

NO. 65103-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

TEENA MARKUSEN,

Appellant.

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorneys for Appellant

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

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A. ASSIGNMENT OF ERROR

Appellant was denied her right to effective assistance of counsel because defense counsel opened the door to the admission of otherwise irrelevant yet highly prejudicial evidence.

Issues Pertaining to Assignment of Error

Appellant was charged with intimidating a public service for allegedly threatening a sheriff's deputy who was arresting her for driving while license was suspended. During cross examination defense counsel asked the deputy if, under the circumstances, he really expected the jury to believe he feared appellant. The deputy said he was and offered to explain, but defense counsel declined. On redirect, however, the deputy explained that he feared appellant because he knew from prior contact that she associated with convicted felons, had access to guns, and had assaulted him once before.

1. Did asking the deputy if he expected the jury to believe he feared appellant constitute deficient performance when, but for that question, evidence of the deputy's prior contacts with appellant would have been excluded as irrelevant and improper propensity evidence?

2. Does defense counsel's deficient performance require reversal when the jury's verdict turned on whether the jury believed the

testimony of appellant or the deputy, and where the evidence of the deputy's prior contacts with appellant likely tipped the scales of credibility against appellant?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 4, 2009, the Whatcom County Prosecutor charged appellant Teena Markusen with intimidating a public servant. CP 53-54; RCW 9A.76.180. The prosecution alleged that on February 24, 2009, Markusen threatened Whatcom County Sheriff's Deputy Magnus Gervol in an attempt to influence his actions as a public servant. CP 53.

Although no amended information was actually filed, the prosecution later added a charge of bail jumping. See CP 47-48 (First Amended Affidavit of Probable Cause). The prosecution alleged Markusen failed to appear in court on July 22, 2009, as required. CP 48.

A jury trial was held before the Honorable Steven J. Mura, February 23-23, 2010. RP 2-164. The jury convicted Markusen as charged. CP 23. On March 15, 2010, the court imposed concurrent standard range sentences of 10 months on each count. CP 12-20; RP 169.

Markusen appeals. CP 2-11.

2. Substantive Facts

Markusen admitted to the bail jumping charge, explaining she simply forgot about the hearing. RP 125-27. Markusen denied, however, the intimidation charge, claiming she never threatened Gervol or his family with harm. RP 117, 123.

In contrast, Gervol claimed that after he arrested and handcuffed Markusen for driving while license suspended, she became irate and made several "inappropriate statements and comments during the contact," including "numerous threats." RP 65-66. When asked to describe the threats, Gervol explained:

It was after she was secured in my police vehicle, my parter [sic], Deputy Paz, had arrived to assist me process the truck after her arrest, and reflecting on the specific comments, she made numerous threats to me. She indicated that other officers, troopers, deputies would simply let her go for the same offense, that driving suspended was no big deal in her opinion, that I should let her go because everybody else did. She's going to have my job. She accused me of being corrupt and ruining people's lives and causing trouble for the locals in the area. She said, in quotes, I'm going to be there when you get beat up, end quote. She berated me continually, used foul language, threatened me. She, in quotes, said I'm going, she's going to have my job, end quote. She said, quote, anyone end quote could beat me up. She knows my family, she's going to do whatever she could to get me in trouble. She knew where I lived, she was yelling this at the top of her lungs.

RP 66.

At the prosecutor's urging, Gervol also claimed Markusen threatened to "plant drugs on my family." RP 67. Gervol stated;

Based on my experience with her I felt threatened and her behavior and demeanor was not consistent with other contacts I have had with her or other individuals.

RP 67.

During cross examination, Markusen's trial counsel, after confirming that both Gervol and Deputy Paz were in uniform and armed, and that Deputy Paz had a K-9 with him, engaged Gervol in the following exchange:

Q So we have two deputies, a K-9, and you want us to believe you actually felt threatened by this woman?

A Yes. Would you like me to explain?

Q I'm just asking were you actually afraid of her?

A Yes.

RP 72.

On redirect, the following exchange occurred between Gervol and the prosecutor:

Q [Defense counsel] asked if you, I think the way he phrased it was do you want us to believe that you were actually afraid of Miss Markusen and you offered to explain. Did you want to explain?

A Yes, if I may. As I stated before, I have had previous unrelated contacts with Miss Markusen. On a

previous contact I know that she associated with convicted felons, members of the Bandito motorcycle club that have been arrested for RICO felonious crimes. She's had access to firearms, too, on previous occasions and she's assaulted me on a previous occasion in 2004.

RP 74-75.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO THE ADMISSION OF OTHERWISE IRRELEVANT AND INADMISSIBLE YET HIGHLY PREJUDICIAL EVIDENCE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Only legitimate trial strategy or tactics constitute reasonable performance by counsel. State v. Killo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). The strong presumption that defense counsel's conduct is reasonable is overcome

where no conceivable legitimate tactic explains counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Admission of evidence of a defendant's prior bad acts is governed by ER 404(b).¹ Under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative value that outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Under ER 404(b), 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. State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

The list of other purposes for admitting evidence under ER 404(b) is not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

¹ ER 404(b) provides:

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

For example, prior acts of domestic violence involving the accused and the complaining witness are admissible to assist the jury in judging the credibility of a complaining witness, but only if the witness has recanted. State v. Grant, 83 Wn. App. 98, 100, 920 P.2d 609 (1996)(cited with approval in Magers, 164 Wn.2d at 185-86). A complaining witness's knowledge of prior acts of violence may also be relevant where fear is an element of the charge at issue. State v. Barragan, 102 Wn. App. 754, 759-60, 9 P.3d 942 (2000).

ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; Magers, 164 Wn.2d at 184. "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is

substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Evidence establishing an accused committed acts similar or identical to the one charged is especially prejudicial because it allows the jury to shift its focus from the merits of the charge and merely conclude that the accused acted in conformity with the character demonstrated in the past. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). This is the "forbidden inference" underlying ER 404(b). State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (citing Wade, 98 Wn. App. at 336).

Here, counsel knew or should have known about Markusen's prior confrontations with Deputy Gervol, if for no other reason than it was revealed during a pretrial hearing. RP 18.² Defense counsel also knew or should have know this evidence would not come in because it constituted propensity evidence that is otherwise inadmissible under ER 404(b), unless the defense somehow opened the door. See Fisher, 165 Wn.2d at 746 (otherwise inadmissible prior misconduct evidence admissible once defense opens door).

² Markusen testified pretrial that she asked Gervol during the stop "why are you always after me, always making reference to my son. . .?", and "why was he being so hard on me pulling me over all the time?" RP 18.

There is no conceivable legitimate defense tactic for asking Gervol whether he "actually felt threatened by" Markusen. RP 72. Whether Gervol subjectively feared Markusen during their February 24th encounter was irrelevant to the intimidation charge. To convict, the State had to prove Markusen "by use of a threat, attempted to influence [Gervol's] decision or other official action as a public servant; and . . . [t]hat the threat was made or received in the State of Washington." CP 32 (Instruction 6, to-convict for intimidation charge). The State did not have to prove Gervol actually feared Markusen. Whether Gervol actually feared Markusen and why only became relevant because defense counsel made it relevant by asking Gervol if he expected the jury to believe he was scared.

To the extent defense counsel wanted to be able to argue to the jury that it should not believe Gervol's claim he was threatened by Markusen because it was unreasonable to believe, under the circumstances, that Gervol actually feared Markusen, that argument could have been made without opening the door to admission of evidence about Markusen prior confrontational contacts with Gervol. See RP 150, 152 (defense counsel argues Gervol's claims are "unbelievable" and that he "exaggerated the circumstances a little" so he could have Markusen charged with a felony). The same argument could have been made by noting that the alleged threats

occurred only after Markusen was handcuffed and placed in the back of a patrol car, and in the present of two armed sheriff's deputies and a police dog, all of which was on the record before defense counsel asked Gervol about his subjective beliefs. RP 71-72.

Defense counsel performed deficiently. Opening the door to evidence of Markusen's alleged association with criminals, her access to guns and her prior assault of Gervol served no legitimate trial tactic. Moreover, the resulting prejudice was significant. Whereas jurors should have been focused solely on the events of February 24, 2009, the prosecution was allowed to elicit otherwise inadmissible evidence of Markusen's past that portrayed her as a person with a criminal propensity and access to guns who was therefore more likely to have tried to intimidate Gervol into letting her go.

There is a reasonable likelihood evidence of Markusen's criminal propensity affected the outcome at trial. This was a close case that turned on the jury's credibility assessment of Gervol and Markusen. The evidence of Markusen's alleged prior bad acts likely contributed to the jury deciding to believe Gervol rather than Markusen. Reversal is therefore required. Kyllo, 166 Wn.2d at 871.

D. CONCLUSION

For the reasons stated above, this Court should reverse Markusen's conviction for intimidating a public servant.

DATED this 2nd day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



Christopher H. Gibson
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65103-0-1
)	
TEENA MARKUSEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID EACHRAN
 WHATCOM COUNTY PROSECUTOR'S OFFICE
 311 GRAND AVENUE
 BELLINGHAM, WA 98227

[X] TEENA MARKUSEN
 570 E STREET, APT. B
 BLAINE, WA 98230

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*