

FILED
9-4-15
Court of Appeals
Division I
State of Washington

No. 72922-5-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JACOB JOHANSEN,

Petitioner.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 5

1. The trial court erred and denied Mr. Johansen a fair trial by permitting the State to offer other acts evidence..... 5

a. ER 404 bars admission of other-acts evidence offered to prove character..... 5

b. There was no relevant purpose for the evidence 7

c. The prejudice greatly outweighed any potential probative value 11

d. The error in admitting the other-acts evidence requires reversal..... 13

2. Defense counsel’s proposal of an instruction which amounts to a comment on the was deficient and prejudicial to Mr. Johansen..... 15

a. Mr. Johansen is entitled to the effective assistance of counsel..... 15

b. Defense counsel’s performance was deficient 16

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. IV, § 16 1

United States Constitution

U.S. Const. amend. VI..... 1, 2, 15

Washington Supreme Court

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995)..... 16
State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997)..... 16
State v. Brush, __ Wn.2d __, 353 P.3d 213 (2015) 17, 18
State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 6
State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) 5, 12
State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014) passim
State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) 5
State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 15
State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) 16
State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)..... 6
State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008)..... 7
State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)..... 6, 7, 11
State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986)..... 7
State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 13
State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002)..... 6, 11

Washington Court of Appeals

State v. Baker, 162 Wn. App. 468, 259 P.3d 270, *review denied*,
173 Wn.2d 1004 (2011) 8
State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001)..... 17
State v. Epefanio, 156 Wn. App. 378, 234 P.3d 253 (2010) 17
State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999)..... 7

United States Supreme Court

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159
L.Ed.2d 403 (2004)..... 16
Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176
L.Ed.2d 284 (2010)..... 15

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.
Ed. 2d 674 (1984) 15

Statutes

RCW 9.94A.535 16

Court Rules

ER 404 passim

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting other acts evidence in violation of ER 404(b).

2. Instruction 13 violates Article IV, section 16 of the Washington Constitution.

3. Jacob Johansen was denied his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of another person's conduct is not, by itself, logically relevant to assess the credibility of a witness at trial. That is especially so where the witness has not placed her credibility at issue by contradicting or recanting earlier statements. ER 404(b) does not permit admission of other acts evidence in that circumstance. Did the court err in admitting allegations of Mr. Johansen's past acts ostensibly as relevant to a witness's credibility where the other-acts evidence only established that, if at all, as propensity evidence?

2. Article IV, section 16 prohibits a trial court from commenting on the evidence and any improper comment is presumed prejudicial. The Supreme Court has determined the pattern instruction pertaining to the aggravating circumstance of an ongoing pattern of abuse which

states the “a prolonged period of time” means “more than a few weeks” is a comment on the evidence. This is so because the instruction tells the jury that so long as the State’s evidence establishes the abuse spanned more than a few weeks the jury must find the aggravating circumstance. Here, Instruction 13 includes this language. Is Instruction 13 an impermissible comment on the evidence?

3. The Sixth Amendment guarantees the effective assistance of defense counsel. Where defense counsel proposed a jury instruction that required the jury to find the presence of an aggravating factor so long as the evidence established the alleged abuse spanned a period greater than a few weeks, was Mr. Johansen denied the effective assistance of counsel?

C. STATEMENT OF THE CASE

According to Lexi Boring, she and her boyfriend Jacob Johansen began arguing when he returned late one evening. RP 299-303. The argument stemmed from a series of texts and voicemails earlier in the day in which she had accused him of cheating. RP 611-13.

Ms. Boring became angrier still when Mr. Johansen began packing a bag, stating he was leaving. RP 308. Ms. Boring pushed Mr.

Johansen. RP 310-11. Mr. Johansen testified he finished packing his bag and left, without touching Ms. Boring. RP 632.

According to Ms. Boring, however, Mr. Johansen responded to her pushing him by pushing her to the ground and choking her. RP 311-12.

The State charged Mr. Johansen with a single count of second degree assault. CP 8-9. The State also alleged the assault was a part of an ongoing pattern of domestic violence. *Id.*

At trial, the State sought to admit, in its case-in-chief, testimony by Ms. Boring and her parents alleging Mr. Johansen had engaged in assaultive conduct against her for a number of years. In response to a defense objection based upon ER 404(b) that the evidence was simply propensity evidence, the State explained it believed the evidence was necessary to show “this is how Mr. Johansen acts.” RP 32. Mr. Johansen agreed the evidence would be admissible in the bifurcated proceeding in which the jury would determine whether the aggravating circumstance was proved after, and only if, the jury first convicted Mr. Johansen. RP 36.

The trial court concluded the evidence was admissible at trial in addition to at the supplemental proceeding on the aggravating factor.

RP 95-98. The court reasoned the jury could not fairly decide whether Mr. Johansen was guilty of the crime without knowing he was alleged to have previously committed similar acts. RP 98.

Although the court prevented the State from eliciting the specific details, Ms. Boring was permitted to testify Mr. Johansen was violent throughout their relationship and that it escalated throughout. RP 293. She claimed he often choked her. RP 294. Both of her parents were permitted to testify they knew Mr. Johansen had been violent towards their daughter. RP 404, 414-15.

The court instructed the jury it could consider the evidence only for purposes of evaluating Mrs. Boring's credibility. RP 686.¹

The jury convicted Mr. Johansen as charged. CP 47-48. The trial court imposed an exceptional sentence. CP 53.

¹ The court's instructions to the jury were not filed and thus could not be designated prior to filing this brief. Counsel has contacted the Superior Court in an effort to have the instructions filed. If that occurs counsel will file a supplemental designation.

D. ARGUMENT

1. The trial court erred and denied Mr. Johansen a fair trial by permitting the State to offer other acts evidence.

a. ER 404 bars admission of other-acts evidence offered to prove character.

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a).

ER 404(b) provides:

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.

“Properly understood . . . ER 404(b) is 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.”
State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is

a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

To admit evidence of other acts the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) (citing *Saltarelli*, 98 Wn.2d at 362). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

b. There was no relevant purpose for the evidence.

The trial court instructed the jury that it could consider the evidence in assessing Ms. Boring's credibility. RP 686. However, that conclusion is contrary to *Gunderson*.

Gunderson explained other acts evidence could be admitted as relevant evidence of the witness's credibility only where the State first established "why or how the witness's testimony is unreliable." 181 Wn.2d at 925. Moreover, the Court limited this class of evidence to instances in which the State can establish its "overriding probative value." *Id.* The threshold for admission is "*conflicting statements about [the defendant's] conduct.*" *Gunderson*, 181 Wn.2d at 924 (emphasis and brackets in original) (citing *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)). On this point, *Gunderson* abrogates this Court's

opinion *State v. Baker* which concluded such evidence was admissible for purposes of evaluating credibility even where the victim had never offered contradictory statements. *See State v. Baker*, 162 Wn. App. 468, 475, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011).

Gunderson requires that before other-acts evidence may be admitted, the State must first show Ms. Boring's testimony was "unreliable" as demonstrated by conflicting statements about Mr. Johansen's conduct. 181 Wn.2d at 924. The evidence in this case did not meet that standard.

The State certainly never contended Ms. Boring's testimony was unreliable. Unlike *Magers* Ms. Boring never made a statement denying the incident or in any way contradicting her trial testimony. To the contrary, the court reasoned the evidence was relevant because Ms. Boring had told others about the alleged prior abuse. RP 274. Thus, rather than lay a foundation of unreliability and contradiction, the court pointed to evidence of reliability and corroboration, which does not place Ms. Boring's credibility at issue under *Gunderson* and *Magers*.

Instead, the State contended, and the court agreed, Ms. Boring's credibility was relevant because Mr. Johansen denied the assault occurred. RP 97. But the mere fact that her account was disputed by

Mr. Johansen cannot open the door to allegations of prior acts. As

Gunderson explained

That other evidence from a different source contradicted the witness's testimony does not, by itself, make the history of domestic violence especially probative of the witness's credibility. There are a variety of reasons why one witness's testimony may deviate from the other evidence in a given case. In other words, the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable.

Gunderson, 181 Wn.2d at 924-25.

If the rule were otherwise any time a defendant entered a general denial defense or exercised her right to go to trial, the alleged victim's credibility would by definition be at issue and thereby open the door to past acts evidence. Witness credibility is at issue in every trial. But, only where the witness is shown to be unreliable can evidence of the defendant's past acts be relevant. *Id.* As the Court noted, the contrary conclusion would amount to a domestic violence exception to ER 404(b), an exception the Court refused to endorse. *Gunderson*, 181 Wn.2d at 925 n.3. It is clear from the record the trial court mistakenly employed such an "exception" in this case.

The trial court mistakenly believed that the analysis under ER 404(b) in domestic violence cases is less rigid than in other criminal

matters: i.e., that a domestic-violence exception exists. The court bluntly stated as much when it said its analysis would be different if this were merely a robbery as opposed to a domestic violence case. RP 253-54. *Gunderson* rejected that view.

At the end of the day, testimony of prior allegations of assault does not tend to make Ms. Boring or anyone more or less credible free of its use as propensity. The only way this evidence can assist in assessing anyone's credibility is by first concluding that because Mr. Johansen has assaulted her previously he must have done so on this occasion. In fact, the State argued the evidence was necessary to assure the jury knew this was not an isolated incident but rather "this is how he acts." It would be difficult to provide a more complete definition of the term "propensity evidence."² That is the singular improper purpose prohibited by ER 404(b)

The court also reasoned the evidence was admissible to explain why Ms. Boring had not previously reported the abuse. RP 95. Of course, if the evidence of prior acts is not admitted there is no question at all about why those prior acts were not reported. This circular logic concludes the admission of the evidence itself creates the relevance to

² Compare, "[A] natural tendency to behave in a particular way."
<http://www.macmillandictionary.com/us/dictionary/american/propensity>.

admit the evidence. In any event, since that evidence does not prove or make more likely any element of the offense it is not admissible.

Thang, 145 Wn.2d at 642.

The court reasoned further the evidence was relevant to show the absence of mistake. RP 98. But Mr. Johansen never claimed he accidentally choked Ms. Boring. He testified he did not commit any assault on her and denied prior acts of violence. RP 632. Because the absence of mistake was not at issue the prior acts could not be of consequence to that point. *Saltarelli*, 98 Wn.2d at 362 (“evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action”).

The evidence was not relevant to any fact of consequence.

c. The prejudice greatly outweighed any potential probative value.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The court acknowledged there was “certainly a danger that this evidence could be misused as propensity evidence.” RP 98. Against this acknowledged risk of prejudice, the court weighed the evidence’s supposed probative value. The court concluded “[t]he jury cannot fairly

weigh the evidence and make a determination concerning Ms. Boring's credibility if they must assume that alleged assault on the night in question was an isolated incident that somehow came out of the blue." *Id.* Put another way, the court concluded the risk that the jury would misuse the evidence as propensity was outweighed by the unfairness of preventing the jury from using the evidence as propensity. ER 404(b) does not permit admission of propensity evidence where offered for another purpose. Instead it categorically bars propensity for any purpose. *Gresham*, 173 Wn.2d at 420

The court also concluded the evidence was necessary to allow the jury to assess the "dynamics" of the relationship. RP 98. However, *Gunderson* rejected the notion that such evidence is broadly admissible for this amorphous purpose. Instead, the Court endorsed a far more limited rule, allowing such evidence "may be helpful to explain the dynamics of domestic violence *when offered in conjunction with expert testimony* to assist the jury in assessing such evidence." *Id.* at 925 n.4 (Emphasis added). Here, there was no effort to offer expert testimony to explain the dynamics. In its place, the State simply offered propensity.

Any probative value was outweighed by the real and identified risk that the evidence would be misused and prejudicially so.

d. The error in admitting the other-acts evidence requires reversal.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

This standard asks more than simply whether the remaining evidence is sufficient to sustain the convictions. *Gunderson* recognized in that case “[a]lthough the evidence may be sufficient to find Gunderson guilty, it is reasonably probable that absent the highly prejudicial evidence of Gunderson’s past violence the jury would have reached a different verdict.” 181 Wn.2d at 926.

In *Gunderson* there was direct testimony of a third-party witness who testified the alleged assault occurred. The Court nonetheless concluded a reasonable probability existed that the improper evidence affected the jury.

The trial court itself understood the prejudice posed by this evidence. It acknowledged that if this had not been a domestic violence charge it would not have admitted the evidence.

Here, the jury heard two different versions of the events. Ms. Boring testified Mr. Johansen strangled her. Mr. Johansen denied doing so. No other person was in the room at the time of the events. Kyle Wilson testified he was at the house, but not in the room. Mr. Wilson testified that when Mr. Johansen came out of the house, Ms. Boring came with him and while she was crying otherwise appeared fine. The State presented the testimony of others who corroborated details of Ms. Boring's testimony. But at the end of the day the jury's task was to weigh the two conflicting stories of the only two people present. Even with the evidence this was not an easy task. At the end of its first day of deliberations, the jury told the court they were unable to unanimously agree on a verdict. After the court instructed them to return the following day and continue deliberations, the jury did reach a verdict. But the jury's note indicates what a close case this was. Placing the improperly admitted evidence on the State's side of the scale had a substantial probability of affecting the verdict.

Indeed, it was precisely because the State wanted the jury to resolve this credibility dispute in Ms. Boring's favor that the State devoted so much energy to admitting the evidence. The prosecutor, intimately familiar with the facts of the case and based upon that knowledge, determined to admit that evidence precisely because she understood its value in obtaining a favorable verdict.

As in *Gunderson*, the error requires reversal.

2. Defense counsel's proposal of an instruction which amounts to a comment on the was deficient and prejudicial to Mr. Johansen.

- a. Mr. Johansen is entitled to the effective assistance of counsel.

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney's performance constitutes ineffective assistance of counsel when her actions "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176 L.Ed.2d 284 (2010) (quoting *Strickland*, 466 U.S. at 688); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

b. Defense counsel's performance was deficient.

Article IV, section 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A comment on the evidence “invades a fundamental right” and may be challenged for the first time on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judicial comment on the evidence is presumed prejudicial and is harmless only if the record affirmatively demonstrates no prejudice could have occurred. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

In addition, a court may not instruct the jury in a way that relieves the State of its burden of proving each element of an aggravating factor beyond a reasonable doubt. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); *Blakely v. Washington*, 542 U.S. 296, 301, 313-14, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amends. VI, XIV.

Before an exceptional sentence can be imposed pursuant to RCW 9.94A.535(3)(g), the State must prove beyond a reasonable doubt “The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple

incidents over a prolonged period of time.” The phrase “prolonged period of time” is not defined by statute and is a factual question to be determined by the jury. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Here, however, the court defined the phrase to mean “more than a few weeks,” thereby implying that any time period greater than “a few weeks” necessarily qualified as a “prolonged period of time.” CP 304. In fact, the Supreme Court has read the instruction as conveying exactly that point. *State v. Brush*, __ Wn.2d __, 353 P.3d 213, 218 (2015). “As long as the State showed that the abuse lasted longer than a few weeks, the jury was instructed to find that the abuse occurred over a ‘prolonged period of time’” *Id.* Thus the instruction violates Article IV, section 16. *Brush*, 353 P.3d at 218.

The Court noted WPIC 300.17 purported to follow *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001), where the court reversed an exceptional sentence based on a pattern of abuse occurring over two weeks, and stated, “[t]wo weeks is not a prolonged period of time.” *Brush*, 353 P.3d at 217 (2015). The Court concluded that, although *Barnett* ruled two weeks was not a prolonged period of time, it did not hold that abuse occurring for more than two weeks was necessarily sufficient to prove the aggravator. *Id.*

Here Instruction 13 contains precisely the same direction to the jury, requiring a finding of a prolonged period of time if the State proves the acts occurred over a period greater than two weeks. CP 50. Here, the State's evidence established the acts spanned several years thus resulting in precisely the same error as in *Brush*. However counsel proposed an instruction which mirrored Instruction 13. CP 41. Thus, counsel proposed an instruction which required the jury to find the aggravating factor applied to his client. Counsel's actions are no different than telling the jury in closing argument they must find the State proved its case. That is plainly prejudicial.

Defense counsel's deficient performance prejudiced Mr. Johansen and requires reversal of the exceptional sentence.

E. CONCLUSION

Because the trial court improperly admitted propensity evidence this Court should reverse Mr. Johansen's conviction. In addition, the Court should reverse the exceptional sentence.

Respectfully submitted this 4th day of September, 2015.

s/ Gregory C. Link
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72922-5-I
v.)	
)	
JACOB JOHANSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF SEPTEMBER, 2015, 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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