudicial effect – recognized by the trial court as "extremely high" – far outweighed any probative value, the evidence should not have been admitted and denied Fualaau a fair trial.

denied, 338 U.S. 862, 70 S. Ct. 97 (1949).

2. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW

a. Conflict of Interest

If Marchi had a direct conflict of interest that adversely affected his lawyer's performance, the Sixth Amendment, criminal rules, and rules of professional conduct required Marchi's withdrawal from the case. The State argues that there was only a potential conflict of interest and no adverse impact on Fualaau's trial defense. See Brief of Respondent, at 27-36. The record shows otherwise.

As discussed in the opening brief, an attorney has an actual conflict of interest as soon as "the attorney's and the defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993) (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n.3, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). An actual conflict is "'a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties.'" State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)), review denied 165 Wn.2d 1012 (2008).

Once Fualaau assaulted Marchi in the presence of jurors, their interests diverged. Marchi was now Fualaau's advocate and his victim. And the conflict went well beyond a theoretical division of loyalties. Marchi immediately became a witness against his own client. While it was uncertain if he would be called to the stand to testify against Fualaau in a separate assault prosecution, he most certainly had become a witness against his client because he was required to give law enforcement a report on the attack. 12RP 4.

Whether counsel had a conflict is a legal question this Court reviews de novo. Regan, 143 Wn. App. at 428. Nonetheless, one recurring assertion in the State' brief regarding the trial court's finding on this issue deserves attention. The State repeatedly indicates that the trial court found only a potential conflict. The trial court made no express finding on this point. See CP 60-63. The State cites only to one portion of the court's oral discussion of the issue where it said, "I fully recognize the situation that Mr. Marchi has been placed in by possibly being a witness against his own client in an assault charge, which hasn't, of course yet occurred." See Brief of Respondent, at 27, 34, 36 (citing 13RP 31). Later, however, the court referred to "the apparent conflict," suggesting the court may in fact have recognized the presence of an actual

conflict. 12RP 33.

Ultimately, it appears the trial court was more concerned with the practical, systemic consequences of allowing an attorney to withdraw – that it would reward and encourage assaultive behavior against attorneys – than whether there was an actual or potential conflict. See 12RP 21, 33; CP 62 (in denying motion to withdraw, court finds that “[t]o do otherwise would have the effect of endorsing and encouraging disruptive behavior by the defendant.”). In any event, for the reasons discussed above, including the fact Marchi was required as a victim of the assault to provide a witness statement against Fualaaau, the conflict was real.

Fualaaau also has satisfied the second prerequisite for a Sixth Amendment violation: adverse effect. The State maintains that nothing in the record indicates that Fualaaau’s assault on Marchi affected the argument made on Fualaaau’s behalf to the jury. Brief of Respondent, at 35. This is incorrect.

Marchi expressly indicated that in light of the assault, he was no longer going to call witnesses to establish that Fualaaau was physically incapable of certain acts he allegedly committed against Hough:

One of the defenses in this case was that my client was in a wheelchair and he couldn't do the actions that he did. And that's what my follow-up witnesses were going to say. However, given what occurred in court yesterday, I'm not in a position to argue that anymore.

12RP 17. Ultimately, Marchi chose not to call these witnesses and did not make this argument to jurors in asking them to acquit. 12RP 2; 13RP 43-59. To do so would have been inconsistent with Marchi's report to police regarding what had happened to him as a victim at Fualaau's hands and would have undermined his testimony against Fualaau at any subsequent assault trial.

The three cases cited by the State in support of its argument that Marchi and Fualaau did not have a conflict of interest involve materially different circumstances.

In State v. Thompson, 597 N.W.2d 779, 781 (1999), the defendant, on trial for a drug charge, struck his attorney outside the presence of the jury after the close of evidence. Trial counsel gave no indication whatsoever that he was concerned about his ability to continue, and the parties went directly into closing arguments. Not until appeal did the defendant first allege a conflict of interest. Id. Not surprisingly, the court found no conflict because the success or failure of the defendant's trial on the drug charge had no impact

whatsoever on a potential assault claim between attorney and client. “It was still in [counsel’s] best interests to obtain an acquittal for his client.” *Id.* at 785. Moreover, because the defense had already presented all of its intended witnesses before the assault, there was no adverse impact to the defendant. *Id.*

In contrast, Fualaau was on trial for assault, he assaulted Marchi in front of jurors, Marchi indicated he could not continue to represent Fualaau, any argument that Fualaau was physically incapable of assaultive behavior would undermine Marchi’s claim that Fualaau assaulted him, and Marchi expressly abandoned defense witnesses and a line of defense he previously intended to present on Fualaau’s behalf.

The State’s other two cases also are easily distinguished. In *United States v. Ettinger*, the defendant, on trial for assaulting a correctional officer, assaulted a deputy marshal during a trial recess. 344 F.3d 1149, 1152 (11th Cir. 2003). Jurors did not see the assault and the defendant did not assault his attorney. Counsel nonetheless alleged a conflict of interest because he might be called as a witness regarding any new assault charge and he was now “inhibited” from arguing to jurors about his client’s non-violent temperament. *Id.* The court found only a potential conflict

at that point, but indicated that if during the remainder of trial an actual conflict arose from the event, it would take appropriate action. Counsel did not raise the issue again until after trial, when he learned his client would be prosecuted for the later assault and once again moved to withdraw. *Id.* The Eleventh Circuit Court of Appeals agreed that the perceived conflict during trial was only potential. *Id.* at 1161.

Ettinger is correctly decided on its facts. Unlike Marchi, counsel in that case was not both victim and advocate. Jurors were unaware of the assault. And while counsel expressed concern that he would be inhibited from arguing his client's peaceful nature, that fear apparently did not come to pass because, despite the trial court's indication that counsel could raise the issue again if there were an actual impact, counsel never claimed that his trial strategy or conduct was in fact affected by what he had seen. We know the opposite to be true in Fualaau's case.

The State's third case is People v. Roldan, 35 Cal. 4th 646, 110 P.3d 289, cert. denied, 546 U.S. 986 (2005), overruled on other grounds, People v. Doolin, 45 Cal. 4th 390, 198 P.3d 11 (2009). Counsel alleged a conflict of interest after his client

threatened him, claiming he could no longer exercise his independent judgment in the case. *Id.* at 303, 305-306. Finding no indication in the record that counsel “pulled his punches” or otherwise omitted an argument he would have made to jurors, the Supreme Court of California rejected this claim. *Id.* at 307-309.

Fualaau did far more than just threaten Marchi; he actually assaulted him while jurors watched. Moreover, we know Marchi “pulled his punches” on Fualaau’s defense after the assault. He very clearly omitted witnesses and an argument he would have otherwise made.

While the Roldan court found no conflict of interest or adverse impact, it is apparent the court – like the court in Fualaau’s case – also was loath to adopt any rule that might “reward” violent conduct by replacing one attorney with another or delaying the trial proceedings. Roldan, 110 P.3d at 307-308. But the court did not consider forfeiture of counsel as a remedy. Forfeiture, warranted when a client physically assaults his attorney, avoids any such incentive while permitting counsel to withdraw when necessary under the Sixth Amendment and required by the Rules of Professional Conduct. See Brief of Appellant, at 34-36.

Finally, the State argues that any argument Fualaau was

physically incapable of committing the alleged assault against Hough was “contrary to reality” in light of what Fualaaau did to Phadnis. Brief of Respondent, at 36 and n.6. Factually, the State is speculating that the defense evidence would have shown that Fualaaau’s physical condition remained the same between 2002 and 2007. More importantly, legally, the State’s assessment of Fualaaau’s defense is irrelevant. Fualaaau need not demonstrate prejudice to establish a conflict of interest, meaning that the claim would have succeeded. Rather he need only show a divergence of interests on a material issue and the resulting failure to pursue a strategy. Regan, 143 Wn. App. at 427-428. This test has been met.

b. Complete Communication Breakdown

The State argues that neither Marche nor Fualaaau claimed a complete breakdown in communication. Brief of Respondent, at 4, 37. While Marche never expressly uttered those words, his statements and actions reveal such a breakdown.

Marchi indicated concern for his safety, noted that Fualaaau should have an attorney who was not distracted and could focus on the case, and asked for a recess in an attempt to “reestablish my relationship with my client.” 12RP 36. There would be no need to

reestablish a relationship if one still existed. Notably, when court reconvened the following week, Marchi did not indicate the relationship had been repaired. Rather, he renewed the motion to withdraw, indicating the relationship had not been sufficiently salvaged. 13RP 3.

On this alternative ground, reversal is required.

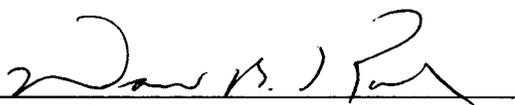
B. CONCLUSION

The trial court erred under ER 404(b) when it permitted evidence of prior crimes and erred when it denied defense counsel's motions to withdraw. Fualaau should receive a new trial.

DATED this 4th day of December, 2009.

Respectfully submitted,

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