

62746-5

62746-5

NO. 62746-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROGER FUALAAU,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANDREA R. VITALICH  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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A. **ISSUES PRESENTED**

1. Evidence is admissible to prove identity under ER 404(b) if the prior crime was committed in the same distinctive way as the charged crime, thus creating a high likelihood that the same person committed both crimes. The trial court's ruling admitting such evidence is reviewed for abuse of discretion. In this case, Fualaau contested his identity as the perpetrator of the charged crimes. Accordingly, the trial court admitted Fualaau's testimony from a murder trial in which Fualaau described committing a prolonged assault against the murder defendant that was remarkably similar in numerous, distinctive ways to the kidnapping and assault Fualaau was charged with committing in this case. Did the trial court properly exercise its discretion in admitting this evidence?

2. A defendant who claims on appeal that his trial attorney had a conflict of interest bears the burden of demonstrating an actual conflict of interest that adversely affected counsel's performance. The trial court's decision denying counsel's motion to withdraw is reviewed for abuse of discretion. State and federal appellate courts have held that a criminal defendant does not create an actual conflict of interest by assaulting or threatening defense counsel. In this case, during the prosecutor's cross

examination of Fualaau's alibi witness, Fualaau intentionally created a disruption by assaulting his attorney. The trial court denied defense counsel's resulting motion to withdraw, finding that there was not an actual conflict of interest. Counsel then continued to provide effective representation through the conclusion of the trial and at sentencing. Did the trial court properly exercise its discretion in denying counsel's motion to withdraw?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Roger Fualaau, with assault in the first degree with a firearm enhancement and two counts of kidnapping in the first degree based on a series of events that took place in February and March 2007 between Fualaau and the victim, John "Jersey" Hough. CP 1-9, 46-48.

Early in the proceedings, Fualaau was evaluated for competency. Although the expert retained by Fualaau concluded that Fualaau was incompetent and suffering from major mental illness, experts at Western State Hospital concluded that Fualaau was malingering. CP 18-36. After a contested competency hearing, the Honorable Jay White found that Fualaau's expert lacked a factual basis for his conclusions, adopted the findings of

the experts at Western State, and found Fualaau competent. CP 37-40. Subsequently, Fualaau's medications were discontinued at his defense attorney's request. RP (9/10/08) 6-7.

Fualaau's jury trial took place in October and November 2008 before the Honorable Mary Roberts. During pretrial motions, the State offered Fualaau's prior testimony from the murder trial of Neelesh Phadnis under ER 404(b) as proof of Fualaau's identity, motive, and intent. In this testimony, Fualaau described a prolonged assault he had committed against Phadnis because Fualaau was convinced that Phadnis had tried to burn down Fualaau's family's home. RP (9/18/08) 7-14; Ex. 23. After hearing argument, the trial court found that Fualaau's prior testimony was admissible because identity was a contested issue, the prior incident with Phadnis bore striking similarities to the crimes committed against Hough, and "the method employed in the commission of both crimes is unique such that proof the defendant committed one of these crimes creates a high probability that he also committed the crimes with which he is charged." CP 64-67; RP (10/29/08) 21-22.

After the State presented its case-in-chief, Fualaau called his nephew, Eric Saunoa, as an alibi witness. RP (11/5/08) 11-15.

During the prosecutor's cross examination, as Saunoa's testimony became increasingly inconsistent, Fualaa'u suddenly blurted out that he needed his "psychiatric medication," and lunged at and grabbed his defense attorney. RP (11/5/08) 23-24; RP (11/6/08) 7-8. After the jury was excused, Fualaa'u's attorney moved for a mistrial and moved to withdraw from the case. RP (11/5/08) 25. Rather than rule on counsel's motions immediately, the Court adjourned the proceedings for the day. RP (11/5/08) 24-28.

The following day, Fualaa'u's attorney reiterated his requests for a mistrial and to withdraw from the case. Counsel's stated reasons for moving to withdraw were the assault itself, the potential that he could be a witness against Fualaa'u if the State were to file charges, and that he was having trouble concentrating on the case in light of Fualaa'u's actions. RP (11/6/08) 3-4, 18. Defense counsel also stated that he could not make an argument he had intended to make to the jury: that Fualaa'u was not physically capable of the acts he was accused of because he was wheelchair-bound. RP (11/6/08) 17. Notably, defense counsel did not argue that there had been a complete breakdown in communication.

After hearing argument from both parties, the trial court denied defense counsel's motions. First, the court noted that there

was no reason to revisit the issue of competency because Fualaaau was claiming to have the same symptoms that the Western State Hospital experts had found to be malingered. RP (11/6/08) 19. And although the court noted that "most, if not all" of the jurors saw the assault, the court found that granting a mistrial would "endorse and encourage disruptive behavior as a way to bring a trial to a halt." RP (11/6/08) 20-21. The court denied the motion to withdraw because defense counsel had not yet been called upon to be a witness against Fualaaau. RP (11/6/08) 31. The court found that Fualaaau's outburst was intentional and "calculated to create a conflict," and the court would not reward such conduct. RP (11/6/08) 33. Lastly, the court found that Fualaaau's experienced defense counsel would be able to continue his representation effectively. RP (11/6/08) 33.

In light of the trial court's ruling, defense counsel requested a recess in order to "realign [his] witnesses" and to reestablish rapport and effective communication with Fualaaau. RP (11/6/08) 33-34, 36-37. The trial court granted defense counsel's request. RP (11/6/08) 37. Before excusing the jurors for the week, the court admonished them not to consider Fualaaau's outburst. RP (11/6/08) 39.

When the proceedings resumed six days later, the parties informed the court that the defense would be resting its case. RP (11/12/08) 2. Although defense counsel renewed his motion for a mistrial and his motion to withdraw for the record, counsel stated no new grounds for these motions. RP (11/12/08) 3. The court then entered its findings and conclusions on both this issue and on the admissibility of Fualaau's testimony under ER 404(b). RP (11/12/08) 3-6; CP 60-67.

The parties then proceeded with closing arguments. RP (11/12/08) 8-66. During defense counsel's closing, counsel highlighted Fualaau's alibi, and vigorously challenged the credibility of the State's witnesses. RP (11/12/08) 43-59.

The jury convicted Fualaau as charged. CP 68-71; RP (11/12/08) 68-72. At sentencing, defense counsel requested an exceptional sentence below the standard range, based primarily on evidence of Fualaau's mental health issues, including his courtroom outburst. CP 104-09; RP (12/12/08) 11-16. During Fualaau's allocution, he thanked his attorney for his representation. RP (12/12/08) 17.

The trial court found that there were not substantial and compelling reasons to grant Fualaau's request for an exceptional

sentence and imposed a sentence at the top of the standard range. CP 110-18; RP (12/12/08) 18-23. Fualaau now appeals. CP 147-49.

## 2. SUBSTANTIVE FACTS

John "Jersey" Hough<sup>1</sup> tried methamphetamine for the first time in 2005 "and just never stopped[.]" RP (11/3/08 a.m.) 5. Among the other methamphetamine users that Hough associated with was Stu Fualaau,<sup>2</sup> the defendant's brother. Hough and Stu used methamphetamine together and became friends. RP (11/3/08 a.m.) 6. Hough would also drive Stu around so that Stu could collect drug debts from other users. RP (11/3/08 a.m.) 6-7. Hough also used methamphetamine with Fualaau, and with Stu's girlfriend, Joanna Palm. RP (11/3/08 a.m.) 8-10.

At some point in late 2006 or early 2007, Stu called Hough and said he needed a gun. Hough gave Stu a Mac-11 fully automatic machine pistol with a 32-round magazine. RP (11/3/08 a.m.) 11-12. After Hough gave Stu the gun, Stu got pulled over

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<sup>1</sup> Hough was known as "Jersey" because he was from New Jersey. RP (11/3/08 a.m.) 4.

<sup>2</sup> To avoid confusion, Stu Fualaau will be referred to as "Stu," and the defendant will be referred to as "Fualaau."

with the gun in a stolen car. As a result, Stu was charged with unlawful possession of a firearm in Pierce County. RP (11/3/08 a.m.) 13.

After Stu was charged, Hough met with Fualaau, Stu, and Palm, and they discussed what they should do. RP (11/3/08 a.m.) 14. Hough agreed to tell the authorities that the gun belonged to him, and that Stu did not know the gun was in the car. Hough was willing to take the fall because Stu was facing a lengthy prison sentence, Hough was essentially homeless, and the Fualaau family told Hough they would take care of him if he said the gun was his. RP (11/3/08 a.m.) 14-15. In addition, Fualaau told Hough he would kill him if he didn't follow through, and displayed a .40 caliber handgun to emphasize this point. RP (11/3/08 a.m.) 16.

Hough tried to make good on his promise. He spoke to Stu's lawyer and told him the gun belonged to him, but nothing happened as a result of this conversation. RP (11/3/08 a.m.) 17-18. Stu had a hearing on February 27, 2007, so Palm drove Hough and Stu to the Pierce Count Courthouse in Tacoma so that Hough could try to convince the court that it was his gun. RP (11/3/08 a.m.) 20. Unbeknownst to them, however, Stu had already been charged in federal court for possession of a machine gun. RP (11/3/08 p.m.)

96. While Palm was parking the car, Hough and Stu walked inside and got on the elevator. When they got off the elevator, a group of U.S. Marshalls placed Stu under arrest for the federal offense. RP (11/3/08 a.m.) 20; RP (11/3/08) 94-97. Stu gave Hough his cell phone and watch before he was taken away by the Marshalls. RP (11/3/08 a.m.) 21.

Hough went out to the car and told Palm what had happened. RP (11/3/08 p.m.) 16. Palm went into the courthouse and confirmed that Stu had been arrested by federal authorities. RP (11/3/08 p.m.) 16. Palm returned to the car and called Fualaau. Fualaau told her to bring Hough to Nathan Yellowrope's house in the Burien area. Fualaau told Palm that "it's okay, Jo, I just want to talk to you guys." RP (11/3/08 p.m.) 18-19.

When Palm and Hough arrived at the house, the garage door was open and several people were inside the garage. RP (11/3/08 a.m.) 23-24. Fualaau was there with his associates, including Yellowrope and a Samoan male known as "House." Fualaau had been drinking. RP (11/3/08 p.m.) RP (11/3/08 p.m.) 20-21.

When Palm and Hough arrived, someone closed the garage door, and someone put a box near Fualaau's wheelchair for Hough

to sit on.<sup>3</sup> RP (11/3/08 a.m.) 25-26. Fualaau then pulled a .25 caliber handgun and asked Hough if he would prefer to be shot in the leg or in the head. RP (11/3/08 a.m.) 26. Fualaau put the gun in Hough's mouth while yelling and cursing at Hough. RP (11/3/08 a.m.) 27. Fualaau then shot the box Hough was sitting on and punched Hough in the face. Hough was crying and "babbling." RP (11/3/08 a.m.) 28. Fualaau then reached over, put the gun against the inside of Hough's thigh, and shot him. RP (11/3/08 a.m.) 29.

After he was shot, Hough fell down on all fours. Fualaau hit him with something, most likely the gun. Hough got back up and sat on the box. Fualaau put the gun to his head and told him he was going to die. Hough pleaded for his life. Then Fualaau made Hough get down on all fours again, and hit him in the back of the head with a metal bar. Fualaau also hit Hough in the face and pistol-whipped him. RP (11/3/08 a.m.) 29-30.

Fualaau forced Hough to strip naked and lie on the floor, face-down. Fualaau then stabbed Hough in the shoulder blade with a small knife. Fualaau invited his associates to kick Hough, but

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<sup>3</sup> Fualaau is a paraplegic because of either a gunshot wound he sustained in 1986 or a surfing accident in 1989. CP 28-29.

only one person did. Then someone handed Fualaau a hand-held blow torch. RP (11/3/08 a.m.) 31. Fualaau burned Hough's back with the torch. RP (11/3/08 a.m.) 32.

At that point, House had apparently seen enough because he picked up Hough and put him on a shelf where Fualaau couldn't reach him. Other people began cleaning up Hough's blood and retrieving the spent bullets. RP (11/3/08 a.m.) 33. House helped Hough get into Palm's car, and Palm drove Hough, House, and Fualaau to Stephanie Marinoff's house in Federal Way. RP (11/3/08 p.m.) 29-31. Hough and House got out of the car and went inside, while Palm drove Fualaau to another location to buy methamphetamine. When Palm and Fualaau returned, it was decided that Hough should go to the hospital. RP (11/3/08 a.m.) 34. House told Hough to tell the authorities that he was attacked by Mexican gang members. RP (11/3/08 a.m.) 35.

Hough was treated for his wounds at Valley Medical Center. RP (11/4/08 p.m.) 4-14. Hough told the police he'd been shot by Mexican gang members in Kent. RP (11/4/08 a.m.) 69-70. After Hough was released from the hospital, he tried to stay out of sight by moving from motel to motel along Pacific Highway South. RP (11/3/08 a.m.) 40; RP (11/4/08 a.m.) 77. Eventually, Kent Police

Officer Tom Riener tracked him down in order to speak with him about what had really happened on February 27, 2007. RP (11/4/08 a.m.) 71.

Officer Riener knew Hough from prior contacts. RP (11/4/08 a.m.) 68-69. Riener confronted Hough with the fact that his report of being attacked by Mexican gang members wasn't true. At that point, Hough admitted he had lied because he was afraid. RP (11/4/08 a.m.) 72. Hough then told Riener what had really happened that day. RP (11/4/08 a.m.) 75. After speaking with Hough, Riener tried to find Fualaa, but his efforts were unsuccessful. RP (11/4/08 a.m.) 78-79.

In the meantime, Joanna Palm had also moved into a motel room on Pacific Highway South. RP (11/3/08 p.m.) 38. Fualaa and his associates located her somehow and moved into her motel room as well. RP (11/3/08 p.m.) 39. Palm was afraid they would hurt her if she reported them to the police. RP (11/3/08 p.m.) 40. Palm noted that Fualaa was becoming increasingly paranoid about the situation with Hough; Fualaa talked about shooting Hough to take care of the problem. RP (11/3/08 p.m.) 43. At one point, Palm overheard a conversation between Fualaa and Layne Keliiliki, during which Keliiliki offered to help. RP (11/3/08 p.m.) 45.

Eventually, Fulaau received a tip that Hough was staying in another motel, so he sent Keliiliki and his associate Henry Fidow to "go get that . . . fucker." RP (11/3/08 p.m.) 47.

On March 17, 2007, Hough was walking on a side street when Keliiliki and Fidow drove up in a black Dodge pickup truck. Fidow jumped out of the truck and grabbed Hough's arm. Fidow said he was from the prosecutor's office and asked if Hough had been shot recently. Hough tried to pretend that he didn't know what Fidow was talking about. RP (11/3/08 a.m.) 46. Eventually, Keliiliki told them to "just get in the fucking truck[.]" Fidow then picked up Hough and threw him in the back seat of the crew cab, and they drove away. RP (11/3/08 a.m.) 47.

During the drive, Keliiliki pulled over in the parking lot of a deserted business park. Keliiliki said, "this is where I do work." RP (11/3/08 a.m.) 49. Hough took this to mean that they were going to beat him to death at this location. However, Fidow stated, "no, we have got to take him to the house," and they started driving again. RP (11/3/08 a.m.) 50.

Keliiliki and Fidow called Fualaau during the drive. They described Hough's tattoos to ensure that they had kidnapped the correct person. In addition, they made Hough identify himself as

"Jersey" so that Fualaau could hear his voice. RP (11/3/08 a.m.) 51-53.

Shortly after that, Keliiliki stopped at a stoplight and Kent Police Officer Matthew Lorette pulled in behind him. Officer Lorette ran Keliiliki's vehicle information and discovered an outstanding felony warrant, so he decided to stop the vehicle. RP (11/4/08 a.m.) 20-21. Officer Lorette activated his lights. Although Keliiliki initially started to pull over, he suddenly accelerated and drove away at high speed. RP (11/4/08 a.m.) 22-23. A ten-mile high-speed pursuit involving numerous police cars ensued. RP (11/4/08 a.m.) 23-30, 37. Eventually, Officer Lorette was able to perform a PIT maneuver, and the Dodge spun out and crashed into a building. RP (11/4/08 a.m.) 31-32.

Keliiliki, Fidow, and Hough were removed from the truck at gunpoint. RP (11/4/08 a.m.) 33. Inside the truck, officers found brass knuckles, pepper spray, a baseball bat, a Leatherman tool, methamphetamine, and a digital scale, as well as assorted license plates, ID cards, and checkbooks. RP (11/4/08 a.m.) 37-51, 55-56, 61-63.

Officer Riener went to the scene and spoke with Hough about what had happened. RP (11/4/08 a.m.) 81-82. Riener also

spoke to Fualaau on a cell phone and told him to turn himself in or "we are going to get you." Fualaau said "fuck you" and hung up. RP (11/4/08 a.m.) 83-84. After taking Hough's statement, Riener arranged for a safe place for Hough to stay. RP (11/4/08 a.m.) 84-87. Riener also obtained some leads from Fidow as to Fualaau's whereabouts, and Fualaau was subsequently arrested. RP (11/4/08 a.m.) 89-90.

As mentioned above, Fualaau's prior testimony in the murder trial of Neelesh Phadnis was admitted under ER 404(b). During this testimony, Fualaau explained that Phadnis was angry because Fualaau had taken Phadnis's gun, a ".9 mm Militech, 23 or 24 rounds in the chamber [sic]." Ex. 23, p. 140-41. Subsequently, someone tried twice to burn down Fualaau's family's home, and Fualaau was convinced it was Phadnis. Ex. 23, p. 144-50. Fualaau did not report Phadnis to the authorities because he "was going to take care of this thing on [his] own." Ex. 23, p. 150. Specifically, Fualaau wanted to "sasa" Phadnis, meaning that he wanted to inflict physical discipline. Ex. 23, p. 155.

One day when Fualaau was at Stephanie Marinoff's house, his nephew told him that Phadnis had arrived. Fualaau then asked his associates to get Phadnis and bring him inside. Ex. 23, p.155-

56. When Phadnis was brought to him, Fualaau said, "You piece of shit, what were you thinking? You wanted to kill me and my family?" Ex. 23, p. 156. Fualaau then hit Phadnis with a metal baton while cursing at him, and punched him in the mouth "8 or maybe 10 times." Ex. 23, p.157-58.

After this had gone on for a while, Fualaau told his associates to take Phadnis to a house in Seattle. Ex. 23, p.160-61. When Fualaau arrived, he was dismayed to discover that his associates had injured Phadnis in Fualaau's absence. Ex. 23, p. 162. Nonetheless, the "sasa" continued. Fualaau told Phadnis to lie on the floor, and Fualaau then hit Phadnis with the flat side of a machete. Ex. 23, p. 163-64. Eventually, Fualaau's father-in-law said, "Son, enough. Give me the machete." The assault stopped at that point. Ex. 23, p. 164. After making Phadnis apologize to his father-in-law and mother-in-law, Fualaau gave Phadnis some clean clothing and put ointment on his wounds. Ex. 23, p. 164-66.

As previously discussed, Fualaau presented an alibi witness, his nephew Eric Saunoa. RP (11/5/08) 11. Saunoa testified that Fualaau was at the family home in Graham all day on February 27, 2007. RP (11/5/08) 13-14.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE UNDER ER 404(b) THAT WAS RELEVANT AND HIGHLY PROBATIVE, PRIMARILY ON THE ISSUE OF IDENTITY.**

Fualaau first argues that the trial court erred in admitting his prior testimony in the Phadnis case under ER 404(b). Specifically, Fualaau argues that his testimony describing the beating of Neelish Phadnis was not relevant to prove identity, motive, or intent in this case, and that the probative value of the evidence was substantially outweighed by its prejudicial effect. Brief of Appellant, at 17-26. This claim should be rejected. Fualaau presented an alibi witness in an effort to establish that he was not the perpetrator of these crimes. As the trial court found, the prior incident that Fualaau described during his testimony in the Phadnis trial bore striking and unique similarities to the current offenses, and thus, this evidence was highly probative of identity. This evidence was also admissible to prove motive, as both incidents stemmed from Fualaau's perception that the victims had wronged his family.<sup>4</sup> And although

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<sup>4</sup> Intent was not a disputed issue in this case, and the trial court's findings and conclusions concern the evidence's admissibility to prove identity. CP 64-67. Therefore, intent will not be discussed further here, as the record is clear that identity was the central reason that the evidence was admitted in this case.

this evidence was certainly prejudicial, the trial court exercised sound discretion in finding that the probative value outweighed the prejudicial effect. The trial court's ruling was proper, and this Court should affirm.

Under ER 404(b), evidence of the defendant's other crimes, wrongs, or acts is admissible if it is relevant to prove identity, motive, preparation, plan, absence of mistake or accident, or for any purpose other than showing the defendant's criminal character or propensity. State v. Russell, 125 Wn.2d 24, 66, 882 P.2d 747 (1994). Before admitting evidence under this rule, the trial court must find by a preponderance of the evidence that the prior acts occurred, identify the purpose for which the evidence is offered, determine its relevancy for this purpose, and weigh its probative value against the prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court's decision to admit evidence under ER 404(b) is reviewed for manifest abuse of discretion. State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). The trial court abuses its discretion only if its decision is made on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, the trial

court's decision will be overturned only if no reasonable judge would have ruled as the trial court did. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In cases where identity is at issue, evidence of other crimes is admissible when the method employed to commit each crime is so distinctive "that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." Russell, 125 Wn.2d at 66-67. When the evidence shows that two or more crimes were committed in the same unique way, "the inference that the same person committed [each crime] is virtually inescapable." State v. Herzog, 73 Wn. App. 34, 48, 867 P.2d 648, rev. denied, 124 Wn.2d 1022 (1994). A concurrence of similar features, coupled with a lack of dissimilarities, weighs in favor of admitting such so-called "signature" evidence. Thang, 154 Wn.2d at 644. And again, "[w]hether the prior offenses are similar enough to the charged crime to warrant admission is left to the discretion of the trial court." State v. Jenkins, 53 Wn. App. 228, 236, 766 P.2d 499, rev. denied, 112 Wn.2d 1016 (1989).

In this case, the trial court followed the proper procedure and admitted Fualaau's prior testimony for proper purposes, primarily on

the issue of identity under the "signature crimes" rule. First, the trial court found by a preponderance of the evidence that the prior acts occurred. RP (10/29/08) 21; CP 66. Indeed, this was not in dispute, given that the evidence in question was Fualaau's own sworn testimony describing the prior acts. Second, the court found that the evidence was relevant to prove identity -- a proper, enumerated purpose under ER 404(b). RP (10/29/08) 21; CP 66.

In determining relevancy on the issue of identity, the trial court found that the similarities between the two incidents "really are quite striking," and noted the concurrence of common, distinctive features between them. RP (10/29/08) 21-22; CP 66. Lastly, while the court recognized that Fualaau's testimony in the Phadnis case would "likely have serious prejudicial impact" due to the violent nature of the prior incident, the court also correctly observed that the prior incident "is no more heinous than the crimes he is currently charged with and the method employed in the commission of both crimes is unique such that proof that the defendant committed one of these crimes creates a high probability that he also committed the crimes with which he is charged." CP 66-67. This ruling was a proper exercise of the trial court's

discretion, and Fualaaau's arguments to the contrary should be rejected.

As the trial court stated, the similarities between the two incidents are indeed striking. For instance, each incident arose from a dispute over a distinctive firearm with a high-capacity magazine: specifically, a "9 mm Militech, 23 or 24 rounds in the chamber" in the Phadnis case, and a 9mm Mac-11 machine pistol with a 32-round magazine in this case. Ex. 23, p. 141; RP (11/3/08 a.m.) 11-12. In addition, Fualaaau was motivated in each instance by the perception that the victim had harmed Fualaaau's family in some way. Fualaaau was convinced that Phadnis had tried to burn down his family's home, and Fualaaau was angry at John Hough because Hough had failed to convince the authorities to charge him with possession of the machine gun instead of Fualaaau's brother Stu. Ex. 23, p. 144-150; RP (11/3/08 a.m.) 16-22.

Furthermore, the assaults themselves were distinctive and remarkably similar. In each case, Fualaaau had other people bring the victim to him. Ex. 23, p. 156; RP (11/3/08 a.m.) 22-23. Fualaaau's associates were present for each assault, and in each case they watched, but did nothing to stop it. Ex. 23, p. 160-63; RP (11/3/08 a.m.) 24-26. Fualaaau used multiple weapons during each

assault: Fualaau beat Phadnis with a metal baton and the flat side of a machete, and he beat Hough with a gun and a metal pipe, stabbed him with a knife, shot him in the leg, and burned him with a butane torch. Ex. 23, p. 156-57, 163-64; RP (11/3/08 a.m.) 29-31. Fualaau also used his fists during each assault. Ex. 23, p. 158; RP (11/3/08 a.m.) 28. Fualaau verbally berated both victims. Ex. 23, p. 157, 159; RP (11/3/08 a.m.) 27. Also, Fualaau made both victims remove some or all of their clothing and get down on the floor so that Fualaau could more easily beat and torture them. Ex. 23, p. 163, 166; RP (11/3/08 a.m.) 31.

Fualaau's assaults on both Phadnis and Hough took place over a prolonged period of time, and the beatings ended only when a third person finally intervened. See Ex. 23, p. 158 (Stephanie Marinoff told Fualaau "to take it somewhere else"); Ex. 23, p. 164 (Fualaau's father-in-law said, "Son, enough. Give me the machete."); RP (11/3/08 a.m.) 33 (House picked up Hough and placed him on a shelf out of harm's way). In each case, the victim was taken to a second location after the initial assault, and one of these locations in each case was Stephanie Marinoff's house. Ex. 23, p. 155-61; RP (11/3/08 a.m.) 34-35. After each assault, efforts were made to clean up and dispose of evidence: Fualaau told

Phadnis to take a shower and gave him a change of clothes, and after the assault on Hough, the garage was cleaned, the bullets were picked up, and Hough was also given a change of clothes. Ex. 23, p. 165; RP (11/3/08 a.m.) 33, 36. Finally, in each case, Fualaa eventually decided that the victim should receive first aid or medical care. Fualaa testified that he put ointment on Phadnis's wounds, and Fualaa rode in the car with Hough and House when Joanna Palm drove Hough to the hospital. Ex. 23, p. 165-66; RP (11/3/08 a.m.) 36-37.

As the trial court found, this concurrence of similarities is more than sufficient to establish relevancy and a high degree of probative value on the issue of identity under the "signature crimes" rule. Indeed, it is difficult to envision how many more distinctive similarities would be required if this case did *not* meet that standard. Given this record, and given Fualaa's presentation of an alibi witness in an effort to refute his identity as the perpetrator, the trial court was well within the bounds of its discretion in admitting Fualaa's prior testimony under ER 404(b).

Nonetheless, Fualaa argues that the incidents were dissimilar in some ways, and that these dissimilarities render the trial court's ruling erroneous. Brief of Appellant, at 22. This

argument is without merit. Crimes need not be identical in every way in order to meet the standard for "signature" crimes. For instance, in Russell, one of the defendant's murder victims was found near some dumpsters in a parking lot, and the other two murder victims were found in their own bedrooms. Russell, 125 Wn.2d at 30, 33, 35. One victim's head was wrapped in plastic and covered with a pillow, whereas the other two victims' heads were not covered. Id. One victim had post-mortem stab wounds, while the others did not. Id. And, although all three bodies had been posed, each body was posed in a completely different way. Id.

Despite these dissimilarities, the Washington Supreme Court affirmed the trial court's ruling that the murders were signature crimes due to the unique concurrence of features between them, i.e., extreme violence, sexual assault, and posing "with the aid of props." Id. at 68. Similarly, in this case, although there are some differences between Fualaa's assaults on Phadnis and Hough,<sup>5</sup>

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<sup>5</sup> In addition to some factual differences between the two incidents, Fualaa argues that the five-year time gap between them is highly significant. See Brief of Appellant, at 22-23. Fualaa is correct that temporal proximity may be relevant in determining whether evidence is admissible for identity purposes. See Russell, 125 Wn.2d at 68. However, it is not of significance in this case because the record establishes that Fualaa was incarcerated for the majority of the time between these two incidents, having been sentenced to 60 months in prison on February 21, 2003. CP 126-33.

the confluence of commonalities is more than compelling enough to outweigh these minor differences.

In addition, although identity was the primary basis upon which Fualaau's testimony was admitted, the trial court was correct that the evidence was also admissible to prove motive.

Specifically, Fualaau 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. In this way, the evidence in this case is similar to evidence of gang affiliation. See State v. Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (2005) (evidence of defendant's gang affiliation "was highly probative of the State's theory -- that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory"). Although the State does not mean to suggest here that Fualaau's family was a gang, Fualaau's motivations were similar in that any perceived threat to Fualaau's family members would be met with a harsh and violent response. The trial court's ruling was sound for this reason as well.

Lastly, Fualaau argues that the prejudicial impact of his prior testimony outweighed its probative value, and that the trial court

erred for this reason as well. However, Fualaau's argument regarding prejudice is based on the premise that the evidence was not admissible in the first place. See Brief of Appellant, at 24-26. Accordingly, it should be rejected.

In addition, the trial court clearly considered the prejudicial nature of Fualaau's testimony describing his assault on Phadnis. See CP 66 (trial court finds that the evidence "will likely have serious prejudicial impact" because of the violent nature of the incident). On the other hand, the trial court also properly found that the evidence was highly probative of identity and motive, and thus admissible. CP 66-67. Lastly, the trial court gave an appropriate limiting instruction to the jury. CP 82. The trial court's procedures were proper, and its analysis is sound.

In sum, the trial court's ruling was an appropriate exercise of its considerable discretion under ER 404(b). This Court should reject Fualaau's arguments to the contrary, and affirm.

**2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW.**

Fualaau next argues that the trial court erred when it denied defense counsel's motion to withdraw from the case after Fualaau's courtroom outburst, which included an assault upon defense

counsel. More specifically, Fualaau argues that defense counsel's motion to withdraw should have been granted because he had an actual conflict of interest and because there was a complete breakdown in communication. Moreover, Fualaau argues that the trial court should have ruled that Fualaau had forfeited the right to counsel entirely rather than denying the motion to withdraw. Brief of Appellant, at 26-36.

These arguments should be rejected. As the trial court found, trial counsel had only a potential conflict, not an actual conflict, based on Fualaau's conduct. Second, the record does not establish a complete breakdown in communication. To the contrary, the trial court granted defense counsel's request for an extended recess in order to re-establish communication with Fualaau, and there is no indication in the record that this did not occur. Lastly, this Court should reject the suggestion that forfeiture of counsel was preferable to competent representation in these circumstances. This Court should affirm.

A defendant is entitled to a new trial due to a violation of the Sixth Amendment right to conflict-free counsel only if the defendant demonstrates that counsel had an actual conflict of interest that adversely affected counsel's performance. Mickens v. Taylor, 535

U.S. 162, 171-72, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003). Prejudice is presumed when counsel is burdened by an actual conflict of interest because the effect of an actual conflict on the outcome of the trial is nearly impossible to quantify. However, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). The possibility of a conflict will not suffice to meet this standard. Dhaliwal, 150 Wn.2d at 573.

In addition, when a criminal case has been set for trial, CrR 3.1(e) authorizes withdrawal of an attorney only with "written consent of the court, for good and sufficient reasons shown." An actual conflict of interest or a complete breakdown in communication, when established by the record and found by the trial court, justifies withdrawal under this rule. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Ultimately, this Court reviews the trial court's decision to deny counsel's motion to

withdraw for manifest abuse of discretion. State v. Hegge, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989).

Although there appear to be no published cases directly on point in Washington, other courts have held that a criminal defendant does not create an actual conflict of interest by assaulting or threatening defense counsel. For instance, in State v. Thompson, 597 N.W.2d 779 (Iowa 1999), the defendant punched his attorney, Mr. Ellerhoff, immediately prior to closing arguments. The assault was serious enough that Ellerhoff required medical attention. Thompson, 597 N.W.2d at 781. Nonetheless, Ellerhoff proceeded with closing argument later that same day. Id. In finding that no actual conflict of interest existed, the Iowa Supreme Court held as follows:

We find no evidence here that the conflict alleged by Thompson progressed beyond a potential conflict of interest. Ellerhoff did not have to make a choice between alternative courses of action. He was not struggling "to serve two masters" in completing his representation . . . . The success or failure of his representation of Thompson had no bearing on any potential claim Ellerhoff had against Thompson for assault. Ellerhoff could seek the filing of criminal charges or pursue a civil case against Thompson regardless of whether the jury convicted or acquitted Thompson. It was still in Ellerhoff's best interest to obtain an acquittal for his client. We will not presume that counsel intentionally gave a poor performance in his closing argument in hopes of obtaining revenge

against his client for the assault. In fact, the transcript shows the opposite. Ellerhoff's closing argument was presented at length, analyzing evidentiary questions in detail.

Id. at 785. In short, the court found that the assault did not create an actual conflict of interest, and that the defendant's claim of an adverse effect on counsel's performance was not evident in the record.

Similarly, in United States v. Ettinger, 344 F.3d 1149 (11th Cir. 2003), the defendant, who was on trial for assaulting a federal officer, "physically attacked one of the deputy marshals in the courtroom." Ettinger, 344 F.3d at 1152-53. Although the defendant did not assault his attorney in this case, the defendant's attorney still moved for a mistrial on grounds of a conflict of interest because the attorney "was involved in the altercation between Ettinger and the deputy marshall[.]" Therefore, the attorney claimed "that the attorney-client relationship was compromised" because the attorney would likely be called as a witness against the defendant as a result of the assault. Id. The trial court denied the motion, finding that the alleged conflict "was merely a potential conflict that would occur at a time when defense counsel would no longer be representing Ettinger," but the court instructed counsel to raise the issue again if

an actual conflict arose. Id. After the defendant was convicted, defense counsel was informed that he would be a witness in a federal prosecution for the courtroom attack. At that point, defense counsel was allowed to withdraw. Id.

In affirming the trial court's initial decision denying the motion to withdraw, the Eleventh Circuit held that no actual conflict existed due to the courtroom assault. Rather, "only a potential conflict existed because of the likelihood that defense counsel would be called to testify against Ettinger in a future prosecution." Id. at 1161. In sum, the attorney-client relationship was not compromised as defense counsel had claimed.

In People v. Roldan, 35 Cal. 4th 646, 110 P.3d 289, 27 Cal. Rptr. 3d 360 (2005), *overruled on other grounds*, People v. Doolin, 45 Cal. 4th 390, 198 P.3d 11, 87 Cal. Rptr. 3d 209 (2009), a capital murder defendant threatened to kill his attorney early in the trial. The attorney took the defendant's threats very seriously, and "had taken precautions to protect his wife and children." Roldan, 35 Cal. 4th at 667-68. Although the attorney was not seeking to withdraw at that point, he sought a continuance in order to attempt to reestablish a working relationship with the defendant. Id. The attorney argued that if the continuance was not granted, he should

be allowed to withdraw based on a conflict of interest. Id. at 669. The trial court denied the request for a continuance, ruling that the defendant had made the death threats for the express purpose of causing a delay in the proceedings, and that the defendant would threaten any other lawyer appointed to his case for the same reason. Id. at 668-69.

As the trial proceeded, defense counsel moved to withdraw multiple times. These motions were based on an alleged conflict of interest due to the death threats, and due to a claim of a complete breakdown in communication between the defendant and counsel. Id. at 672-73. These motions were denied as well. Id.

On appeal, the defendant claimed that his trial attorney "labored under a conflict of interest stemming from defendant's threats against counsel's life." Id. at 671. As a preliminary matter, the California Supreme Court called this argument "perverse," and noted that "[w]e are reluctant to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials by simply threatening their lawyers." Id. at 674. After analyzing the record in light of relevant authorities, the court affirmed the trial court's rulings that no actual conflict of interest existed, that the record did not support the contention that there

was a complete breakdown in communication, and that trial counsel's performance was not adversely affected by the defendant's conduct. Id. at 675-76. A similar case presents itself here.

In this case, Fualaau's nephew Eric Saunoa testified as an alibi witness, and claimed that Fualaau was at their family home in Graham on February 27, 2007. RP (11/5/08) 11-14. The trial prosecutor conducted a vigorous cross-examination, during which Saunoa began vacillating. RP (11/5/08) 22. At that point, Fualaau said something about needing his medication, lunged at his attorney, and "grab[bed] onto him with both hands." RP (11/6/08) 7-8. The trial court later observed that "most, if not all, of [the jurors] saw the armed officer restrain and pull Mr. Fualaau off of" defense counsel. RP (11/6/08) 20. The proceedings were then adjourned for the day. RP (11/5/08) 25-28.

The following day, defense counsel moved for a mistrial and moved to withdraw from the case. Counsel argued that he had a conflict of interest due to Fualaau's assault, stating that he would be making a police report and could be a witness if charges were filed. RP (11/6/08) 3-4. Counsel further argued that Fualaau's actions had deprived him of an argument that he had intended to make to

the jury, i.e., that Fualaau could not have committed the acts he was alleged to have committed because of his paraplegia. RP (11/6/08) 17. Lastly, counsel argued that he would have difficulty concentrating on the case. RP (11/6/08) 18.

The trial court denied the motion for a mistrial, finding that "to grant a mistrial in this circumstance would, in effect, endorse and encourage disruptive behavior as a way to bring a trial to a halt." RP (11/6/08) 21. The court also denied counsel's motion to withdraw, ultimately finding that counsel would be able to continue with his representation, and observing that Fualaau "was the person who caused the disruption and placed defense in the position he is in[.]" CP 62. The court found that there was no actual conflict of interest because counsel was not a witness against his client at that point in time. RP (11/6/08) 31. Lastly, the court determined "that the outburst was calculated to create a conflict and perhaps force a mistrial," and the court would not reward such behavior by granting either motion. RP (11/6/08) 33.

Significantly, Fualaau's counsel did not argue that there had been a complete breakdown in communication. Rather, after his motions were denied, counsel requested a recess of several days in order to "realign [his] witnesses" and reestablish effective

communication with Fualaau. RP (11/06/08) 33-34, 36-37. The trial court granted counsel's request. RP (11/6/08) 37.

When trial resumed six days later, counsel stated that the defense would be resting its case. RP (11/12/08) 2. Although counsel renewed his motion for a mistrial and his motion to withdraw for the record, he stated no new grounds for these motions. RP (11/12/08) 3. Both parties then proceeded with closing arguments. There is no indication in the record that defense counsel's argument was affected by Fualaau's courtroom outburst. Rather, counsel went through the evidence, highlighted Fualaau's alibi, and vigorously challenged the credibility of the State's witnesses. RP (11/12/08) 43-59.

After Fualaau was convicted, defense counsel prepared a sentencing memorandum requesting an exceptional sentence below the standard range. CP 104-09. The primary reason for this request was Fualaau's purported mental health issues, and counsel asserted that the reports of the two experts "as well as his outburst in Court" made it clear that a mitigated sentence was justified on these grounds. CP 107. Fualaau thanked defense counsel during his allocution at sentencing. RP (12/12/08) 17.

Based on this record, the trial court correctly ruled that no actual conflict of interest existed. As the authorities cited above have held, the outburst and assault did not create a conflict in and of itself. Moreover, as the trial court found, defense counsel would not be called upon to be a witness against Fualaa until well after the trial was over, if at all.

Furthermore, although Fualaa's courtroom outburst in front of the jury may have deprived defense counsel of the opportunity to argue that Fualaa was physically incapable of committing the crimes he was charged with, this problem would not have been solved by allowing defense counsel to withdraw. Indeed, if *any* lawyer had intended to make such an argument, it would have been contrary to reality in any event.<sup>6</sup> Also, the record does not show that counsel's performance was adversely affected by Fualaa's conduct. Rather, counsel provided effective representation through the conclusion of the trial and at sentencing.

In addition, Fualaa cannot demonstrate that there was a complete breakdown in communication -- a claim Fualaa raises for

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<sup>6</sup> Such an argument also would have been absurd in light of Fualaa's testimony in the Neelesh Phadnis case, during which he described in detail how he was fully capable of assaulting someone in a protracted and tortuous manner. Ex. 23.

the first time on appeal. An irreconcilable conflict between attorney and client occurs when the breakdown of their working relationship results in the complete denial of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). If the defendant claims that a complete breakdown in communication deprived him of the right to counsel, the reviewing court should consider the extent of the conflict, the adequacy of the trial court's inquiry, and the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P.2d 80 (2006).

In this case, neither Fualaaau nor his trial counsel claimed that there had been a complete breakdown in communication. To the contrary, counsel was granted a lengthy recess in order to reestablish effective communication with Fualaaau and to ensure his continued effective representation. RP (11/6/08) 34, 36-37. Effective representation was provided through the conclusion of trial and at sentencing, and Fualaaau thanked counsel on the record for his work on the case. RP (12/12/08) 17. This record does not support Fualaaau's claim, but belies it.

Lastly, Fualaaau's argument that the trial court should have found that Fualaaau forfeited his right to counsel and forced him continue without representation is wholly without merit. Although

there is authority standing for the proposition that a defendant may forfeit the right to counsel due to "egregious misconduct," see City of Tacoma v. Bishop, 82 Wn. App. 850, 860, 920 P.2d 214 (1996), there is no authority supporting the proposition that forcing Fualaau to proceed pro se for the remainder of the trial would have been appropriate in this case. Indeed, based on the authorities set forth above, if the trial court had discharged counsel and forced Fualaau to proceed pro se, Fualaau's resulting claims on appeal would have considerably more merit.

In sum, the trial court exercised sound discretion in finding that no actual conflict of interest existed, and that withdrawal of counsel should not be granted based on Fualaau's intentional acts, which were intended to disrupt the proceedings. This Court should reject Fualaau's arguments to the contrary.

**D. CONCLUSION**

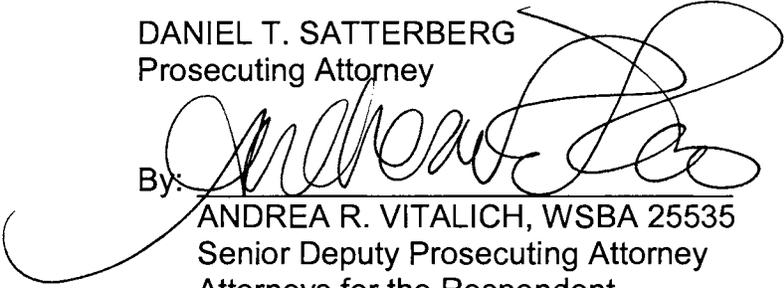
The trial court properly exercised its discretion in admitting evidence under ER 404(b), and in denying defense counsel's motion to withdraw due to a claim of conflict of interest. For the reasons stated above, this Court should affirm Fualaau's

convictions for assault in the first degree with a firearm, and two counts of kidnapping in the first degree.

DATED this 14<sup>th</sup> day of September, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG  
Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA 25535  
Senior Deputy Prosecuting Attorney  
Attorneys for the Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ROGER FUALAAU, Cause No. 62746-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

9/14/09  
Date

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