72628-5

72628-5

NO. 72628-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

EURAN J. WOODS,

Appellant.

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

BRIEF OF APPELLANT

JAMES M. WOMACK
Attorney for Appellant

THE WOMACK LAW GROUP, PLLC
2101 4TH Avenue Suite 1560
Seattle, WA 98121
(206) 223-1875

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....5

Issue Pertaining To Assignment Of Error.....5

B. STATEMENT OF CASE.....6

1. Procedural History.....6

2. Trial Testimony.....6

3. 404 (b) Evidence.....8

C. ARGUMENT.....8

THE COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED "PIMPING" OF VICTIM

2. THE DEFENDANT WAS DENIED EFFECTIVE..... ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO EVIDENCE OF PIMPING OR SUGGEST A LIMITING INSTRUCTION

D. CONCLUSION.....16

TABLE OF AUTHORITIES

WASHINGTON CASES Page

Micro Enhancement Intern, Inc. v Coopers & Lybrand, LLP
110 Wn. App. 412, 40 P.3d 1206 (2002)..... 15

State v. Aho
137 Wn.2d 736, 745, 975 P.2d 512 (1999)..... 13

State v. Bacotgarcia
59 Wash.App. 815, 822, 801 P.2d 993 (1990)..... 15

State v. Barragan
102 Wash.App. 754, 762, 9 P. 3rd 942 (2000)..... 14

State v. Brown
132 Wash.2d 529, 571, 940 P.2d 546 (1997).....11, 14

State v. Everybodytalksabout
145 Wash.2d 456, 49 P.3d 294 (2002)..... 10

State v. Gresham
173 Wn.2d 405, 420, 269 P.3d 207 (2012)..... 9

State v. Irby, 187 Wash.App. 183, 347 P.3d 1103 (2015)..... 12

State v. Monday
171 Wash.2d. 667, 257 P.3d 551 (2011).....9, 10, 14

State v. Stenson
132 Wash.2d 668, 701-02, 940 P.2d 1239 (1997)..... 11

State v. Warren
165 Wash.2d 17, 43, 195 P.3d 940 (2008)..... 14

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2n 674 (1984)..... 12, 13

RULES, STATUTES AND OTHER AUTHORITIES

ER 404..... 5, 8, 9, 10, 11, 13, 14

Const. Amend. VI..... 9

Const. Art. Sec. 1, Sub. 22..... 11

Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism, 92 Colum. L. Rev.1212, 1222-23 & nn. 67, 71 (1992)..... 9

Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 Law & Hum. Bahav. 621, 627- 28 (2005)..... 10

Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The problems of Judge-Dominated Voir Dire, the failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y rev. 149, 150 (2010).....10

A. ASSIGNMENT OF ERROR

THE COURT ERRED IN ADMITING EVIDENCE OF THE DEFENDANT'S ALLEGED PIMPING OF THE ALLEGED VICTIM, BRITTANY ENGLUND.

Issue (s) Pertaining to Assignment of Error

Appellant was charged with one (1) count of Assault in the Second Degree – Strangulation for an incident involving the complaining witness. The Court ruled, after argument, that other uncharged incidents between the appellant and the complainant witness were admissible under ER 404 (b) to prove res gestae and explain why the complaining witness delayed reporting the alleged incidents. Along with allowing the State to present other incidents under ER 404 (b), the Court allowed the State present evidence through the complaining witness that she had been prostituted by the Appellant despite the fact that the Appellant was not charged with promoting prostitution or any pimping offense. This evidence was admitted in the context of an African-American Defendant, a white complaining witnesses and a mostly white jury. Given the presence of a non-diverse jury presented with pimping evidence, which played into deep-seated racial stereotypes, was the appellant denied his constitutional right to a fair tribunal?

B. STATEMENT OF CASE

1. Procedural History

The King County prosecutor charged appellant Euran Woods with one count of Assault in the Second Degree (DV) – Strangulation for incidents with the complaining witness, Brittany Englund, between September 1, 2011 and September 11, 2015. CP 28-28. A jury found Woods guilty of Assault in the 2nd Degree as charged. CP 51-51.

The court imposed a standard range sentence of 9 months. CP 53 - 59. Woods timely appeals. CP 60 – 69.

2. Trial Testimony

Englund and Woods met while Ms. Englund was living at a mutual friend's house. RP 18. They soon became friends –moving from friendship to a relationship rapidly. RP 11. According to Englund, toward the end of 2009, the relationship changed from friendship to something more. RP 11. During this time, Englund was arranging drug deals with Woods. RP 11- 12. While she was selling and using drugs, Ms. Englund's relationship with her family degraded. RP 14. As Ms. Englund's drug activity separated her from her family, she started to spend more time with the Appellant, Mr. Woods. RP 15. Toward the summer of 2011, Ms. Englund thought she was "in love" with Mr. Woods. RP 15.

In August of 2011, Ms. Englund testified that Mr. Woods began to talk to her about prostitution. RP 17. Ms. Englund testified that Mr. Woods told her that she needed to be equal in the relationship. RP 17- 18. Ms. Englund testified that the Defendant purchased clothes for her then dropped her off on Aurora Avenue for the purpose of engaging in prostitution RP 18- 19. According to Ms. Englund that she engaged in this activity for approximately three weeks during the month of August 2011. RP 19. She further testified that after then, the Appellant would arrange for prostitution calls on Backpage. RP 20. Backpage, as described by the complaining witness, is a website where prostitutes advertise. RP 21. Ms. Englund testified that the Appellant created the ads for Ms. Englund on Backpage. RP 21. He wrote the content for the ads on Backpage and took the photographs RP 21. Ms. Englund testified that after she performed an act of prostitution she would provide the money to Mr. Woods. RP 21. Ms. Englund testified that alleged prostitution continued into early October 2011. RP 22. Ms. Englund testified about her feelings when the Appellant "encouraged" her to prostitute herself. RP 22.

Referring to a fight in August 2011, Ms. Englund testified that the two (2) quarreled about her prostitution activities. RP 23. During the incident, Ms. Englund testified that the Appellant chocked her. RP 25-26. Later, she testified that another incident occurred in September 2011. RP

27. Defense counsel did not make a contemporaneous objection to the admission of this evidence. Opting instead to question Ms. Englund about whether she reported the date she began prostituting for Mr. Woods correctly. RP 62-63.

3. 404 (b) Evidence

Before trial, the State moved to admit evidence of a number of uncharged acts between Woods and Englund. CP 9-27. Importantly, the State did not identify any intent to admit evidence of alleged pimping activities under ER 404 (b) in its Trial Memorandum despite including those facts in the State's Trial Memorandum. Id. The Court gave a limiting instruction related to past assaults but made no mention of the alleged pimping activity. CP 31-48.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING THE EVIDENCE OF PIMPING IN THE STATE'S CASE IN CHIEF

It is fundamental to the fair determination of any controversy that Court function as a gatekeeper to prevent irrelevant and/or highly prejudicial evidence with little probative value from being admitted at trial. The prosecution is precluded from using evidence to demonstrate a defendant's criminal propensity. ER 404 (b). This includes a categorical bar to the admission of evidence for the purpose of proving a person's

character and showing that the person acted in conformity with that character." ER 404 (b); State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

A. Evidence of 'pimping' was a subtle appeal to deep-seated racial stereotypes.

"Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." State v. Monday, 171 Wash.2d. 667, 257 P.3d 551 (2011) citing Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism, 92 Colum. L. Rev. 1212, 1222-23 & nn. 67, 71 (1992).*

In the instant case, the State elicited evidence from the alleged victim regarding the Appellant's alleged encouragement of her prostitution activities. This evidence was allowed despite the fact that Mr. Woods, an African-American male, was not charged with promoting prostitution or any other offense that would make admission of this highly damaging evidence relevant.

2. Courts must ensure a trial that minimizes the impact of Implicit Bias.

Generally, there is a consensus in the research that jurors predominated by one race tend to show bias against defendants belonging to another race. Tara L. Mitchell et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 LAW & HUM. BEHAV. 621, 627-28 (2005). Moreover, there is little to suggest that judges are any less immune to the effects of implicit bias than jurors. See gen. Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL'Y rev. 149, 150 (2010).

In the instant case, the Court was well aware that the State intended to seek ER 404 (b) evidence in the form of prior alleged assaults. The State requested as much in its pretrial motions. However, there appears to have been no acknowledgment, by any of the parties and particularly by the judge, of the damaging impact of allowing a jury to hear evidence of pimping in the context of this case where the Defendant, Mr. Euran Woods is a black male and the alleged victim was a white female. Similar to the situation in State v. Monday, the State, Defense, and Court in our case failed to recognize the message communicated to the jury by admission of this evidence. While Monday involved overt appeals to racial stereotypes, the subtle impression given in the instant case was

equally damaging, particularly given the fact that the jury was not racially diverse. The admission of this evidence simply operated to make the defendant appear to be a bad actor, criminal type, and untrustworthy. This is precisely the type of evidence that ER 404 (b) is designed to prohibit. State v. Everybodytalksabout, 145 Wash.2d 456, 49 P.3d 294 (2002).

In order to be admissible, the Court had to find the evidence relevant to a material issue and its probative value must outweigh its prejudicial impact. State v. Brown, 132 Wash.2d 529, 571, 940 P.2d 546 (1997).

In our case, the only cognizable rationale for admitting evidence of pimping was that it was related to the reason for the argument between Mr. Woods and Ms. Englund in August of 2011. However, properly analyzed, there is little basis to find it relevant under ER 402 or finding it admissible under ER 404 (b). It was not relevant (i.e. evidence which tended to make a fact of consequence more or less likely) unless the assumption is that pimps of necessity use force, including choking and other forms of physical mistreatment, to control their prostitutes. State v. Stenson, 132 Wash.2d 668, 701-02, 940 P.2d 1239 (1997).

Moreover, under ER 404 (b), the Court should have easily found evidence of pimping inadmissible after weighing the probative value

versus the prejudicial impact of allowing it into evidence. Clearly, presenting irrelevant evidence to a non-diverse juror of a black male prostituting a white female had little if any probative value absent the above-referenced negative associations. Conversely, this evidence was highly prejudicial not simply because it makes Mr. Woods out to be a very bad actor but, more critically, because it plays into deeply rooted stereotypes of black men. Gibson, R., & Zillmann, D. (1994). Exaggerated versus representative exemplication in news reports: Perception of issues and personal consequences. *Communication Research*, *21*(5), 603–624.

Ultimately, the Court is required to ensure that the Defendant receive a fair trial. State v. Irby, 187 Wash.App. 183, 347 P.3d 1103 (2015) [Trial court reversed and new trial granted where trial court and prosecutor allowed obviously biased potential juror to be seated on jury where defendant had waived his presence at trial]. This should include a sufficient awareness on the part of trial court evidentiary issues that may arise which demonstrate implicit racial bias.

2. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF PIMPING EVIDENCE AND/OR FAILED TO PRESENT A LIMITING INSTRUCTION.

A criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington; 466 U.S. 668, 685 – 86, 104 S. Ct. 2052, 80 L.Ed. 2n 674 (1984); State v. Thomas, 109 Wash.2d 222, 229, 743 P.2d 816 (1987). Counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wash. 2d at 226. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id.

a. Counsel's Failure to Object and/or Demand a limiting instruction was Deficient.

The Government is precluded from using evidence to demonstrate a defendant' s propensity. ER 404(b). As discussed above, the failure to object to such evidence is only a bar to reversal on appeal when the

conduct is not "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Warren, 165 Wash.2d 17, 43, 195 P.3d 940 (2008) (quoting Brown, 132 Wash.2d at 561, 940 P.2d 546).

While dissimilar in tone to the appeal to racial prejudice found in Monday, the admission of this pimping evidence had a much more damning impact on Mr. Woods' right to a fair trial given the presence of a essentially homogenous, non-diverse jury. There was no legitimate reason not to object to this pimping evidence on relevancy and prejudicial grounds.

While under certain circumstances, courts have held that the decision to not to object and/or request a limiting instruction may be a legitimate trial strategy because such an instruction cans highly damaging evidence. See e.g. State v. Barragan, 102 Wash.App. 754, 762, 9 P. 3rd 942 (2000) (Failure to propose a limiting instruction for the proper use of ER 404 (b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence.)

Here, this evidence was certainly important enough for both the Defense and the State to address the matter on cross-examination CP 63 - 64 and re-direct examination. CP 69 -71. However, Counsel's failure to object to this evidence fell below the standard expected for effective

representation. There simply was no reasonable trial tactic or strategy for not objecting to this racially charged and damaging evidence. Further, failing to ask for a limitation on how the jury viewed this evidence fell below the standard for effective representation.

b. Mr. Woods was prejudiced by Counsel's Deficient Performance.

Absent an objection and/or a limiting instruction, jurors were free to consider the pimping evidence for whatever purpose they wished, including for an improper purpose. There is every reason to believe that the jury, faced with a he-said, she-said, evidentiary situation, would be more favorably disposed to believe Ms. Englund after hearing that Mr. Woods "pimped" her out. The jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wash.App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wash.2d 1020 (1991); see also Micro Enhancements Intern, Inc. v. Coopers & Lybrand, LLP, 110 Wash.App. 412, 430, 40 P.3d 1206 (2002). ("Absent a request for limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.")

In the instant case, the jury simply could not be expected to block out the extreme prejudice caused by the admission of the pimping evidence. Given that the jury was not diverse, it is highly probable that

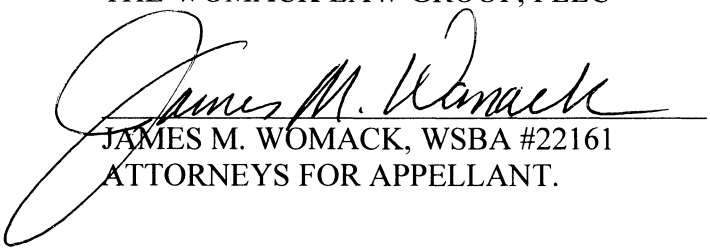
admission of this evidence confirmed implicit racial assumptions and fatally impacted Mr. Woods right to receive a fair trial.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Woods' conviction and remand for a new trial.

DATED this 19th day of February 2016.

THE WOMACK LAW GROUP, PLLC



JAMES M. WOMACK, WSBA #22161
ATTORNEYS FOR APPELLANT.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/ Respondent, v. EURAN WOODS Defendant/Appelant,	DIVISION ONE No. 72628-5-1 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the instant action. My business address is: The Womack Law Group, PLLC 2101 Fourth Avenue, Suite 1560, Seattle, WA 98121. I hereby certify that on February 19, 2016 I served a copy of the foregoing Brief of Appellant to the person/entity below via personal service:

Deborah Dwyer Esq.
King County Prosecutor's Office
Appellate Unit
516 3rd Ave Ste. W-554
Seattle, WA 98104-2362
deborah.dwyer@kingcounty.gov

Signed this 19th day of February at Seattle, WA.

s/Ian Marlow

Ian Marlow, Certificant

THE WOMACK LAW GROUP, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, Washington 98121
(206) 223-1875 Fax: (206) 223-1887