71468-6

FILED
June 15, 2015
Court of Appeals
Division I
State of Washington

NO. 71468-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MARTIN ADAMS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

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# APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

**1. The court denied Mr. Adams his right to exercise peremptory challenges to which he was entitled**.

Although Mr. Adams was entitled to two peremptory challenges for the two alternate jurors being selected, the court only allowed him to have a single challenge. There is no dispute that the court misapplied the legal requirement of CrR 6.5 allotting two challenges if selecting two alternates yet it only gave a single challenge to each party despite selecting two alternates. 1RP 55.

When exercising peremptory challenges, Mr. Adams did not decline to exercise any peremptory challenges. 12/10/13RP 597-99. Because he had not passed on the opportunity to exercise a peremptory challenge, he was entitled to challenge any juror in the group. RCW 4.44.210. But the court refused to let Mr. Adams strike a juror within the group. 12/10/13RP 600-01. Therefore, a juror was seated on the panel who Mr. Adams intended to challenge and should have been entitled to challenge but for which Mr. Adams was not permitted to challenge.

"Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice.

As such, harmless error analysis does not apply." *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000). Mr. Adams was denied his right to exercise a peremptory challenge for a seated juror for whom he appropriately believed he was entitled to challenge when he had not declined to exercise an allotted peremptory or otherwise accepted the selected panel of 12 jurors. The denial of his right to exercise a peremptory challenge for a seated juror requires reversal, as explained in Mr. Adams' opening brief.

**2. The State's use of unduly prejudicial, irrelevant accusations of uncharged misconduct was objected to and denied Mr. Adams a fair trial.**

The prosecution asks this Court to ignore the State's reliance on evidence bashing Mr. Adams as a bad person based on a misguided assertion that Mr. Adams did not object. But Mr. Adams appropriately objected. The resulting use of unduly prejudicial claims of wrongful conduct toward Ms. Adams were not sufficiently probative of whether Mr. Adams committed the alleged assault, encouraged the jury to decide the case based on his propensity to abuse his wife, and denied him a fair trial.

"[A] a party *losing* a motion to exclude evidence has a standing objection to the admission of that evidence at trial unless instructed by

the court to continue to object." *State v. Weber*, 159 Wn.2d 252, 271, 149 P.3d 646 (2006) (emphasis in original). Mr. Adams filed a motion in limine objecting to ER 404(b) evidence of uncharged domestic violence allegations and claims of any past or future fear of Mr. Adams. CP 12-13. Defense counsel reminded the court that if the State wanted to introduce past acts, it needed to determine their admissibility. 1RP 27, 29; *see e.g.*, *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014) ("careful and methodical" weighing of probative value against prejudicial effect required before admitting "prior acts in domestic violence cases"). Counsel also explained that she had not been notified what allegations the State wanted to introduce. 1RP 29. The court denied the motion after the State indicated it did not intend to elicit any such information and based upon an expansive reading of prior cases undermined by *Gunderson*, 181 Wn.2d at 923-24 (explaining narrow intended construction of *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008)); 1RP 14, 30; 12/10/13RP 503-04.

Having notified the court of the legal standard for admitting allegations of uncharged wrongful conduct and losing his in limine objections, Mr. Adams further objected to the testimony during as insufficiently relevant. *See, e.g.*, 85-86, 135-36, 147, 154, 185-88. But

these in-trial objections were not necessary based on his pretrial motions in limine. *See Weber*, 159 Wn.2d at 271.

Moreover, *Gunderson* explains that weighing the probative value against the prejudicial effect is particularly critical in cases involving allegations of prior domestic violence. Mr. Adams' objections to the limited relevance, and resulting undue prejudicial effect, in the short hand objection raised in the course of a jury trial, appropriately advised the court of the reasons the evidence should not have been admitted. The State's preservation claims are specious.

Admitting this evidence, in addition to the other evidentiary errors discussed in the opening brief, was decidedly prejudicial. The "relationship dynamic" was a central point in the State's case and the court permitted this inquiry based on an expansive reading of *Magers* that was contradicted by *Gunderson*. Ms. Adams consistently claimed Mr. Adams assaulted her. She was not a recanting witness. The allegations that he acted disrespectfully and meanly on other occasions led the jury to disliked and discredit Mr. Adams for improper reasons and surely affected the jury's assessment of the critical credibility questions central to the case. The improperly admitted evidence casting Mr. Adams as a serial abuser and drug user, while crediting Ms. Adams

as a consistent complainer about Mr. Adams, undermined the fairness of the trial.

### 3. Mr. Adams' failure to persuasively explain his innocence to police at the time of his arrest was inadmissible.

In addition to the inadmissible bad act evidence, the State used Mr. Adams' conduct at the time of his arrest as substantive evidence of his guilt, contrary to *State v. Easter*, 130 Wn.2d 228, 236-37, 922 P.2d 1285 (1996); U.S. const. amend. 5; Const. art. I, § 9. Police officers contacted Mr. Adams for the purpose of arresting him and told the jury he did not express shock or surprise when told of his wife's injuries. 3RP 268. Mr. Adams objected during the trial when the State attempted to use his state of mind and failure to act appropriately surprised against him. 3RP 268-29. The purpose for questioning him was simply to gather evidence, not preliminary investigation, yet he was not told of his right to remain silent. *Id*. The court overruled Mr. Adams' objection but instructed the prosecution to limit its question to a physical response, yet the police officer again responded by telling the jury that Mr. Adams failed to act as an innocent person would. *Id*.

In *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996), the Supreme Court unambiguously ruled that an accused person's

prearrest silence cannot be used against him. The prosecution claims that *Easter* has been overruled by *Salinas v. Texas*, _ U.S. _, 133 S.Ct. 2174, 2178, 186 L.Ed.2d 376 (2013), but it acknowledges that no court has recognized this overruling. This Court is bound by supreme court decisions. *See Satterlee v. Snohomish Cnty*., 115 Wn.App. 229, 233, 62 P.3d 896 (2002), *as amended on denial of reconsideration* (2003); *State v. Hunley*, 161 Wn.App. 919, 932, 253 P.3d 448 (2011), *affirmed*, 175 Wn.2d 901, 287 P.3d 584 (2012) (stating that Supreme Court precedent is binding on this court). Our state common law and the constitutional difference between article I, section 9 and the Fifth Amendment may lead to different analysis than applied in the recent *Salinas* decision. This Court is not free to disregard the clear application of *Easter* to this case.

Furthermore, in *Salinas* the sole question before the Court was whether a non-arrested person's silence "during a noncustodial police interview," may later be used against him under the Fifth Amendment. 133 S.Ct. at 2179. The court repeatedly emphasized that "it is undisputed that [the] interview with police was voluntary." *Id*. at 2180. By its own terms, *Salinas d*oes not apply when a person is questioned in

a custodial interview such as a situation when *Miranda*[1] warnings would have been required. *Id*. Given the presence of two uniformed officers who were preparing to arrest Mr. Adams, his freedom of movement was in the process of being revoked and the police officer's questions should have been preceded by *Miranda* warnings.

At the least, the State was obligated to advise Mr. Adams that they intended to use his statements from the time of arrest and give him the opportunity to litigate whether his remarks were elicited during custodial interrogation. CrR 3.5 states that any time a statement of the defendant is to be offered into evidence, the court must hold a hearing to determine its admissibility. The prosecution violated this mandatory procedure by failing to give notice of its intent to use Mr. Adams' statements against him. The police implied that Mr. Adams made statements indicating he was not surprised or upset about his wife's condition. 3PR 268-69, 271. The purported oral statement he made to the police that showed he was not surprised by Ms. Adams' injuries was not in the police report. 3RP 271. The State did not inform Mr. Adams that it intended to use his failure to proclaim his innocence against him.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Finally, the State does not avoid its obligation to steer free of commenting on a person's right to remain silent by implying his silence indicated his guilt, when in fact the only statements he made were those protesting his innocence, which the officer disbelieved. The officer's belief that Mr. Adams was not sufficiently credible when he denied committing a crime is inadmissible, and the State cannot hide behind the fact that the jury later learned that Mr. Adams denied harming Ms. Adams.

Based on this improper allegation that Mr. Adams did not sufficiently express his innocence at the time of his arrest, coupled with repeated allegations of his routine belittling and demeaning conduct toward his wife on other occasions and the bolstering of the complainant's testimony by claims of prior consistent statements, these various errors undermined the fairness of the trial and require reversal.

B. CONCLUSION.

For the foregoing reasons and those presented in Appellant's Opening Brief, Mr. Adams' conviction should be reversed and a new trial ordered.

DATED this 12th day of June 2015..

Respectfully submitted,

*s/ Nancy P. Collins*
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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| STATE OF WASHINGTON, | ) | |
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| RESPONDENT, | ) | |
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| v. | ) | NO. 71468-6-I |
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| MARTIN ADAMS, | ) | |
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| APPELLANT. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **REPLY 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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| [X ] | MARTIN ADAMS<br>1784 OLD HIGHWAY 99 N<br>BURLINGTON, WA 98223 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 15TH DAY OF JUNE, 2015.

X_____

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