

NO. 65157-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO VARGAS,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT'S FAILURE TO LIMIT THE JURY'S CONSIDERATION OF UNCHARGED MISCONDUCT DEPRIVED VARGAS OF A FAIR TRIAL.

The State urges this Court to reject Division Two's well-reasoned holding in State v. Russell, 154 Wn. App. 775, 225 P.3d 478 (2010), in favor of Division Three's cursory opinion in State v. Williams, 156 Wn. App. 482, 234 P.3d 1174 (2010). This Court should follow the Washington Supreme Court and Division Two and hold that when evidence of uncharged misconduct is admitted, a limiting instruction is required. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007), Russell, 154 Wn. App. at 784.

In Williams, Division Three essentially ignored the clear language from Foxhoven and Division Two's application of that language in Russell. The Williams court's entire discussion of the limiting instruction is as follows:

Mr. Williams also assigns error to the court's failure to instruct the jury on the limited purpose of this evidence. The trial court is required to give the jury a limiting instruction if requested. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007). Mr. Williams did not request a limiting instruction and therefore waived any right to assign error here. Stein, 140 Wn. App. at 70, 165 P.3d 16. Moreover, the prosecutor effectively gave the jury a limiting instruction during closing argument. The prosecutor cautioned the jury that evidence of prior convictions should not be used to decide that a defendant is a "bad seed," but

may only be considered if the prior bad acts had such striking similarities that they showed a common scheme or plan. RP at 613. In this way, the State further reduced any taint from MS's testimony.

Williams, 156 Wn. App. at 492. The Williams court did not address the arguments or authorities cited in Russell. The Williams court also relied on a Division Two case, State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), that predates Russell without discussing the subsequent contrary precedent in Russell. Williams, 156 Wn. App. at 492 (citing Stein, 140 Wn. App. at 70). A petition for review was granted in Russell and is pending in Williams. See State v. Russell, 169 Wn.2d 1006, 234 P.3d 1172 (2010); State v. Williams, no. 84844-1.

Aside from its limited analysis of the legal authorities and arguments at play, Williams is distinguishable. In Williams, the court was less inclined to find prejudicial error because the prosecutor essentially gave a limiting instruction during closing argument. 156 Wn. App. at 492. The prosecutor's closing argument thus reassured the court that the jury had not relied on a forbidden inference of guilt based on criminal propensity or character. This Court has no such assurance in this case. RP 645-656, 686-695.

The State also argues that if instruction is required even when counsel does not request it, defense counsel will be unable to exercise his or her discretion in presenting the defense case. Brief of Respondent at 9-10.

This is incorrect. If the proposed instruction interferes with defense counsel's presentation of the case, nothing prevents counsel from proposing alternate wording of the instruction to avoid, for example, re-emphasis of negative facts.

The State also argues that Vargas' argument has been rejected in prior cases where the defense argument relied on the same precedent. Brief of Respondent at 8 (discussing State v. Noyes, 69 Wn.2d 441, 418 P.2d 471 (1966) and State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950)). But the State is incorrect that Russell rests entirely on Goebel. The Russell court relied largely on the Washington Supreme Court's clear directive from Foxhoven that "a limiting instruction must be given." Russell, 154 Wn. App. at 782 (quoting Foxhoven, 161 Wn.2d at 175). Nor does Foxhoven, in turn rely solely on Goebel. The Foxhoven court cited State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

In Lough, the court noted there was no evidence the jury used the prior bad act evidence for an improper purpose because the jury was presumed to follow the court's limiting instruction. 125 Wn.2d at 864. As the courts have recognized in Foxhoven and Russell, without that instruction, the jury was permitted to, and likely did, use evidence of past misconduct to infer guilt. Russell, 154 Wn. App. at 785-86. The jury should not be permitted to engage in this forbidden inference merely

because defense counsel unreasonably failed to request a limiting instruction.

2. COUNSEL WAS INEFFECTIVE IN PERMITTING THE JURY TO CONSIDER OTHER UNCHARGED ACTS AS EVIDENCE OF A CRIMINAL PROPENSITY.

a. There Is No Strategic Reason for Allowing Jurors to Consider Uncharged Acts to Infer Guilt Based on Criminal Propensity.

The rule against the forbidden inference of guilt based on propensity or character, codified in ER 404, has “deep historical roots.” City of Kennewick v. Day, 142 Wn.2d 1, 6 n.2, 11 P.3d 304 (2000). “Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt.” Id. (quoting Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)). In other words, in a criminal prosecution, the State must prove beyond a reasonable doubt that the defendant actually committed the charged acts on this occasion, not simply that he or she is the type of person who would.

Yet it is human nature to conclude guilt in one instance based on past conduct, to reason that “once a criminal, always a criminal.” State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999); State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Without instruction to the

contrary, jurors are likely to base judgment about what happened in one instance based on the defendant's acts in other instances. Bacotgarcia, 59 Wn. App. at 822.

To fail to request a limiting instruction on prior bad act evidence is to allow the jury to engage in this improper inference. There can be no valid strategic reason for allowing the jury to convict one's client based on an inference of criminal propensity or character. Counsel's sworn declaration only shows she did not, in fact, consciously or strategically, make such an unreasonable choice.

b. Vargas Was Prejudiced Because There Is a Reasonable Probability a Limiting Instruction Would Have Changed the Outcome.

Vargas does not have to demonstrate that the outcome of the trial would definitely have been different had the proper instruction been given. The prejudice prong is satisfied when there is a "reasonable probability" of a different outcome. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The "reasonable probability" standard is met when there is a probability "sufficient to undermine confidence in the outcome." Id. Here, that confidence is undermined.

The presumption of innocence is "the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Yet when the jury's attention is shifted to criminal

propensity, the presumption of innocence “is stripped away.” State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987).

The inference of criminal propensity is a powerful one. The danger is that the jury may believe the defendant should be punished for a series of immoral actions. Id. at 195. Washington law recognizes the inherently prejudicial nature of prior bad acts evidence. State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). “The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury.” Michelson, 335 U.S. at 475-76.

Where the inference of criminal propensity was erroneously permitted to play a role in the jury’s deliberations, it is likely to have “weighed too much” and confidence in the outcome is undermined. Cf. State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001) (failure to give limiting instruction not harmless because jurors could well have regarded evidence defendant had a gun when arrested as tending to show he was a “bad man”). Counsel’s unreasonable failure to request a limiting instruction violated Vargas’ constitutional right to effective assistance of counsel.

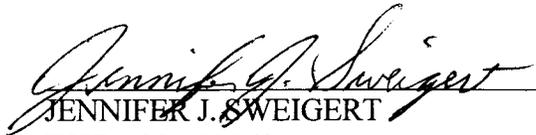
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Vargas requests this Court reverse his conviction and grant him a new trial.

DATED this 28th day of October, 2010.

Respectfully submitted,

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DIVISION ONE**

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v.)	COA NO. 65157-9-1
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)	
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 28TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] GILBERTO VARGAS
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*