

NO. 36464-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

TROY ANTHONY TATE,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR 18 PM 1:16
STATE OF WASHINGTON
BY DEPUTY

Appeal from the Superior Court of Skamania County
The Honorable E. Thompson Reynolds
No. 07-1-00042-7

BRIEF OF RESPONDENT

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PM 4-16-08

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

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2. Did the trial court abuse its discretion by admitting emergency room medical records pursuant to ER 803(a)(4) which contained hearsay statements by the victim concerning prior assaults by the defendant? (Appellant's Assignment of Error 1, 2 and 3)

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7. Was defendant's attorney ineffective due to deficient performance resulting in a reasonable probability that the result of the proceeding would have been different? (Appellant's Assignment of Error 2)

B. STATEMENT OF THE CASE.

1. FACTUAL HISTORY.

Robin Tate, age 43, was married to defendant Troy Tate for five years and lived with him in his mother's home in Carson, Washington. RP 30-31, Ex. 3. Ms. Tate described their marriage as "rocky". RP 30. Ms. Tate was not working, and Mr. Tate, who was also unemployed, was serving on a work crew in order to pay fines. RP 137.

On Sunday, February 4, 2007, Robin and Troy Tate drank beer and watched the Super Bowl at their home. RP 31. After the game ended, defendant Tate began to verbally berate Ms. Tate for being "a parasite and a mooch". RP 34. Ms. Tate told him that she wanted a divorce, and went to a travel trailer outside the residence to pack some of her belongings. RP 34. Defendant Tate followed her to the trailer, screamed at her that she was not leaving, grabbed her hair, and threw her to the floor. RP 34. He jumped on her chest with his knees, knocking the wind out of her, slapped her in the face, and tried to bite her finger when she put her hands up to ward off his blows. RP 34, 50. Ms. Tate said that he would not let her leave and that she was screaming at him to stop. RP 34. Eventually Ms. Tate was able to get him to stop hitting her by

being nice and begging him to stop and go to bed. RP 35. Ms. Tate testified that this had happened before, and the only way to get him to stop was to give in to him, so they went to bed, where she slept in her clothes under a separate blanket. RP 36.

Ms. Tate was in a great deal of pain that night and testified that it was hard for her to breathe. RP 36. The next morning, after the defendant left to go to the work crew, Ms. Tate walked to a friend's house and was driven to Skyline Hospital in White Salmon, Washington. RP 36-37. Ms. Tate reported to medical personnel that she was in a lot of pain, and described how she had been injured to both Donna Clack, R.N. and later to Dr. Smith, who both described her as being emotionally distraught. RP 39, 64, 65, 115. Dr. Smith found that she had tenderness in her right rib area and upper thoracic spine near the junction with her chest wall and neck, bruising and swelling on her left knee and left upper arm, her face, her left upper eyelid region, left side of her scalp, and an abrasion and mild swelling on her hand. RP 116. X-rays ordered by Dr. Smith revealed that there were no obvious fractures of Ms. Tate's ribs, although it was possible that the fresh fracture would not be visible on the films. RP 116. He testified that it was also possible that Ms. Tate had an injury or disruption of cartilage

where it joins the rib cage, which might not show up on an x-ray but would be very painful. RP 116-117. Dr. Smith prescribed percocet to Ms. Tate for pain and directed her to see her doctor within a week. RP 118, Ex. 3. Ms. Tate saw her physician twice after that, was prescribed anti-inflammatory medication and muscle relaxants, and continued on pain medication through March, 2007. RP 44, 46. She continued to be in a lot of pain and went to a physical therapist. RP 46-47.

At the hospital Ms. Tate was contacted by a domestic violence advocate, who helped Ms. Tate to move from the residence and get into safe housing. RP 83. Deputy Jay Johnston took a statement from the victim and then contacted defendant Tate. RP 107-08. When he asked defendant Tate what had occurred in his motor home the night before, he observed that the defendant's demeanor changed. The defendant began trembling and did not look at the deputy. RP 109. Defendant Tate said that Ms. Tate had told him she wanted a divorce and they had an argument, but stated, in response to the deputy's questions, that he did not hit, punch, or kick Ms. Tate. RP 109.

Defendant Tate's testimony differed from that of Ms. Tate in his description of the altercation. He claimed that he told her he

was glad they wouldn't be drinking together any more because he was entering alcohol treatment, and she then told him she wanted a divorce. RP 122. Mr. Tate testified that he was upset and criticized her for her relationship with her daughter and with his family. RP 123. She "glared intently at him" and he knew it was time to leave, so he went to the door and told Ms. Tate that she was no better than his son's mother. RP 123. Defendant Tate claimed that Robin jumped up, grabbed him by the neck, and pulled him backwards, causing them both to fall back onto a table. RP 124. The defendant swung her around to get her off of him and she fell on her left side, causing her injuries. RP 126. He stated that Ms. Tate drug him back, then was on top of him so he had to throw her off. RP 130. He said that she cried and he helped her up, they drank some more, and she yelled at him for a couple of hours, until they went to bed. RP 126, 128. He denied biting Ms. Tate, punching her in the face, or jumping on her ribs. RP 127.

Defendant Tate testified that he told Deputy Johnston that he told Ms. Tate he was glad they were going to stop drinking, and she said she wanted a divorce. RP 129. The defendant said that he denied hitting her, and he then didn't want to talk any more because the deputy was a threatening individual who showed by

his face and posture that he wanted a confession for something the defendant didn't do. RP 129. On cross examination defendant Tate again confirmed that in response to the deputy's questions he said that he did not kick, bite, or attack Ms. Tate or pull her hair. He had not told the deputy that there had been any physical altercation with Ms. Tate, and in his testimony he did not mention any report of an altercation to the deputy. RP 137.

2. PROCEDURAL HISTORY

Defendant Troy Tate was charged by the Skamania County Prosecuting Attorney with one count of Assault in the Third Degree (RCW 9A.36.031), committed by causing bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering to Robin Tate on February 4, 2007. The information included an allegation that he had committed the assault against a family or household member (RCW 10.99.020). CP 1-2. The case was tried to a jury on June 11, 2007. Before trial, defense counsel moved in limine to exclude testimony from Robin Tate that the defendant had physically abused her in the past. RP 17. The trial court denied the motion and held the proposed testimony relevant and admissible under ER 404(b) to explain the reason Ms. Tate stayed with the defendant in their home the night of the assault and failed to report the assault until the following day.

RP 22-25. Pursuant to that order, Ms. Tate testified that she went to bed with him after the assault because

“It’s the only way I could get him - - he was never going to let me leave. I mean, this has happened before and the only way to get him to stop is just to give in, you know. So we just went to bed. I slept in my clothes, you know, under a separate blanket.”

RP 36.

In denying the defendant’s motion to exclude evidence of prior assaults, the trial court ordered defense counsel to object at trial when the question about prior assaults was posed to the witness. RP 25. Defense counsel did not object to this testimony at trial. RP 36.

The defendant testified at trial, in reference to Ms. Tate’s claim that he had assaulted her, that he had no idea that she was going to do “this” to him “again, but that’s what she did”, apparently referencing pressing charges against him for assault. RP 137. He also stated, “And here I am *again*, trying to defend myself against her accusations. I’m - - I’m tired of it.” RP 137 (emphasis added).

The defendant also made motions in limine before trial to prevent the domestic violence advocate from testifying to statements Ms. Tate made to her about the assault, and to preclude any reference to the defendant being on a work crew on the morning after the assault. RP 14-

17. The court granted these motions. RP 16-17. At trial, the defendant volunteered (not in response to a question):

I went in the [sic] morning, the work crew, on the work van to pay a fine because I wasn't working. And I just - - if I did as violent attack that she did, why would I put myself in the custody of the law and leave myself completely exposed to them and be at their mercy? I had no idea she was gonna to do this to me again, but that's what she did.

RP 137.

At trial the emergency room coordinator and nurse, Donna Clack, testified about her contact with Ms. Tate. RP 61-79. The court admitted Ms. Tate's Skyline Hospital emergency room medical record into evidence as a business record over the defendant's objection that the medical record was cumulative and that admitting it would draw undue attention to its contents. RP 74.

At trial the State's witnesses were: Ms. Tate, emergency room coordinator Donna Clack, domestic violence advocate Lisa Butcher, Rock Creek Clinic office manager Cheryl Wright, Deputy Jay Johnston, and Dr. Russell Smith. The defendant was the only witness called by the defense. Report of Proceedings. At the defendant's request, the jury was instructed on the lesser included offense of assault in the fourth degree and on self-defense. CP 3-22, 26-47. Neither party proposed that the court give a

limiting instruction concerning evidence of prior assaults by the defendant.

Report of Proceedings, Clerk's Papers.

During deliberations the jury sent this question to the court:

Can we consider the defendant's 2 prior arrests for domestic abuse as to his credibility as stated in the medical record? (page 9, item 3)

"She states that she has been assaulted numerous times by her husband". . .

"She also states that her husband has been in jail for two assaults involving her."

CP 48, Appendix 1 (attached). Although not reflected in the original record, a Supplemental Report of Proceedings has been filed which establishes that the court contacted both the prosecuting attorney and defense counsel, and they all met in chambers, discussed the jury's question, and agreed to a response which the judge wrote at the bottom of the jury's question:

"No, you may not consider any alleged prior acts of the defendant. 6/12/07 3:20 p.m. E.T. Reynolds, Judge."

CP 48, Appendix 2 (Agreed Report of Proceedings).

The trial began on June 11, 2007, and the jury began deliberating at approximately 2 p.m. on June 12, 2007. CP 85, 90. The jury returned a verdict of guilty and a special verdict finding that the crime involved domestic violence on June 12, 2007 at 4:39 p.m. The defendant was sentenced and filed a timely appeal. CP 51-62, 64.

C. ARGUMENT.

I. ADMISSION OF THE MEDICAL RECORD OF MS. TATE'S EMERGENCY ROOM VISIT WAS A PROPER EXERCISE OF THE COURT'S DISCRETION AND DID NOT CONSTITUTE ADMISSION OF NEEDLESSLY CUMULATIVE EVIDENCE.

Admitting the medical record of Ms. Tate's emergency room visit (Ex. 3) as a business record was proper pursuant to RCW 5.45.020 and did not violate ER 403. ER 403 states:

Although relevant, evidence *may* be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*. (Emphasis added)

ER 403 is concerned with what is termed "unfair prejudice". *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987); *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). The court's decision to admit evidence as being relevant and not unfairly prejudicial is reviewed for abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The burden of showing unfair

prejudice is on the party seeking to exclude the evidence. *Carson v. Fine*, 123 Wn.2d 206, 225, 223 867 P.2d 610(1994).

Defendant Tate claims that admission of the medical record violates the ER 403 prohibition against “needlessly cumulative” evidence. Washington authority fails to support this contention. In one of the only cases found dealing with evidence which was both unfairly prejudicial and needlessly cumulative, the court in *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650(1983) reversed a murder conviction in part because the trial court had admitted two pubic hairs which were consistent with but not unequivocally identical to the defendant’s hairs. Defendant Cameron had made two unchallenged detailed confessions that he had killed his stepmother, and his bloody footprints and palm prints were found at the scene. The defense was insanity. The Supreme Court found that there was no actual doubt as to the assailant's identity and that, at best, the challenged evidence was needlessly cumulative of unchallenged relevant facts of an undenied killing. Further, this highly prejudicial evidence raised an unsubstantiated inference of some type of sexual attack by petitioner which could only inflame the passions of the jury. Thus, although technically relevant, the evidence was held inadmissible under ER 403 because it had an objectionable tendency to prejudice the jury

without any exigency of proof to make it necessary or important that the cause be proved in that manner.

In this case the medical record which is claimed to be cumulative contained no evidence which was unfairly prejudicial.¹ It described the medical observations of the victim's condition and the results of her exam, which were necessary to prove the charge of third degree assault based upon infliction of substantial pain that extended for a period of time sufficient to cause considerable suffering.

The nine-page record also contained some data which was not part of the testimony of either the emergency room coordinator/nurse Donna Clack or Dr. Smith, the emergency room physician. For example, Donna Clack's notes indicate that Ms. Tate stated that her head/scalp felt bruised, which was a complaint consistent with her description of the assault but was not a part of Ms. Clack's testimony. Ex. 3, page 3; RP 61-79. The medical record provided Ms. Tate's contemporaneous estimate of the time of the assault the previous evening (2100 hours), although she was unable to recall the time when she testified. Ex. 3, page 9; RP 54, 58. At trial, medical personnel were not asked and did not testify about the time of the assault the previous day. Time of the assault could have been relevant due

¹ The references to prior assaultive behavior by the defendant were properly admitted by the court under ER 404(b) and are also admissible under ER 803(a)(4) as discussed herein.

to the defendant's description of the altercation as occurring at half time of the Super Bowl. RP 123. Ms. Tate described the assault as occurring after the Super Bowl ended. RP 33, 58. Exhibit 3 also indicated that Ms. Tate had denied drug abuse to medical personnel. Ex. 3, page 9. This information became relevant only after the defendant repeatedly testified that Ms. Tate abused drugs, as follows:

“ . . . she's got a meth problem - -“ RP 123.

“ (Ms. Tate) . . . continually abuses alcohol and drugs.” RP 128.

Appellant's citation to *Carson v. Fine*, 123 Wn.2d 206, 223 867 P.2d 610(1994) is misplaced insofar as it is claimed to provide support for exclusion of evidence under the “needlessly cumulative” prong of ER 403. In *Carson v. Fine*, the court considered whether a treating physician could testify for the defense in a medical malpractice case. The court focused primarily on whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and did not base its ruling on the cumulative nature of the evidence. In its decision, the court noted that under ER 403, the relevance of the evidence sought to be admitted is assumed. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *Carson v. Fine*, citing *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990); *State v.*

Gatalski, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). The *Carson* court stated at 226:

“We do not see that the danger of unfair prejudice exceeded the probative value of such testimony, and we are mindful of the admonition that ‘[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.’ (citing *United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978)).

(Emphasis added)

2. MEDICAL RECORDS CONTAINING HEARSAY STATEMENTS BY THE VICTIM CONCERNING PRIOR ASSAULTS BY THE DEFENDANT WERE ADMISSIBLE PURSUANT TO ER 803(a)(4).

ER 803(a)(4)² provides that the following evidence is admissible, regardless of the availability of the declarant:

“(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In cases involving domestic physical abuse, statements attributing fault to a person living in a victim's household are reasonably pertinent to treatment and therefore admissible. *State v. Sims*, 77 Wn. App. 236, 890 P.2d 521 (1995), citing *United States v. Joe*, 8 F.3d 1488, 1494 (10th Cir.

² The issue of admissibility of the medical record is discussed in the context of claimed ineffective assistance of counsel. The only issue preserved for appeal is the cumulative nature of the medical record, which was previously addressed.

1993), *cert. den.*, 510 U.S. 1184, 127 L. Ed. 2d 579, 114 S. Ct. 1236

(1994).

All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. In short, the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes "reasonably pertinent" to the victim's proper treatment.

(Footnote omitted.) *Joe*, 8 F.3d at 1494-95.

The rationale behind this rule is that such statements are "relevant to the prevention of recurrence of injury." *State v. Sims*, at 239 (quoting *State v. Butler*, 53 Wn. App. 214, 221, 766 P.2d 505, (1989)). The rule is not limited to physicians. Statements made to hospital employees have been held to fall within the provisions of ER 803(a)(4). *In re J.K.*, 49 Wn. App. 670; 745 P.2d 1304(1983), *rev. den.*, 110 Wn.2d 1009 (1988). The medical records admitted at trial contain two references to prior abuse by the appellant which are submitted as the basis for an appeal. Ms. Tate

reported that the appellant had assaulted her numerous times, and that her husband had been in jail for two assaults involving her. Ex. 3, page 9. These references to prior abuse are properly contained in the medical record and fall squarely within the provisions of ER 803(a)(4).

3. THE TRIAL COURT ACTED IN ACCORDANCE WITH ER 404(b) IN ADMITTING EMERGENCY ROOM MEDICAL RECORDS CONTAINING MS. TATE'S STATEMENTS ALLEGING PRIOR ABUSE BY THE DEFENDANT SINCE THEY SHOWED HER STATE OF MIND IN REMAINING WITH THE DEFENDANT AFTER HE HAD ASSAULTED HER.

Evidence of other crimes, wrongs, or acts is not admissible to prove character or to show action in conformity therewith. ER 404(b).³ However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). Before admitting evidence of prior bad acts, the trial court must first determine whether the evidence is logically relevant to a material issue. *State v. Powell*, 126 Wn. 2d 244, 258, 893 P.2d 615 (1995). The admission or refusal of ER 404(b)

³ Appellant did not assign error to the court's ER 404(b) decision to admit evidence of prior assaultive behavior by the defendant, instead claiming only that Exhibit 3 should not have been admitted since it contained "prejudicial" material suggesting that Mr. Tate had a propensity to commit an assault (which is not within the parameters of the "cumulative" objection). This issue will be discussed in the context of the assignment of error claiming ineffective assistance of counsel and the discussion of the court's response to the jury's question.

evidence lies largely within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Powell*, at 258; *State v. Turner*, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981), *review denied*, 95 Wn. 2d 1030 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Powell*, at 258.

Evidence of prior physical abuse of a victim is admissible to explain a delay in reporting the abuse and to rebut the implication that the abuse did not occur. *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). In *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996), a prosecution for domestic violence felony violation of a postsentence court order, the Court of Appeals held that evidence that Grant had previously assaulted his wife was admissible. The *Grant* trial court admitted the evidence of prior assaults pursuant to ER 609. The appellate court found that while ER 609 was inapplicable, the history of domestic violence was properly admissible under ER 404(b), “at the very least for the purpose offered by the State of explaining Ms. Grant’s inconsistent statements and conduct.” *Grant*, at 109. The *Grant* court noted that victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence.

In the present case, defendant's attorney moved in limine to exclude evidence of prior assaults by the appellant. The trial court ruled that evidence of prior assaults and an abusive relationship was admissible under ER 404(b) to explain why Ms. Tate delayed reporting the abuse and why she remained with the defendant until he left for work on the day after the assault. RP 22-25.⁴

During trial, Ms. Tate testified that on the night after the assault she and the appellant slept in the same bed. RP 35-36. She did not report the assault or seek medical help until the following day. She testified that "this has happened before and the only way to get him to stop is just to give in, you know. So we just went to bed." RP at 36. This testimony was squarely within the parameters of the court's order in limine and was consistent with the requirements of ER 404(b).

An error in an evidentiary ruling under ER 404(b) is not of constitutional magnitude. Therefore, the error is not prejudicial to the defendant and is not the basis for reversal "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951(1986). Even if the appellate court finds that the admissibility of the 404(b) prior assault evidence was properly preserved for appeal, given

⁴ Admissibility of evidence of prior assaults was not preserved in the trial court for appellate review. See section 4 herein.

the credible testimony of Ms. Tate and other witnesses to her injuries, it is not reasonably probable that the outcome would have been different had the error not occurred.

4. APPELLANT FAILED TO PROPERLY PRESERVE FOR APPELLATE REVIEW THE ADMISSIBILITY OF EVIDENCE OF PRIOR ASSAULTS BY THE DEFENDANT.

a. The defendant is attempting to base his appeal on an evidentiary objection not presented to the trial court.

A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322(1976). When the trial court overrules a specific objection and admits evidence, the appellate court “will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.” *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 Karl B. Tegland, Washington Practice: Evidence sec. 10, at 25 (2d ed. 1982) and citing ER 103.)

At trial the defendant objected to admission of emergency room medical records because they were “cumulative” and “admitting it would draw undue attention to its contents”. RP 74. In his brief on appeal, the defendant assigns error to admission of the medical records because they

are “replete with double hearsay” statements of Ms. Tate which do not meet any recognized exception to the hearsay rule.⁵ Brief of Appellant at 7. Because that objection was not presented to the trial court, it should not be considered on appeal. If considered on appeal, defendant’s claim should fail due to proper admission of the evidence under ER 803(a)(4).

b. Defendant attempts to base a claim of reversible error on an evidentiary ruling by the court in response to a motion in limine which was not properly objected to at trial.

Defendant also claims in his brief that the medical records contain statements which are inadmissible under ER 404(b). This claim was not properly preserved in the trial court. The trial court’s decision to allow evidence of the defendant’s prior assaultive behavior toward Ms. Tate was the result of denial of a motion in limine by the defendant to exclude the evidence. RP 17-24. After the court’s ruling, the judge instructed defense counsel to again raise the objection at the time the issue was presented at trial. RP 25. Defense counsel did not object as the trial court had instructed on the basis of ER 404(b) when Ms. Tate testified to prior assaults by the defendant. RP 35-36. Defense counsel did object to the form of the question and was overruled. The question was asked again without objection.

A party must specifically object to evidence presented at trial to

⁵ This contention is incorrect. As discussed herein, statements made for purposes of medical diagnosis and treatment are admissible hearsay pursuant to ER 803(a)(4).

preserve the matter for appellate review. RAP 2.5(a); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). Even if a party makes a motion to exclude evidence and the court denies the motion, the party does not have a standing objection to the evidence at trial if instructed by the court to continue to object at trial. *State v. Weber*, 159 Wn. 2d. 252, 272, 149 P.3d 646 (2006); *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

In the present case defense counsel likely made a tactical choice not to object to Ms. Tate's statement that she stayed in the defendant's residence the night after he had assaulted her. Tactical choices are often the reason for remaining silent to otherwise objectionable testimony. But the failure to object at a point which would allow the trial judge an opportunity to correct an alleged error constitutes a waiver of the right to predicate an appeal thereon. *State v. Kendrick*, 47 Wn. App. 620, 736 P.2d 1079 (1987).

Defendant Tate cannot now base his appeal upon admission of evidence of prior assaults. However, had defendant's attorney made a proper objection, his claim would still fail under ER 404(b). His only possible remedy for his claim that evidence of prior assaults should not be admitted is a claim of ineffective assistance of counsel, which is not reversible error, as discussed in Section 7.

5. THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTION WAS PROCEDURALLY AND SUBSTANTIVELY PROPER.

The trial court received the following question from the jury:

“Can we consider the defendants 2 prior arrests for domestic abuse as to his credibility as stated in the medical record? (page 9, item 3)”

“She states that she has been assaulted numerous times by her husband” . . .

“She also states that her husband has been in jail for two assaults involving her.”

CP 48.

The judge answered: “No, you may not consider any alleged prior acts of the defendant.” and signed and dated his response. CP 48. See Appendix 1, attached.

a. The answer was a proper instruction to the jury.

A trial court may, in its discretion, answer questions the jury posed or give the jury further instructions during deliberations. CrR 6.15(f)(1); *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). A question from the jury does not create an inference that the entire jury was confused or that any confusion was not clarified before the jury reached its verdict. *Ng*, at 43. Jury questions are not final determinations and the jury's decision is contained exclusively in the verdict. *Ng*, at 43 (quoting *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985)). Absent evidence to the

contrary, we presume that the jury followed the trial court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The answer given by the trial judge was correct. The reason for admitting evidence of prior assaultive behavior, as previously discussed, was to explain why the Ms. Tate stayed with the defendant the night following the assault and did not report the assault until the following day. The prior acts evidence was not admitted to show that the defendant lacked credibility, and the court's answer so instructed the jury.

In addition to the medical record, evidence of prior assaults was properly before the jury through the testimony of both Ms. Tate and the defendant. RP 36, 137. Ms. Tate did not, however, state that the defendant had been arrested for those assaults. The defendant, in rambling and nonresponsive testimony, violated the order in limine which he had requested when he testified that he was on a "work crew" for failure to pay a fine when he was contacted by deputies about the assault. RP 137. This information would have led jurors with any knowledge of the criminal justice system to assume that he had some type of prior conviction.

The defendant also claimed in his testimony, in reference to Ms. Tate's claim that he had assaulted her, that he had no idea that she was going to do "this" to him again, apparently referencing pressing charges against him for assault. RP 137. He also stated, "And here I am again,

trying to defend myself against her accusations. I'm - - I'm tired of it.”

RP 137. These statements indicate at least some prior consequence to the defendant for assaulting Ms. Tate. The information in the medical record is consistent with this testimony. It merely indicates the number of prior assaults – two – and confirms that they resulted in jail time, which could be either for an arrest or a conviction. Ex.3, page 9. Therefore, the medical record information about prior incarcerations was merely cumulative to evidence already before the jury through the defendant’s own testimony.

A literal reading of the trial judge’s response told jurors that they were not to use the information to determine the credibility of the defendant. It could also have been interpreted as prohibiting the use of the information for any purpose. Under either interpretation, the defendant was not unfairly prejudiced by the judge’s response.

b. The trial court contacted counsel before answering the jury question and fully complied with CrR 6.15(f)(1).

Pursuant to a motion by the Respondent to supplement the record on review, an Agreed Report of Proceedings has been filed. See Appendix 2, attached. That Agreed Report shows that the trial judge fully complied with CrR 6.15(f)(1) by contacting trial counsel about the jury question, meeting with counsel, and writing the answer to which both counsel

agreed on the bottom of the question. Although the original record did not reflect that this occurred, statements of both trial counsel which were approved by the trial judge should satisfy the appellate court that no procedural error occurred in responding to the jury question.

Appellant relies upon *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983) for the proposition that communication between the trial court and the jury in the absence of the defendant is error. Brief of Appellant, page 13. *Caliguri* involved the trial judge's decision, without input from defendant or his counsel, to have an FBI agent replay tapes for the jury in the presence of the trial judge but without counsel present. The replay of the tapes included several minor portions which had been redacted during the trial. The *Caliguri* court held that the defendant must first raise some possibility of prejudice before the State would face the burden of demonstrating harmless error beyond a reasonable doubt. Since the communication to the jury was in the presence of a third person and the defendant failed to demonstrate prejudice, the court found the error to be harmless.

CrR 6.15(f)(1) governs the court's actions regarding responding to jury questions. It requires the trial court to notify "the parties" of the content of a jury question and "provide them an opportunity to comment upon an appropriate response". The trial court followed the court rule.

The defendant cannot show prejudice when his attorney was present to comment upon the legal issue involved.⁶

c. The defendant did not preserve his claim of error regarding the trial court's answer to the jury question.

The defendant's attorney at trial did not object at trial to the judge's response to the jury question. Appendix 2, attached. The law regarding preservation of claimed error in instructing the jury is well settled. An appellate court generally will review only those issues properly raised in the trial court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As long as the instructions properly inform the jury of the elements of the charged crime, other claimed error is not of constitutional magnitude and pursuant to RAP 2.5(a) will not be considered for the first time on appeal. *State v. Stearns*, 119 Wn.2d 247, 250, 839 P.2d 355 (1992).

d. If failure to give a limiting instruction is found to be error, reversal should not be required because, with reasonable probability, the error did not materially affect the outcome.

The judge's response could have more completely addressed the issue of use of the information about the defendant's prior assaultive behavior. A limiting instruction regarding the ER 404(b) evidence would have been appropriate if requested. The test for whether the failure to give

⁶ The issue of defense counsel's claimed ineffective assistance is discussed in Section 7 herein.

an adequate limiting instruction requires reversal is whether, within reasonable probability, the evidence materially affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P. 3d 294 (2002).

The issue of failing to give a limiting instruction in an assault case involving prior domestic abuse is discussed in *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006). In *Cook* the victim testified in detail about six prior incidents of domestic abuse by the defendant, although she recanted her testimony about the actions upon which the assault charge was based. The incidents included: the defendant hit her and threatened to kill her; the defendant violated a no-contact order and stole her car; the defendant pushed her, ransacked her house, and cut the phone cord when she tried to call 911; the defendant pushed her twice, once when she was driving, and stepped on the gas pedal, causing the car to crash; and the defendant violated a no-contact order and begged her to have contact with him. The trial court gave an instruction limiting the jury's consideration of the prior assaults to assessment of the victim's credibility. Division Two held that prior domestic abuse is not admissible for the generalized purpose of assessing the victim's credibility, although it is admissible to show the victim's state of mind and why she submitted to and did not report the abuse. In *Cook*, the court found that the trial court committed

error by admitting the prior assault evidence without a proper limiting instruction. The appellate court was unable to say with sufficient certainty that the jury would have found the defendant guilty absent the extensive evidence of six prior assaults, and therefore reversed the conviction.

Cook is easily distinguished from the present case. First, *Cook* objected to the evidence and to the limiting instruction in the trial court, thus preserving the issue for appeal. Second, unlike the detailed and extensive evidence in *Cook*, the evidence in this case did not provide any detail about the past abuse and consisted only of a statement that she had been assaulted numerous times by her husband, and he had been in jail for two assaults involving her. The lack of detail and the relatively minor and generic statement in the medical record, insofar as it was consistent with testimony given by Ms. Tate without objection and corroborated by the defendant, does not meet the test for reversal. Courts have frequently held that the trial court error of failing to give a limiting instruction is harmless and would not have affected the outcome. See, e.g., *State v. Binh Thach*, 126 Wn.App. 297, 106 P.3d 782 (2005). While the jury certainly knew about the prior assaults and incarceration, the combination of the lack of detail and the judge's admonition that it was not to be used by the jury, at least to determine credibility, makes it reasonably likely that the evidence did not materially affect the outcome of the trial. And an examination of

the State's closing argument shows that the evidence regarding the prior assaultive relationship was used precisely as intended by the court's ruling on 404(b) evidence – to explain why Ms. Tate spent the night after the assault with the defendant. No portion of the argument suggested that the defendant had a “propensity” to assault Ms. Tate, or that he was likely to have committed the assault as he had done in the past. RP 141-159, 172-175.

It is important to note that the defendant does not, and cannot successfully, base an appeal on the contention that the court committed reversible error in failing to give a limiting instruction concerning the prior bad acts evidence. Defense counsel did not propose such an instruction, and since the failure to give the instruction was not manifest constitutional error, an appeal cannot be predicated on the omission. *State v. Ellard*, 46 Wn. App. 242, 730 P.2d 109 (1986), *rev. den.* 108 Wn.2d 1011 (1987); RAP 2.5(a). The court's answer to the jury's question is simply another jury instruction approved by defense counsel, and as such it cannot be a platform for the defendant's claim of trial court error concerning propensity evidence. The defendant's only vehicle for review of this issue is his claim of ineffective assistance of counsel.

6. ANY ERROR IN ADMITTING STATEMENTS PERTAINING TO PRIOR ASSAULTS IS HARMLESS IN VIEW OF THE OVERWHELMING EVIDENCE OF MR. TATE'S GUILT.

If admitting evidence via the medical record of prior assaultive behavior and prior incarceration for that behavior is found to be error based on the prohibition against "needlessly cumulative evidence", the court must determine if the error was of sufficient seriousness to require reversal of the conviction. Since such an evidentiary error is not of constitutional magnitude, the rigorous test of "harmless error beyond a reasonable doubt" does not apply. *State v. Christopher*, 114 Wn. App. 858, 60 P.3d 677 (2003). Rather, as is usually the case with evidentiary rulings, the court should apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred". *State v. Tharp*, 96 Wn. 2d 591, 599, 637 P.2d 961 (1981). In other words, any impropriety in the admission of exhibit 3 is considered harmless if its admission is of minor significance compared to the evidence as a whole.

A review of the testimony at trial shows that, within reasonable probability, the outcome of the trial would not have been materially affected if Exhibit 3 had been excluded while other evidence of prior assaults by the defendant was introduced through testimony of Ms. Tate

and the defendant.

a. Summary of trial testimony showing the defendant's guilt.

(1) Ms. Tate testified that during an argument in which appellant called her a parasite and a mooch, she told him she wanted a divorce. RP 34. He became enraged and pulled her hair, slapped her in the face, threw her to the floor, jumped on her with his knees on her chest, and bit her finger. RP 34. He punched her in the back of the head. RP 35. To get him to stop hitting her, Ms. Tate testified that she begged him to stop and go to bed. RP 35. When asked how she could go to sleep with the appellant after just having been brutally assaulted, Ms. Tate stated:

“It’s the only way I could get him - - he was never going to let me leave. I mean, this has happened before and the only way to get him to stop is just to give in, you know. So we just went to bed. I slept in my clothes, you know, under a separate blanket.”

RP 36, lines 4-8.

In describing her injuries, Ms. Tate testified she was in pain from the center of her chest all the way around and down the inside of her right arm. RP 37. She said that she felt pain upon moving, sitting, walking, and breathing. RP 39.

(2) Emergency room coordinator Donna Clack testified that on the day following the assault Ms. Tate told her about the same assaultive actions by the appellant. RP 65. Ms. Clack observed the bruises and noted

that Ms. Tate was trembling, tearful and afraid. RP 65-70.

(3) Domestic violence advocate Lisa Butcher testified that on the day following the assault Ms. Tate was upset and crying in the emergency room. RP 82. Ms. Butcher also saw bruises on Ms. Tate. RP 82.

(4) Deputy Johnston testified that he contacted Ms. Tate at the emergency room, where he also observed her bruises and difficulty breathing, RP 107. He then contacted Mr. Tate, who told him that they had argued about Ms. Tate wanting a divorce. RP 109. Deputy Johnston observed that the defendant's demeanor changed when he was asked about his actions at his home the previous night. RP 108-109. He began trembling and did not look at Deputy Johnston any more after the question. RP 109. Mr. Tate told Deputy Johnston that Ms. Tate told him she wanted a divorce and they had an argument. RP 109. He said that he did not hit, punch, kick or take any action like that against Ms. Tate. RP 109. Deputy Johnston did not recall being told by the defendant that he and Ms. Tate had an argument the previous evening about not drinking alcohol anymore. RP 110. In response to a question by Deputy Johnston concerning what had happened the prior evening, the defendant did not tell Deputy Johnston that Ms. Tate had jumped on him or that they had had any kind of physical altercation. RP 109.

(5) Dr. Russell Smith testified that he provided medical care to Ms. Tate on the day after the assault. He testified that Ms. Tate had reported to him that she had been picked up by the hair, hit with a fist several times on the head, thrown to the ground, her hand was scraped by Mr. Tate's teeth, and that Mr. Tate jumped with a knee onto her chest. RP 115. He noted some swelling and bruising around her left eye and left upper eye lid region, right rib tenderness and significant right sided chest pain going all the way to her back and radiating through her right arm, bruising and mild swelling around her left knee region and on the fleshy part of her upper left arm, tenderness on the left side of her scalp, tenderness in her upper thoracic spine area near the junction with the neck and chest wall, and a small abrasion and swelling on her hand. RP 115-116. Dr. Smith ordered x-rays which did not reveal any rib injuries. RP 116. He testified that some rib fractures are not initially visible in x-rays, and that separation of the cartilage and rib can occur which don't show up on x-rays but can be very painful. RP 117. He prescribed percocet for pain. RP 118.

(6) Mr. Tate's testimony was characterized by rambling statements that often did not pertain to the question asked. He testified that Ms. Tate told him she wanted a divorce, and he related disparaging remarks he made to her concerning her treatment of her family and her drug use. RP

123-124. He said she glared at him and he knew it was time to leave, so he went to the door while telling her that she was no better than his son's mother. RP 124. He claimed that Ms. Tate grabbed him by the neck and pulled him backwards, causing them both to fall on the back of the table. RP 124. He claimed that as they fell backward his head hit her face. RP 126. He stated that he swung around to get off of her and swung her around and she fell down on her left side, consistent with the injuries she had complained of. RP 126. (However, Dr. Smith found tenderness in her *right* rib area, and Exhibit 3 describes pain in the right rib cage.) Mr. Tate stated that she was crying and he helped her up and she yelled at him for a couple of hours. RP 126.

Mr. Tate continued his claim that Ms. Tate used drugs and alcohol and had assaulted him. RP 128, 129. The defendant stated that he told Deputy Johnston that he told Ms. Tate he was glad that was going to be their last day of drinking together, and she said she wanted a divorce. RP 136. When asked about being questioned by Deputy Johnston, Mr. Tate said that he had started to tell him what happened, but the deputy said, "And then you hit her". Mr. Tate said he denied it and refused to talk more because the deputy showed by his face and posture, being a threatening individual, that he wanted a confession for something Mr. Tate did not do. RP 129. And even though his motion in limine to preclude

reference to Mr. Tate's being on a work crew for a prior offense was granted without opposition (RP 16-17), Mr. Tate volunteered that he was shocked when (they) came to arrest him, that he was on the work crew, on the work van to pay a fine because he wasn't working. RP 137. Mr. Tate also suggested that he had been previously accused of assault by Ms. Tate and had been in court before regarding her allegations of assault. RP 137.

A review of the entire transcript reveals that there was easily sufficient evidence to convict the defendant of assault. Ms. Tate had contacted medical personnel and officials who testified consistently about what she had told them and what they had observed of her injuries. Her own testimony was simple and credible and revealed no inconsistencies. By contrast, the defendant rambled and made incendiary allegations toward Ms. Tate. He contradicted Deputy Johnston about what was said during the interview and, although he talked about what had occurred the previous night, failed to tell Deputy Johnston that he was assaulted by Ms. Tate. In his testimony, he tried to account for Ms. Tate's injuries by claiming that she had assaulted him, but his description would have resulted in injuries to the side of Ms. Tate's body opposite from those observed by the doctor.

7. DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE; HIS PERFORMANCE WAS NOT DEFICIENT AND DID NOT RESULT IN PREJUDICE TO THE DEFENDANT.

The standard of review for a claim of ineffective assistance of counsel is well settled. "Review of an ineffective assistance claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

"To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). And to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original).

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

"In determining whether trial counsel was deficient, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy."

State v. Donald, 68 Wn. App. 543, 550, 844 P.2d 447 (1993).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). "Because the defendant must prove both ineffective

assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.”

a. Admission of emergency room medical record (Exhibit 3).

As previously discussed, the defendant cannot show that he was prejudiced by admission of the emergency room medical record. Prior assaults were referred to in testimony of both parties, and prior incarcerations were the subject of testimony by the defendant. The medical records were properly admitted as business records pursuant to RCW 5.45.020, and the statements of the victim contained in those records are admissible pursuant to ER 803(a)(4) and ER 404(b). Defendant contends that a more complete objection to Exhibit 3 would have been successful, but fails to articulate the exact basis for the objection which should have been expressed in order to successfully exclude this obviously admissible evidence.

b. Redaction of emergency room medical record (Ex. 3).

The arguments in subsection (a) above, justifying admission of the medical record exhibit, also pertain to the failure to request redaction. Because the evidence of prior assaults and incarceration had been properly admitted through testimony of both Ms. Tate and the defendant, redaction was unnecessary.

c. Failure to propose a limiting instruction pertaining to statements of the victim contained in the emergency room medical record

It is well settled that defense counsel may be presumed to have decided not to request a limiting instruction because to do so would reemphasize damaging evidence. *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086(1992); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. at 551. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wash.2d 829, 883, 822 P.2d 177 (1991). The defendant has the burden of establishing that his counsel's performance was deficient and resulted in prejudice to him. *State v. Gladden*, 116 Wn. App. 561, 66 P.3d 1095 (2003).

The defendant has not met his burden of showing that counsel's failure to request a limiting instruction was *not* the result of legitimate trial tactics. If he had requested a limiting instruction, the instruction would have refocused the jury's attention on the prior assaults and incarceration.

While the court's response to the jury question could have been framed to further limit the use of the evidence of prior assaults, the defendant has not assigned error to defense counsel's failure to request a different answer. Therefore, any error in the failure to request a more

comprehensive answer should not be considered on appeal. RAP 10.3(a)(4); 10.3(g).

While a more specific response by the trial court might have been preferable, it is arguable that Ms. Tate's statements about prior assaults contained in Exhibit 3 were not considered by the jury after the judge responded to their question. The answer to the jury question could easily have been read by the jury as stating that the prior acts of the defendant were not to be used *for any purpose*, rather than being limited to the phrasing of the question "to determine credibility".

Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A review of the record shows that defense counsel did a competent job of defending his client. He made motions in limine to preclude references to prior assaultive behavior and to the fact that the defendant was on a work crew the day after the assault. RP 16-18, 21-24. During testimony he identified issues regarding Ms. Tate's failure to leave the residence after the assault. RP 51-55. He attempted to establish that Ms. Tate's injuries were not serious enough to constitute bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RP 55-59. He requested and received a lesser included offense instruction of

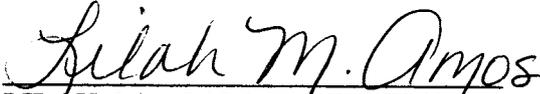
Assault in the Fourth Degree and a self-defense instruction. CP 3-22 (Defendant's Proposed Instructions to the Jury) and CP 23-25 (Defendant's Amended Proposed Instructions to the Jury). During direct examination of the defendant he attempted to elicit pertinent facts supportive of the defendant's position that Ms. Tate was the aggressor and that her injuries were inflicted when the defendant pushed her off of him after she had attacked him. RP122-130. His closing argument was coherent and persuasive. RP 159-172.

Counsel is not expected to perform flawlessly or with the highest degree of skill. It is only when his performance is such that no reasonably competent attorney would have so conducted himself, that a client has grounds for complaint and the court a duty to grant relief. *State v. Cobb*, 22 Wn. App. 221, 589 P.2d 297 (1978). Defendant has not met his burden of establishing either that defense counsel's performance was deficient or that the deficiency prejudiced the defense. He has not shown that a reasonable probability exists that, except for trial counsel's errors, the result would have been different. He has not undermined confidence in the result of the trial.

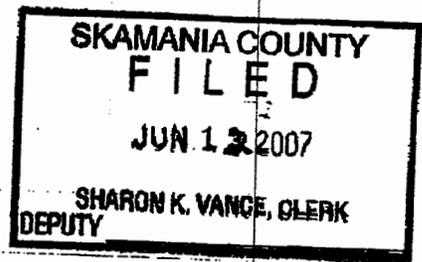
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this court affirm the defendant's conviction and sentence for assault in the third degree, with domestic violence finding.

RESPECTFULLY SUBMITTED this 16TH day of April, 2008.


LILAH M. AMOS / WSB # 7168 /
Special Appointed Attorney for
Respondent

Appendix 1



CAN WE CONSIDER THE DEFENDANT'S
7 PRIOR ARRESTS FOR DOMESTIC ABUSE
AS TO HIS CREDIBILITY? AS STATED
IN THE MEDICAL ~~RECORD~~ RECORD? (PAGE 9,
ITEM 3)

[Handwritten signature]

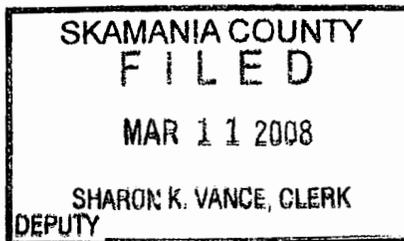
"SHE STATES THAT SHE HAS BEEN ASSAULTED
NUMEROUS TIMES BY HER HUSBAND."

"SHE ALSO STATES THAT HER HUSBAND HAS
BEEN IN JAIL FOR TWO ASSAULTS INVOLVING
HER."

No, you may not consider any
alleged prior acts of the defendant.
6/12/07 3:20 PM *[Signature]*, Judge

1
2
3 Appendix 2
4
5

6 IN THE SUPERIOR COURT OF THE
7 STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF SKAMANIA



9 STATE OF WASHINGTON,
10 Plaintiff,

11 vs.

12 TROY ANTHONY TATE,
Defendant.

NO.07-1-00042-7

AGREED REPORT OF PROCEEDINGS

13 The attorneys who participated in the trial of the above-entitled matter
14 hereby stipulate that the following facts are accurate and reflect the
15 trial court's actions in the trial of this case:

- 16 1. The jury in the above-entitled case began deliberations on June
17 12, 2007.
- 18 2. The jury sent a written question to Judge E. Thompson Reynolds
19 on June 12, 2007.
- 20 3. Immediately after receiving the question, deputy prosecuting
21 attorney Adam Kick and defense counsel Christopher Lanz were
22 contacted and asked to meet with the judge to discuss the question.
23 They then met with Judge Reynolds in chambers, where the content of
24 the note was discussed. With the approval of both prosecution and
25 defense, Judge Reynolds then wrote the following response to the
26 jury question, " No, you may not consider any alleged prior acts of

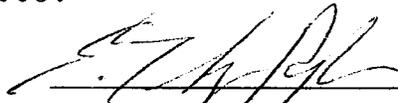
1 the defendant." Judge Reynolds then signed the response, noted the
2 time to be 3:20 p.m., and dated the note "6/12/07".

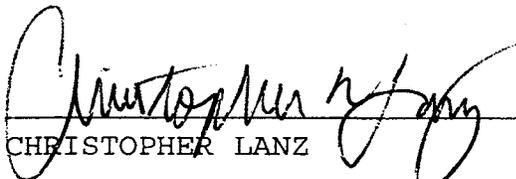
3 4. The note, with the written response, was then transmitted back
4 to the deliberating jury.

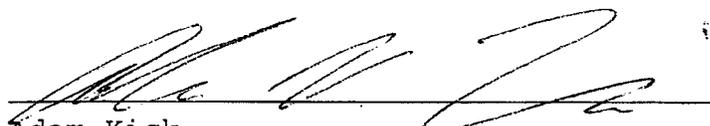
5 5. Attached is a true and correct copy of the jury question and
6 the court's response.

7
8 I concur in the statements contained herein.

9
10 DATED this 17th day of March, 2008.

11 
12 _____
13 JUDGE/Court Commissioner

14 
15 _____
16 CHRISTOPHER LANZ
17 Attorney for Defendant at Trial
18 WSB # 24220

19 
20 _____
21 Adam Kick
22 Attorney for Plaintiff at Trial
23 WSB # 27525

