

65528-1

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No. 65528-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON DODD,

Appellant.

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

The Honorable Douglass North

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Clifton Dodd his Fourteenth Amendment and article I, section 22 right to adequate notice of the charges against him and Sixth Amendment right to the assistance of counsel when it authorized the State to add the charge of felony harassment on the day of trial.

2. The trial court erred when it denied Dodd's motion for a continuance to prepare to meet the newly charged offense against him.

3. The trial court denied Dodd his Sixth and Fourteenth Amendment right to a defense when it barred counsel from impeaching the complainant with evidence of prior false allegations.

4. The trial court denied Dodd his Fourteenth Amendment right to a fair trial when it allowed the State to introduce evidence that Dodd was known to the complainant as the "Candy Man" and supplied her with drugs.

5. The trial court erred in including Dodd's prior Georgia conviction for family violence battery in his offender score where that crime was not comparable to a felony in Washington.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments and article I, sections 3 and 22 guarantee an accused person the right to notice of the charges against him. When the State amends an information to charge a new or different offense at trial, an accused person's constitutional rights are violated. Where the State had provided no notice of its intent to amend the information, did the trial court err in permitting the State to charge Dodd with the crime of felony harassment on the day of trial? (Assignment of Error 1)

2. As a matter of law, substantial rights of an accused person are violated when the State amends an information to charge new or different crimes. In such a circumstance, the defendant is entitled to a continuance to meet the new charges. Dodd sought a continuance to prepare to meet the charge of felony harassment, which was brought against him on the day of trial. Did the trial court deny Dodd his constitutional right to fair notice and effective counsel when it refused to grant his continuance request? (Assignment of Error 2)

3. An accused person has the right under the Sixth and Fourteenth Amendments to a defense. Although the State relied on multiple prior allegations of domestic violence by Dodd against the

complainant to prove its case, the trial court barred Dodd from presenting evidence that would have refuted these allegations and impeached the complainant's credibility. Where the complainant's lack of credibility was material to the defense theory at trial, did the trial court violate Dodd's right to present a defense? (Assignment of Error 3)

4. Evidence of prior bad acts is admissible only when it is necessary to prove an essential ingredient of the crime charged. The trial court admitted prejudicial evidence that Dodd furnished the complainant with crack cocaine without finding the evidence was necessary to prove an element of any of the charged offenses. Where the evidence's sole relevance was to portray Dodd as someone of bad character, did the admission of the evidence deny Dodd a fair trial? (Assignment of Error 4)

5. In determining the offender score under the Sentencing Reform Act of 1981 ("SRA"), the State bears the burden of proving the existence and comparability of prior out-of-state convictions. The trial court included in Dodd's offender score a prior Georgia conviction for family violence battery, but an examination of the elements of this offense reveals that it is substantially similar to fourth degree assault in Washington. Did the trial court err in

including this conviction in Dodd's SRA offender score?

(Assignment of Error 5)

C. STATEMENT OF THE CASE

1. Factual allegations. Clifton Dodd first met Nancy Davis in downtown Seattle in 2006. Davis had just had a fight with her ex-husband and was homeless. RP 387.¹ When Dodd encountered Davis, she was crying and distraught. RP 388. He spoke to her gently, telling her that he helped homeless people and had a safe place for her to go. Id. Davis trusted Dodd, and took a taxi with him back to his apartment on Eastlake Avenue East. Id.

Because of chronic mental health issues, Davis received SSI payments from the State. RP 384, 891. Dodd suggested to Davis that they become roommates. RP 391. He proposed that he become her payee and provide her with assistance by cooking her meals, doing her laundry, and taking her to her medical appointments. RP 389, 541. This seemed like a good arrangement to Davis and she consented. RP 390.

Davis and Dodd were roommates for about two weeks before their relationship turned intimate. Id. Dodd continued to function as Davis' payee, and they lived together for approximately

¹ The verbatim report of proceedings is contained in five consecutively paginated volumes and is referred to herein as "RP" followed by page number.

two years. RP 403. According to Davis, however, the relationship was marred by drug and alcohol abuse and violence. Davis alleged that Dodd had a bad drinking problem and that together they would smoke crack cocaine. RP 393, 402, 412. She claimed they used crack cocaine every day. RP 402. Davis herself was a drug abuser, had used crack cocaine before she met Dodd, and had even been arrested with crack cocaine on her person. RP 487.

In July 2008 Davis broke off her relationship with Dodd. RP 403. Davis claimed that she left the relationship because Dodd was abusive and controlling towards her. RP 394-95, 400.

Because Dodd allegedly had threatened Davis and her new boyfriend with a gun, in October 2009, Davis obtained a no contact order against Dodd. RP 405, 414-20, 542. A permanent no contact order was entered on January 13, 2009. RP 420.

In February 2010, Dodd telephoned Davis. During this conversation, according to Davis, Dodd offered her \$500 and a plane ticket for her daughter, Amanda, to come to Seattle. RP 407, 425. Davis trusted Dodd and came to his apartment, arriving on Valentine's Day. RP 408, 574. She stayed there with him for several days. RP 574. She and Dodd ate dinner, drank malt liquor

together, and on at least one occasion she gave Dodd money to buy crack cocaine. RP 423-26, 447, 505.

On the evening of February 19, Dodd's next-door neighbor, Madolynne Lawson, heard Dodd and Davis arguing. RP 174-75. They were yelling at one another and Lawson heard bumps that sounded like furniture dropping. RP 174. She heard a woman's voice shouting, "why don't you go ahead and hit me, you know you want to." RP 175. Lawson did not hear any noises that sounded like someone was being assaulted, but she was concerned about the intensity of the argument. RP 197. As the argument escalated Lawson thought about calling the police, but as she was about to do so, the argument seemed to dissipate. RP 176-77.

Then Lawson heard a woman outside her apartment screaming, "Someone help me. Please help me. He's trying to kill me." RP 177. Lawson opened her door and Davis stumbled in and told Lawson to call the police. RP 177. She told Lawson that Dodd had tried to hurt her, strangle her, and kill her. RP 178. Davis was transported to Harborview, where she reported that she had also been raped. RP 233, 310, 440.

Dodd cooperated with the ensuing police investigation. RP 537-38, 565, 569, 708-09. When he was questioned by the

investigating detective, Dodd initially denied having an intimate relationship with Davis. RP 542. When he realized he was being investigated on a rape allegation, however, he acknowledged that he and Davis had been sexually involved with one another and told the detective that they had sex several times after Valentine's Day, but that they did not have sex on February 19. RP 542, 557, 560, 716. Nevertheless, based on the presence of Dodd's semen in Davis' vagina, the matter was referred to the King County Prosecutor's office for criminal prosecution. RP 577.

2. Untimely amendment of charges. The King County Prosecutor initially charged Dodd with one count of Rape in the First Degree – domestic violence and one count of Felony Violation of a Court Order – domestic violence. CP 1-2. On the day of trial, the State moved to amend the information to add one count of second degree assault, one count of felony harassment, and aggravating circumstances as to all the counts. CP 16-19. The State conceded that Dodd was not given notice of the felony harassment allegation but contended, “[I]t's clear from the discovery that that's a potential charge for trial.” RP 6-7.

Dodd objected to the amendment. RP 10. Dodd agreed that he had been given notice of the assault allegation and aggravating

circumstances, but noted that despite recent discussions with the prosecution regarding a bill of particulars for the assault charge, the prosecutor did not mention that the State would also add a count of felony harassment. RP 10-11.

The prosecutor admitted that she made a “mistake not putting it [the felony harassment charge] on the omnibus order” but argued that because the charge was based on a verbal threat Dodd allegedly made in the course of his February 19 altercation with Davis there were no “new facts” and Dodd was not prejudiced. RP 13-14. Dodd countered that the alleged threat was first mentioned in an interview of Davis, and did not appear in her written statement or the police report. He noted that he had done nothing to prepare to meet this charge. RP 16.

The court ruled that Dodd had failed to articulate prejudice from the untimely amendment, and offered him the remedy of a continuance. RP 18, 22. Dodd's counsel at first demurred on the basis that Dodd should not be forced to choose between a timely trial and prepared counsel, but Dodd stated firmly that he would feel more comfortable with the additional charge if his lawyer were afforded additional time to prepare. RP 23, 74.

Dodd's counsel indicated that due to her vacation schedule she would require a three-week continuance. RP 74-75. The State did not voice an objection. In fact, the prosecutor stated that she would be "deferring to the court" on the continuance, but that if a witness was unavailable at the time of trial, she reserved the right to seek a continuance herself. RP 75. The assigned judge, Douglass North, indicated that the presiding judge of King County Superior Court would decide whether a continuance should be granted, and permitted the State to arraign Dodd on the amended information. RP 77-79.

Following arraignment, the parties attempted to go before the presiding judge but no one was in the presiding judge's courtroom, and so the parties returned to Judge North's court. There, for the first time, the State voiced an objection to the length of the continuance. RP 79-80. The State suggested that instead of granting Dodd the amount requested, the State should put on one witness and then the court could recess the matter for a few days. RP 80. The State argued that more time would be "wasteful." RP 80-81. When asked for his response to the State's suggestion, Dodd said that the couple of days proposed by the prosecutor were not enough time. RP 82.

When they finally appeared before the presiding judge, defense counsel reiterated her request for a three-week continuance. RP 87. However, faced with the State's objection and counter proposal, and in light of defense counsel's unavailability to try the case sooner, the court denied Dodd's continuance request. RP 90-91. The court ruled that Dodd would be entitled to no more than a half-day recess, at Judge North's discretion, to discuss the new charge with his attorney. RP 91.

3. Erroneous evidentiary rulings. Prior to trial, the State sought to bar Dodd from impeaching Davis with evidence that she had previously made a false allegation that Dodd had struck her with a baseball bat. Dodd insisted that the evidence was relevant in light of the aggravating circumstances charged by the State. RP 118, 359-60, 362. The court excluded the testimony, ruling that it served only to impeach Davis on a collateral issue and was not probative of whether Davis' allegations against Dodd with regard to the charged offenses were factually grounded. RP 361.

At the same time that the court excluded Dodd's evidence that Davis had lied about prior allegations of violence, it reached a contrary result with regard to prejudicial evidence against Dodd. Dodd moved to prohibit the State from presenting testimony that

Dodd referred to himself as “the candy man” to Davis. RP 109. The State sought to present the evidence as probative of “the dynamics of . . . a relationship marked by domestic violence, the type of manipulation and control.” RP 111. The State contended that cards allegedly from Dodd signed “candy man” were evidence that Dodd had manipulated Davis by supplying her with drugs and controlling her money. Id.

Dodd noted that he was not charged with any offense relating to drugs and that the evidence was collateral and prejudicial. Id. He argued that the evidence would paint him as a “bad, evil guy” who forced drugs on Davis, and that such evidence would be a distraction. RP 112. The court ruled that the evidence was probative of the domestic violence aggravator and thus admissible. RP 113.

Accordingly, at trial Davis testified that Dodd used her money to buy crack cocaine and that he was known on the street as “the candy man.” RP 394-95, 402-03. She stated that she received two cards from Dodd during their relationship. One read, “I am sorry. I will always be there for you. Please call. I’ll be your candy man. Love ya.” RP 412. The second card read, “Let me bless you, the candy.” Id. It had a plus sign and a dollar sign

written on it, and was signed, “love ya.” Id. Davis testified that “candy” referred to crack cocaine. RP 414.

4. Sentencing. At sentencing the State presented evidence of Dodd’s prior Georgia convictions for aggravated battery, false imprisonment, and family violence battery. CP 110-88. Defense counsel conceded that the crimes were comparable to the felonies of assault in the second degree, unlawful imprisonment, and assault in the third degree. RP 999. Both the State and defense counsel agreed that Dodd’s conviction for assault in the second degree merged into his felony violation of a no-contact order conviction and that the latter offense should be reduced to a misdemeanor. RP 997.

Dodd, however, objected to the State’s calculation of his offender score. He specifically argued that the family violence battery conviction was comparable to a misdemeanor, not a felony. RP 1006. The trial court accepted the State’s calculation of Dodd’s offender score and sentenced him on counts I and III, the rape in the second degree² and assault counts, based on an offender score of 7, and on count IV, the felony harassment count, based on an offender score of 5. CP 163. The court imposed a sentence of

² Although Dodd was charged with rape in the first degree, the jury convicted him of the lesser included offense of rape in the second degree.

170 months on the rape in the second degree count, and concurrent sentences of 57 and 22 months respectively on the assault and felony harassment counts. CP 165-66. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT DENIED DODD HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO NOTICE OF THE CHARGES AGAINST HIM WHEN IT PERMITTED THE STATE TO AMEND THE INFORMATION TO CHARGE A NEW OFFENSE ON THE DAY OF TRIAL.

a. An accused person has the right under the Sixth and Fourteenth Amendments and article I, section 22 to notice of the charges against him. An accused person's right to fair notice of the charges against him is protected by the state and federal constitutions. U.S. Const. amends. XVI, XIV; Const. art. I, §§ 3, 22; Gray v. Netherland, 518 U.S. 152, 167-68, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The "precise evil that article I, section 22 was designed to prevent" is "charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice." State v. Shaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993).

b. The amendment of an information at trial to charge a new or additional crime violates the constitutional right to fair notice. Pursuant to CrR 2.1(d), “[t]he court may permit any information ... to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” This rule has been interpreted as permitting the amendment of charges only when “the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated.” State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Thus, for example, in Gosser the Court held that the defendant’s right to fair notice was not violated by the prosecution’s amendment to allege a different prong of the assault statute than that originally charged. Id. In Shaffer the Court held that a mid-trial amendment of a malicious mischief charge to bring the charge in conformity with the evidence and reduce the charge to an inferior degree was permissible under the state constitution. Shaffer, 120 Wn.2d at 620-21.

However, “[a]n amendment during trial stating a new count charging a different crime violates [article I, section 22].” State v. Carr, 97 Wn.2d 436, 645 P.2d 1098 (1982). In Carr, the Supreme Court reversed a conviction where the State was permitted to

amend an information during trial to charge an offense not alleged in the original information. Id. at 440. Importantly, although the Court interpreted a predecessor rule to CrR 2.1(d), the Court rested its holding on the state constitution. Id. (citing Const. art. I, § 22 and State v. Lutman, 26 Wn. App. 766, 614 P.2d 224 (1980)). Analyzing Carr in a subsequent decision, this Court explained, “the amendment substituted a different crime for the one originally charged, requiring Carr to defend against the State’s proof of different elements.” State v. Baker, 48 Wn. App. 222, 225, 738 P.2d 327 (1987).

In State v. Ziegler, 138 Wn. App. 804, 158 P.3d 647 (2007), the Court held that Ziegler was prejudiced by the State’s amendment of an information to add additional counts of child rape not included in the original information. 138 Wn. App. at 810-11. In so holding the Court reasoned:

[T]he State amended the information to charge Ziegler with two additional serious felonies. This was not merely the amendment from one crime to a similar charge. Nor was this an amendment that changed the means of a crime already charged. Adding two child rape charges during trial affected Ziegler’s ability to prepare his defense. His trial strategy and plea negotiations with the State would likely have been different had he known there would be two additional child rape charges. The addition of two child rape

charges was a violation of Zeigler's right to know of and defend against the State's charges.

Id.

c. The ruling authorizing the State to add a charge of felony harassment on the day of trial violated this constitutional guarantee. Here, unlike Shaffer and Gosser, and like Carr and Ziegler, on the day of trial the court allowed the State to amend the information to add an entirely different charge than the charges alleged under the original information. The court erroneously believed the amendment was permissible because the felony harassment arose from the course of conduct allegedly giving rise to the other charges. RP 24. But this is a very different circumstance from that in Shaffer and Gosser. "The principal element" in the new charge was not "inherent" in any of the other charged offenses. Cf., Gosser, 33 Wn. App. at 435. Nor is felony harassment an inferior degree or lesser included offense of any of the other charged crimes. See Shaffer, 120 Wn.2d at 620-21.

The State conceded that it had not given written notice of its intent to add the felony harassment count, and defense counsel made it plain that she was caught off guard by the new allegation. RP 12, 85. Dodd, who had opposed continuances in the past, told

the court that he felt uncomfortable going to trial with a lawyer who was being forced to defend against brand new charges. RP 74, 91. Defense counsel stated that the unexpected charge would impact her strategy with regard to the other charged counts. RP 23, 84-85.

In Ziegler, the Court found that an amendment to charge new offenses was prejudicial because if defense counsel had been given notice of the crimes, Ziegler's trial strategy and plea negotiations would likely have been different. 138 Wn. App. at 811. Here, similarly, Dodd was forced to defend against an entirely new charge, of which he was not informed at omnibus or any other time before the State's motion to amend. The additional count increased Dodd's offender score, thus altering the calculus of whether Dodd would have tried to negotiate a resolution short of trial. Had he known of the State's intention to amend the charges, Dodd's trial strategy may well have been different. This Court should conclude that authorizing the amendment violated Dodd's constitutionally-protected right to notice of the charged crime.

d. The trial court violated Dodd's rights under the Sixth Amendment and article 1, section 22 when it denied counsel's request for a continuance to prepare. "The typical remedy for a defendant who is misled or surprised by the amendment of the

information is to move for a continuance to secure time to prepare a defense to the amended information.” State v. Murbach, 68 Wn. App. 509, 512, 843 P.2d 551 (1993) (citation omitted). Despite defense counsel’s representations that she was caught off guard and needed time to be ready to meet the felony harassment count, the court inexplicably denied Dodd’s request for a continuance to prepare to meet the charges.

This precise issue was addressed by the Supreme Court in State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986). In Purdom, the defendant initially was charged with conspiracy to deliver a controlled substance. Id. at 746. On the Friday preceding a Monday trial date, the prosecutor notified defense counsel that the State intended to file an amended information charging Purdom with being an accomplice to delivery of a controlled substance. Id. Defense counsel requested a continuance but the court denied the request. Id. at 746-47.

Analyzing the identical court rule at issue here, the Court found “as a matter of law that substantial rights of the defendant were violated by amending the charge on the day of trial without granting a continuance when one was requested.” Id. at 647. The Court explained:

Defense counsel in this case expressed surprise and requested a continuance. He had only learned of the prosecutor's decision to amend on the Friday preceding the Monday trial. When defense counsel made the motion for a continuance, he stated he did not know whether the prejudice would be great or not because he had not had time to study the matter. Counsel further explained that he had prepared to answer the original charge and should be given an opportunity to consider how to meet the new charge. We agree. The defendant must be given the opportunity when it is requested to prepare to meet the actual charge made against him when it is made for the first time on the day trial is to begin. We remand for a new trial.

Id. at 749.

Presumably, in ruling that Dodd was not entitled to a continuance, the court was influenced by the prosecutor's surprise opposition to Dodd's request. This was not a pertinent consideration. "As a matter of law" the court should have granted Dodd's request for a continuance. Purdom, 106 Wn.2d at 747.

e. The remedy is vacation of the felony harassment conviction. In Purdom, the Court reversed the conviction and remanded for a new trial. Purdom, 106 Wn.2d at 749. In Ziegler, the Court affirmed the remaining convictions but held that Ziegler was entitled to have the convictions for the additional rape counts vacated and to be resentenced. Ziegler, 138 Wn. App. at 811. In

the event that this Court does not reverse Dodd's remaining convictions based on the prejudicial evidentiary errors discussed in the arguments that follow, this Court should vacate his conviction for felony harassment and remand for resentencing.

2. THE TRIAL COURT DENIED DODD HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT BARRED HIM FROM IMPEACHING DAVIS WITH EVIDENCE OF PRIOR FALSE ALLEGATIONS.

a. Accused persons are guaranteed the right to present a complete defense by the Fourteenth Amendment and the Sixth Amendment.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The right to present a defense, therefore, is intimately connected to an accused person's right to present all relevant evidence bearing on the credibility of the State's allegations. ER 401; ER 402.

Relevancy is a low bar. "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, where an accused person's right to present a defense is at stake, the court must be very careful not to exclude even minimally relevant evidence. Id.

Where the right to a defense is implicated, the court must apply a three-part test to determine if the evidence may be excluded.

First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 622 (citing State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)).

b. The evidence of Davis' prior false allegations was relevant and material to rebut the domestic violence aggravating circumstance and should have been admitted. Where a witness testifies inconsistently with a prior out-of-court statement of material fact, the witness may be impeached with the statement, even if it would otherwise be inadmissible. State v. Clinkenbeard, 130 Wn. App. 552, 559, 123 P.3d 872 (2005); ER 607; ER 613. If the impeachment is by extrinsic evidence, the witness must first be afforded an opportunity to explain or deny the statement. ER 613(b). The prior statement is then relevant to assess the witness' credibility. Clinkenbeard, 130 Wn. App. at 559.

The trial court deemed the evidence of Davis' prior false allegation that Dodd had struck her with a baseball bat to be "collateral," but the court's ruling was wrong on two grounds. First, the State had charged the domestic violence aggravating circumstance of "an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 16-19. Because the State had charged this aggravating circumstance, evidence of the false allegation regarding the baseball bat was directly relevant to the credibility of Davis' assertions of prior abuse.

Second, to prove this aggravating circumstance, the State introduced extensive evidence of prior alleged acts of physical and psychological abuse. The State thus opened the door to evidence that Davis had made prior false reports. “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Seattle Police Officer Brian Hunt would have testified that Davis told him Dodd had struck her with a baseball bat, but that when he examined her he could find no injury to corroborate her accusation. RP 359. The trial court limited Dodd’s cross-examination regarding Davis’ prior false report to questions to Davis herself, and barred him from asking Hunt about the incident. RP 362. Not surprisingly, when defense counsel asked Davis about the incident her testimony was self-serving. She stated firmly that Dodd had threatened her with a baseball bat in the past but that he “never, ever struck [her] with a baseball bat.” RP 483.

c. The ruling barring Dodd from impeaching the truth of Davis’ allegations was prejudicial. A constitutional error is

prejudicial unless the State proves beyond a reasonable doubt the error did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this burden here.

By prohibiting Dodd from eliciting Hunt's testimony about the false allegation, the trial court essentially allowed Davis' claims of prior abuse to stand unrebutted. Hearing this evidence, it is not surprising that the jury concluded the aggravating circumstances had been proven beyond a reasonable doubt. Given that Dodd was not given the opportunity to dispute the prejudicial testimony about prior bad acts, it also is unsurprising that the jury returned a guilty verdict on the underlying allegations. This Court should conclude that the court's ruling preventing Dodd from impeaching Davis' credibility was prejudicial. Dodd is entitled to a new trial at which he will be permitted to introduce the impeachment evidence.

3. EVIDENCE THAT DODD CALLED HIMSELF THE "CANDY MAN" AND SUPPLIED DAVIS WITH CRACK COCAINE WAS IRRELEVANT AND PREJUDICIAL AND SHOULD HAVE BEEN EXCLUDED.

a. ER 404(b) prohibits the admission of propensity evidence unless it is relevant and material to proving an essential ingredient of the crime. Under ER 404(b), a court is prohibited from

admitting “[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” ER 404(b). “This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (quoting State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007)).

Where the State seeks to introduce propensity evidence, the trial court first must analyze whether the evidence is necessary to prove an “essential ingredient” of the crime charged “rather than simply to show the defendant had a propensity to act in a certain manner which he followed on that particular occasion.” State v. Sanford, 128 Wn. App. 280, 285, 115 P.3d 368 (2005). Second, the court must evaluate the evidence’s relevance – i.e., whether its probative value is outweighed by its prejudicial effect. Id. Third, the court must issue a limiting instruction to ensure the evidence is not considered for its propensity purpose. Id. The other misconduct may not be admitted unless the court finds it is more likely than not that it occurred. Foxhoven, 161 Wn.2d at 175.

b. The evidence was not relevant to prove an essential ingredient of the crime charged, was highly prejudicial, and should have been excluded. Pursuant to RCW 9.94A.535, the State may submit an aggravating circumstance to the jury where the crime involved domestic violence and “[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(i); (h). The trial court ruled that evidence of Dodd’s moniker “the candy man” was admissible to prove this aggravating circumstance. RP 113. This ruling was erroneous. Further, to the extent that the ruling was based on State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), it was predicated on a misapprehension of controlling law.

In Magers, a plurality of the Washington Supreme Court held that evidence of the defendant’s prior violent behavior was relevant and admissible in a prosecution for domestic violence second degree assault to prove (1) the victim’s “reasonable apprehension and imminent fear of bodily injury” and (2) her possible motivation for giving conflicting statements about Magers’ conduct. Id. at 183-85. With respect to the first part of this ruling, the plurality found that “evidence of Magers’s prior violent misconduct was relevant on

the issue of whether Ray's apprehension and fear of bodily injury was objectively reasonable, those elements being at issue since the charged act does not itself conclusively establish 'reasonable fear of bodily injury.'" Id. at 383.

This ruling does not represent the opinion of a majority of the Court and thus has limited precedential value. In re Personal Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) ("A plurality opinion has limited precedential value and is not binding on the courts"). There being "no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." Lauer v. Pierce County, 157 Wn. App. 693, 700, 238 P.3d 539 (2010) (citations omitted).

Concurring justice Madsen disagreed with the plurality's rationale for finding the evidence admissible, but believed that the error was harmless. Magers, 164 Wn.2d at 194-95 (Madsen, J., concurring in result). The dissenting justices also believed that the evidence should have been excluded:

A defendant is on trial only for actions taken in the current case, not for wrongful acts that may have occurred in the past. ER 404(b) has historically been a mechanism to ensure that the jury convicts a defendant based only on evidence proving the

commission of the crime charged. A person should not be convicted based on being the type of person who is likely to commit crimes. . . . By generally allowing admission of highly prejudicial evidence of prior bad acts to be admitted at trial, the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant's past. ER 404(b) protects against this type of prejudicial and biased trial.

Id. at 198 (Johnson, J., dissenting).

To be admissible, propensity evidence must be necessary to prove an essential ingredient of the charged crime. The State introduced extensive testimony regarding alleged prior acts of domestic violence by Dodd against Davis to prove the aggravating circumstance. RP 395-401, 405. The State also introduced evidence that Dodd controlled Davis' finances and restricted her access to her money. RP 394-95. Given the admission of this evidence, the evidence that Dodd allegedly furnished Davis with drugs and was known by the moniker "candy man" was unnecessary surplusage. As defense counsel correctly pointed out, the evidence was a "distraction" from the matters to be proven at trial and thus solely probative of Dodd's alleged bad character. RP 112.

c. The prejudicial error requires reversal. "An evidentiary error is not harmless if, within reasonable probabilities,

had the error not occurred, the outcome of the trial would have been materially affected.” In re Detention of Post, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 4244821 at 6 (October 28, 2010). Here, the error in the admission of the drug evidence was prejudicial.

Dodd’s general denial defense was founded on the theory that an altercation may have occurred on February 19, 2009, but that any sexual intercourse happened prior to that evening and was consensual. RP 828-29, 936, 947-56. His defense depended on the jury finding Davis’ allegations incredible.

There were ample reasons to reject Davis’ testimony. Davis did not tell the police officers or emergency personnel who responded to her 9-1-1 call that she had been raped. RP 215, 218, 325-28, 340. Lawson, Dodd’s next-door neighbor, did not recall Davis telling her that she had been sexually assaulted. RP 203. Davis’ physical injuries, such as they existed, were insignificant and arguably inconsistent with the events that she described. RP 793, 802-05, 827, 881. Davis gave exaggerated accounts of Dodd’s prior alleged abuse. RP 678, 692-93, 724, 734. One police officer testified that despite having been dispatched to Dodd’s apartment on several prior occasions he had never made an arrest or even written a police report. RP 686, 695. He explained that sometimes

a person will lie about events, or “say a key word” in order to get a faster response from police and get the other person involved away. RP 695.

The evidence that Dodd allegedly gave Davis crack cocaine was designed to induce the jury to overlook these reasons to doubt Davis’ credibility. Supplying the jury with a basis to believe that Dodd was a bad person assisted the State to overcome the problems with its complaining witness and inconsistencies in its case-in-chief. This Court should conclude that if the evidence had not been admitted, there is a reasonable probability the outcome of the trial would have been different. Dodd’s convictions should be reversed.

5. THE TRIAL COURT ERRONEOUSLY INCLUDED A PRIOR CONVICTION FOR THE GEORGIA OFFENSE OF FAMILY VIOLENCE BATTERY IN DODD’S OFFENDER SCORE THAT WAS NOT COMPARABLE TO A FELONY IN WASHINGTON.

a. The inclusion of out-of-state offenses in the SRA offender score violates due process unless the foreign convictions are legally and factually comparable to crimes in Washington.

Where the State alleges a defendant’s criminal history contains out-of-state felony convictions, under the SRA, the State bears the

burden of proving the existence and comparability of those convictions. RCW 9.94A.525; State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved by indictment or trial to determine if the prior offenses are comparable. Id. at 256-57. In this latter instance, however, the court must exercise care.

As the Supreme Court explained in Lavery:

Where the foreign statute is broader than Washington's, [an examination of the underlying facts] may not be possible because there may have been

no incentive for the accused to have attempted to prove that he did not commit the narrower offense.

Lavery, 154 Wn.2d at 257 (citation omitted).

The concern is that substantive differences in the criminal law of foreign jurisdictions may result in the defendant being convicted for conduct for which he may have had a legitimate defense in Washington. See id. at 258 (“Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution”). Such an outcome violates the Fourteenth Amendment guarantee of due process. Murray v. Carrier, 477 U.S. 478, 495, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (“[i]n appropriate cases’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’”) (citation omitted); In re Personal Restraint of Carter, 154 Wn. App. 907, 918-20, 230 P.3d 181 (2010) (applying “actual innocence” exception to excuse procedural default where lack of comparability invalidated persistent offender sentence).

b. Dodd’s Georgia conviction for family violence battery was legally comparable to the misdemeanor offense of

assault in the fourth degree in Washington and should not have been included in his SRA offender score. Without engaging in any independent analysis, the trial court accepted the State's argument that Dodd's Georgia conviction was comparable to the crime of assault in the third degree and included this conviction in his offender score. In fact, "family violence battery" is comparable to the crime of assault in the fourth degree, a gross misdemeanor, and so should have been excluded from Dodd's SRA offender score.

i. Dodd's Georgia conviction for family violence battery is legally comparable to the misdemeanor offense of assault in the fourth degree. Georgia Code Ann. § 16-5-23.1 provides: "A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another." Georgia Code. Ann. § 16-5-23.1(a). The same statute defines "visible bodily harm" as "bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts." Georgia Code Ann. § 16-5-23.1(b).

“Family violence battery” involves battery “between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household.” Georgia Code Ann. § 16-5-23.1(f). The crime is a misdemeanor for a first conviction and a felony for all subsequent convictions. Id.

RCW 9A.36.031 provides that a person is guilty of assault in the third degree if “[w]ith criminal negligence, [he or she] causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(f).

RCW 9A.36.041 provides, “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1). Assault in the fourth degree is a misdemeanor. RCW 9A.36.041(2). Washington does not provide that second or subsequent fourth degree assaults committed against family members are felonies.

Below, the State conceded that “the Washington [assault in the third degree] statute requires slightly more than the

corresponding Georgia law.” CP 109. The State contended that for this reason the court should examine the “the facts admitted at the plea hearing” to determine whether Dodd could have been convicted of a felony assault if he had been prosecuted in Washington Id. The State was incorrect. “[T]he elements of the charged crime must remain the cornerstone of the comparison.” Morley, 134 Wn.2d at 606. If the elements are substantially similar, then the comparability analysis is concluded. Lavery, 154 Wn.2d at 255.

Washington’s fourth degree assault is exceptionally broad. Any assault “not amounting to assault in the first, second, or third degree” is an assault in the fourth degree. RCW 9A.36.041(1). Georgia Code Ann. § 16-5-23.1 provides that an assault that results in “substantial bodily harm” or “visible bodily harm” is a battery. The Georgia Legislature has not defined “substantial bodily harm,” however under Georgia law “substantial bodily harm” must be distinguished from “the ‘seriously disfiguring’ injury required for aggravated battery.” Carroll v. State, 667 S.E.2d 708, 722-23 (Ga. App. 2008). “Visible bodily harm” broadly contemplates all “bodily harm capable of being perceived by a person other than the victim.” Georgia Code Ann. §16-5-23.1(b).

On its face, Georgia's misdemeanor battery statute is squarely comparable to Washington's assault in the fourth degree statute. "Visible bodily harm" encompasses injuries "not amounting to assault in the first, second, or third degree." The trial court erred in including the crime in Dodd's offender score.

ii. No factual analysis is possible because

Dodd did not admit the underlying facts regarding the assault and the State did not prove the requisite elements of the offense.

Below, the State argued that the court should look at the underlying facts to determine comparability. CP 109. As noted above, because family violence battery in Georgia is legally comparable to a fourth degree domestic violence assault in Washington, no factual analysis is permitted. However, even assuming arguendo that a factual inquiry were possible, Dodd did not admit the facts necessary to establish a felony assault in Washington, nor did the State prove the requisite elements of the crime.

At the plea hearing, the Georgia prosecutor stated:

[O]n January 1st of this year, in Gwinnett County, Mr. Dodd got into an argument with his wife. During the argument, Mr. Dodd struck his wife, broke her cheekbone and knocked out one of her molars for her teeth [sic].

CP 148. The prosecutor was not under oath when he made this representation, and no additional evidence of the underlying facts was presented to the court.

The plea itself was a “straight” plea. During the plea colloquy, Dodd admitted that he had committed the offenses that he was pleading guilty to, but disagreed with the State’s recitation of the facts. CP 153-54. When the prosecutor asked Dodd, “Are the facts that I outlined to [the] judge about how it happened regarding the argument between you and your wife in front of your children true and correct?” Dodd replied, “To an extent, yes, sir.” *Id.* As the colloquy makes plain, Dodd did not admit or stipulate to any facts regarding the commission of the assault.

This omission makes it impossible for this Court to adjudge with any certainty what facts were proven. “Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.” Lavery, 154 Wn.2d at 258; see also State v. Releford, 148 Wn. App. 478, 489, 200 P.3d 729 (2009) (“the facts supporting a prior conviction must either be proved beyond a reasonable doubt or admitted by the defendant”) (emphasis in original).

Moreover, even assuming that the Georgia prosecutor's bare recitation were true, his explanation of what occurred does not establish the mens rea with which Dodd committed the acts. If, for example, the assault were committed without the requisite intent, it would not be comparable to an assault in Washington. Similarly, the bare-bones facts submitted by the prosecutor do not establish the pain and suffering required to prove a third degree assault. RCW 9A.36.031.

The State bears the burden of proving the comparability of prior out-of-state convictions. Ford, 137 Wn.2d at 480. The trial prosecutor, aware of this burden, obtained documentation that contained only an allegation of the conduct underlying the charged crime, and presented no additional facts. As the Georgia sentencing court noted during Dodd's sentencing hearing, "this named victim being your wife doesn't want to cooperate, does not want to testify against you," CP 156. It is therefore far from clear that the prosecution could have carried its burden of proving the underlying facts absent a stipulation or admission from Dodd, which the State did not obtain.

For all of these reasons, this Court should conclude that the Georgia family violence battery conviction is comparable to a fourth

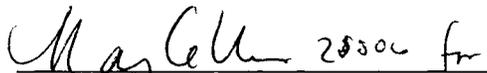
degree domestic violence assault in Washington. The offense should not have been used to elevate Dodd's offender score. Dodd is entitled to be resentenced without the prior conviction.

E. CONCLUSION

For the foregoing reasons Dodd requests this Court reverse his convictions. In the alternative, he asks the Court to strike his conviction for felony harassment and remand with direction that upon resentencing, his prior Georgia conviction for family violence battery be excluded from his offender score.

DATED this 15th day of December, 2010.

Respectfully submitted:



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65528-1-I
)	
CLIFTON DODD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2010.

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