

NO. 48309-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DALE FARRELL
Appellant.

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

The Honorable Michael Schwartz, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSBA #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal.....	2
B. <u>STATEMENT OF THE CASE</u>	3
a. <u>ER 404(b) Evidence</u>	5
C. <u>ARGUMENT</u>	7
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE STEAK KNIFE WAS A DEADLY WEAPON.	7
2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ASSAULT IN THE SECOND DEGREE.	10
3. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT ERRED BY ADMITTING ER 404 PROPENSITY EVIDENCE AND FAILED TO CONDUCT AN ER 403 ANALYSIS.	12
a. <u>ER 404(b)</u>	13
b. <u>Evidence Inadmissible as Motive</u>	14
c. <u>failure to Balance Probative v. Prejudicial</u>	15

TABLE OF CONTENTS

	Page
d. <u>Error Not Harmless</u>	17
4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.	19
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Abuan</i> , 161 Wn.App. 135, 257 P.3d 1 (2011).....	11
<i>State v. Acosta</i> , 123 Wn.App. 424, 98 P.3d 503 (2004).....	15, 16
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	20
<i>State v. Baker</i> , 162 Wn.App. 468, 259 P.3d 270, <i>review denied</i> , 173 Wn.2d 1004, 268 P.3d 942 (2011).....	14, 15
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	11, 12
<i>State v. Chesnokov</i> , 175 Wn.App. 345, 305 P.3d 1103 (2013).....	11
<i>State v. Cobb</i> , 22 Wn.App. 221, 589 P.2d 297 (1978).....	8, 9
<i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015).....	7
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80, <i>cert. denied</i> , 549 U.S. 1022 (2006).....	19
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002).....	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	13-16
<i>State v. Foster</i> , 140 Wn.App. 266, 166 P.3d 726, <i>review denied</i> , 162 Wn.2d 1007 (2007).....	21
<i>State v. Fuller</i> , 169 Wn.App. 797, 282 P.3d 126 (2012).....	14, 16, 18
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	19, 20
<i>State v. Hawkins</i> , 157 Wn.App. 739, 238 P.3d 1226 (2010), <i>review denied</i> , 171 Wn.2d 1013 (2011).....	20
<i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253, (2015).....	7
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	21
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	20
<i>State v. Salinas</i> , 119 Wbn.2d 192, 829 P.2d 1068 (1992).....	8
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Thompson,
88 Wn.2d 546, 564 P.2d 323 (1977).....9

FEDERAL CASES

Roe v. Flores–Ortega,
528 U.S. 470, 120 S.Ct. 1029,
145 L.Ed.2d 985 (2000).....20

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984).....19, 21

OTHER AUTHORITIES

Sixth Amendment to the U.S. Constitution..... 19

Washington article I, section 22. 19

ER 403.....1,2, 12, 15,-22

ER 404(b).....*ad passim*

RCW 9A.36.021(1)(c).....11

RCW 9.94A.825.....8

A. ASSIGNMENTS OF ERROR

1. The state failed to prove that the steak knife was a deadly weapon.
2. The state failed to prove that the complainants' fear was reasonable in the assault second in the degree charges.
3. The trial court erred by failing to conduct an ER 404(b) analysis before admitting propensity type evidence.
4. The trial court erred by failing to conduct an ER 403 analysis before admitting propensity type evidence.
5. Appellant was denied his due process right to effective assistance of counsel where counsel failed to move for a mistrial after inadmissible, prejudicial evidence was presented to the jury.
6. The state failed to prove beyond a reasonable doubt the essential elements of assault in the second degree.
7. The trial court denied Mr. Farrell his due process right to a fair trial by failing to give an adequate limiting instruction to the jury regarding prior no-contact order evidence.

Issues Presented on Appeal

1. Did the state fail to prove that the steak knife was a deadly weapon when the evidence suggested that the knife could have been plastic or rubber and was 3-6 inches long, and Mr. Farrell never closer than 25 feet from either complainant?
2. Did the state fail to prove that the complainant's fear was reasonable in the assault in the second degree charges where Mr. Farrell was at all times between 25-50 feet away from the complainants and never made any attempt to leave his property?
3. Did the trial court err by failing to give a limiting jury instructing informing the jury that it could not consider any of the evidence of the no –contact orders because they were propensity type evidence?
4. Did the trial court err by failing to conduct an ER 403 analysis before denying the defense motion for a limiting instruction that would have precluded consideration of the no contact order evidence?
5. Did the trial court err by failing to conduct an ER 404

analysis before denying the defense motion for a limiting instruction that would have precluded consideration of the no contact order evidence?

6. Was counsel ineffective for failing to move for a mistrial after the trial court dismissed the two no contact order charges, but the court refused to give a limiting instruction that the jury had to completely disregard that evidence?

B. STATEMENT OF THE CASE

Dale Farrell was charged with two counts of assault in the second degree with a deadly weapon; two counts of felony harassment, threat to kill; two counts of violation of no-contact orders; and one count of resisting arrest. CP 1-3, 18, 21. The state filed a second amended information. CP 24-28. The trial court dismissed the no-contact order charges; the jury returned a verdict of guilty on the assault charges, the felony harassment charges and the lesser offense of obstructing an officer. CP 81, 83, 85, 86, 88, 89, 91, 92, 131-32, 133-48.

Dale Farrell lives next door to Lisa Hardy, and Dori Leboeuf lives on the other side of Ms. Hardy. RP 85-87. During the night of

October 2, 2013, Ms. LeBoeuf was aggravated with Mr. Farrell because he played his drums loudly during the night. RP 72-73. According to Ms. Leboeuf, Mr. Farrell while watering his lawn and holding a knife in the other hand, yelled obscenities at her while she was in her home. RP 75-79. Ms. LeBoeuf called the police from the safety inside her home, while her husband took photographs of Mr. Farrell outside yelling and waiving his hand with the knife –all while watering his lawn. RP 80-92.

Ms. LeBoeuf testified that she was afraid even though she was inside her home and was too far away to determine if the knife was made of rubber or plastic or metal, but guessed that the blade was 3 inches long. RP 81-82, 93-94, 110-112. Ms. LeBoeuf estimated that Mr. Farrell was 25-50 feet away from her on his own lawn while he waived the knife and shouted at her. RP 110-112. Mr. Leboeuf stated that Mr. Farrell was 45 feet from the Leboeuf's home. RP 170. From inside, Ms. Leboeuf claimed to hear Mr. Farrell threaten to kill her. RP 79, 145. Mr. Farrell never left his property while watering his lawn, waiving the knife and shouting threats. RP 88, 176, 243.

Ms. Hardy, Mr. Farrell's adjacent neighbor came home from

work to find Mr. Farrell watering his lawn with a knife in his other hand. RP 237. Ms. Hardy testified that she was afraid but she nonetheless went to get her mail and walked back inside her house as Mr. Farrell was yelling obscenities at her and threatening to kill her too. RP 237-44. Mr. Farrell was about 25 feet away from Ms. Hardy as he was shouting and never made any attempt to leave his property. RP 88, 176, 243.

Ms. Hardy like Ms. LeBoeuf could not determine if the knife was made of plastic, rubber or metal but she thought it was shiny and six inches long. RP 251-54.

a. ER 404(b) Evidence.

After both sides rested their cases, the court granted the defense motion to dismiss the two no contact order charges because the state charged them under the wrong statute. RP 365-65. The defense argued that if the no contact orders had not been part of the case, evidence of the no contact orders would have been inadmissible propensity evidence under ER 404(b). RP 375-76, 387. The defense argued that the admission of the inadmissible evidence was overly prejudicial and the bell could not be unrung. RP 375-81, 387-89.

The state admitted that it did not offer the evidence of the no contact orders to prove motive in the assault cases, but argued that the evidence was nonetheless admissible under ER 404(b) to show the defendant's motive in the assault cases. RP 380-82. Without any analysis, the court agreed that the evidence was admissible. RP 386, 389. "I do believe that the evidence would still be admissible under 404(b), that it is probative, and the prejudice does not substantially outweigh the probative value of the admission of the protection orders themselves or what is contained in the 911 tapes." RP 390.

The court gave the state's requested limiting instruction not the defendant's. RP 403-04. The defense requested an instruction that completely prohibited the jury from considering the no contact order information. RP 403. The court gave the following instruction number 30.

"Certain evidence has been admitted consisting of two protection orders issued by a court naming Dori Leboeuf and Lisa Hardy as the protected parties. The charges alleging that Dale Farrell violated those orders have been dismissed. You must not speculate on the reason for the dismissal. You may only consider the evidence, if at all, for the limited purpose of motive, and or the alleged victim's state of mind, and for no other purpose.

CP 76.

This timely appeal follows. CP 169.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE STEAK KNIFE WAS A DEADLY WEAPON.

The state failed to prove beyond a reasonable doubt that Mr. Farrell was armed with a deadly weapon.

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253, (2015). To determine if the State presented sufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015).

An appellant's claim of insufficient evidence admits the truth of the State's evidence and "all inferences that reasonably can be drawn [from it]." *Condon*, 182 Wn.2d at 314 (alteration in original)

(quoting *State v. Salinas*, 119 Wbn.2d 192, 201, 829 P.2d 1068 (1992)).

To establish that a knife is a deadly weapon per se, the state must prove beyond a reasonable doubt that the blade is longer than three inches. RCW 9.94A.825. If the blade is less than three inches, the state must prove beyond a reasonable doubt that the knife “has the capacity to inflict death, and from the manner in which it is used, is likely to produce or may easily and readily produce death.” *Id.* The state proceeded under the theory that the knife was capable of being used as a deadly weapon.

Jury instruction 23 defined a deadly weapon as a “weapon, device instrument, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial injury.” CP 42-79. Because the state did not proceed under the per se rule, it was required to prove beyond a reasonable doubt that Mr. Farrell’s threatened use of the knife was readily capable of causing death or substantial injury. *State v. Cobb*, 22 Wn.App. 221, 223, 589 P.2d 297 (1978).

In *Cobb*, the Court held that the State presented sufficient

evidence of a deadly weapon where a knife with less than a three inch blade produced a cut over the victim's sternum bone, a cut to the forehead, and a cut in the muscle of the left arm. *Cobb*, 22 Wn.App. at 223. Likewise, in *State v. Thompson*, 88 Wn.2d 546, 564 P.2d 323 (1977), the defendant used a pocketknife with a blade two to three inches in length to assault the victim during a robbery. The defendant held the knife against the victim's neck, and the victim sustained bruises on her right arm and a cut on her neck. *Thomson*, 88 Wn.2d at 550. Under these circumstances, our Supreme Court held that the jury could have properly found that the knife was a deadly weapon. *Id.*

Here, there was no evidence that the knife was used in a manner capable of causing death or substantial injury. Mr. Farrell was at all times on his property between 25-50 feet away from Ms. Hardy and Ms. LeBoeuf, waving his knife while holding a knife that he waived and jabbed in the air.

Ms. Hardy described Mr. Farrell using the knife as an extension of his arm while he gesticulated from 25 feet away from her in the center of his yard. RP 243, 251-54. Mr. Farrell never attempted to leave his property, and continued to water his lawn.

Mr. Farrell was on his side of the chain link fence that separates his house from Ms. Hardy's and Ms. Hardy did not run away, rather she picked up her mail and calmly walked back to her house. RP 237-38.

Ms. LeBoeuf testified that Mr. Farrell was 25-50 feet away from her on his property and that she was safely inside her house with the doors locked. RP 110-11. Mr. Farrell was on his property with a house in between his property and the LeBoeuf property. RP 88, 130-31. Mr. Farrell never made a move to leave his property. RP 88, 176, 243.

Viewing this evidence in the light most favorable to the state this evidence does not establish sufficient evidence for a rational jury to properly find beyond a reasonable doubt that the knife was a deadly weapon because from Mr. Farrell's vantage point, it was not used or threatened to be used in a manner capable of causing death or substantial bodily harm.

Accordingly, this Court must reverse and dismiss the deadly weapon enhancement with prejudice and the assault in the second degree with a deadly weapon charges.

2. THE STATE FAILED TO PROVE

BEYOND A REASONABLE DOUBT
ASSAULT IN THE SECOND DEGREE.

The state charged Mr. Farrell by second amended information with assault in the second degree under RCW 9A.36.021(1)(c). CP 24-28. The state defined assault as “A person commits the crime of assault in the second degree when he assaults another with a deadly weapon”. CP 46 (JI 5).

Assault as charged in this case required the state to prove beyond a reasonable doubt that Mr. Farrell assaulted Ms. Hardy and Ms. LeBoeuf with a deadly weapon by putting them in apprehension or fear of harm, and that the victims’ fear was reasonable regardless of whether Mr. Farrell intended to inflict or was incapable of inflicting such harm. RP 415-20; *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Abuan*, 161 Wn.App. 135, 154, 257 P.3d 1 (2011); *State v. Chesnokov*, 175 Wn.App. 345, 352, 305 P.3d 1103 (2013); RCW 9A.36.021(1)(c).

The specific elements at issue in this case are the lack of evidence of a deadly weapon and lack of evidence that Ms. Hardy and Ms. Leboeuf had reasonable fear. Mr. Farrell was never closer than 25 feet to Ms. Hardy, he never left his property, Ms. Hardy did

not run to her house and the voice on the 911 call was calm. RP 88, 176, 243. This evidence does not support an inference that Ms. Hardy's fear of imminent harm was reasonable.

Similarly, Mr. Farrell was never closer than 50 feet from Ms. LeBoeuf while Mr. Farrell remained on his property, with a house in between his house and Ms. LeBoeuf's house, Ms. LeBoeuf was at all times inside her home with the doors locked. Mr. Farrell never attempted to leave his property but he did spew foul and offensive language. These facts taken the light most favorable to the state do not establish that Ms. LeBoeuf's fear of imminent harm was reasonable. *Byrd*, 125 Wn.2d at 713-14.

As argued above the state also failed to prove beyond a reasonable doubt that the steak knife was a deadly weapon. Because the state failed to prove the essential elements of assault in the second degree: that the victims' fear was reasonable and that the knife was a deadly weapon, this Court must reverse both assault charges and remand for dismissal with prejudice.

3. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT ERRED BY ADMITTING ER 404 PROPENSITY EVIDENCE AND FAILED TO CONDUCT AN ER 403

ANALYSIS.

Trial counsel objected to the admission of evidence of the dismissed no-contact orders. RP 375-381. Defense counsel stated that the evidence was inadmissible propensity evidence that was unduly prejudicial, and once the bell was rung, it could not be unringed with a limiting instruction. *Id.* Counsel did not move for a mistrial, but requested a jury instruction that would have precluded the jury from considering any evidence related to the no contact orders. RP 375-403.

a. ER 404(b)

This Court reviews a trial court's decision to admit or deny evidence of a defendant's past crimes or bad acts under ER 404(b) for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when it fails to adhere to the requirements of ER 404(b) in admitting evidence of a defendant's prior convictions or past acts. *Fisher*, 165 Wn.2d at 744-45.

Prior to admitting ER 404(b) evidence, the trial court must "(1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the

evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence.” *Fisher*, 165 Wn.2d at 745. The reviewing Court presumes that evidence of a defendant’s past acts is inadmissible and resolves any doubts on whether to admit the evidence in the defendant’s favor. *State v. Fuller*, 169 Wn.App. 797, 829, 282 P.3d 126 (2012).

b. Evidence Inadmissible as Motive

The trial court may not admit evidence of a defendant’s past crimes or bad acts to show that the defendant likely committed the crime charged, that the defendant acted in conformity with prior bad acts, or that the defendant had a propensity to commit the crime. *Fuller*, 169 Wn.App. at 892 (citing ER 404(b)); and *State v. Baker*, 162 Wn.App. 468, 472-73, 259 P.3d 270, *review denied*, 173 Wn.2d 1004, 268 P.3d 942 (2011). Under some circumstances, evidence of a defendant’s past crime or bad act may be admissible to show the defendant’s motive. *Baker*, 162 Wn.App. at 473.

“[T]he State may not show motive by introducing evidence that the defendant committed or attempted to commit an unrelated crime in the past.” *Fisher*, 169 Wn.App.at 829 (citing *Baker*, 162

Wn.App.at 473-74. Moreover even when the State's proposed evidence is relevant to show motive, a trial court must evaluate ER 404(b) evidence under ER 403. *Fisher*, 154 Wn.2d at 745.

Here, the court admitted direct testimony from both Ms. LeBoeuf and Ms. Hardy and through the 911 tape, that they had no contact orders against Mr. Farrell. RP 390. After the court dismissed the two no contact order charges, the prosecutor argued that the evidence would have been admissible as "motive" in the assault charges, even though he never used this evidence to prove motive during trial. RP 382. RP 382.

The no contact orders were not admissible to prove an element of the crime of assault or felony harassment or to show motive. Rather, under *Fisher*, once the no contact orders were dismissed, their existence was unrelated to the present charges and impermissible propensity evidence that did not tend to prove an element of the crimes charged. *Fisher*, 169 Wn.App.at 829 (citing *Baker*, 162 Wn.App.at 473-74).

c. Failure to Balance Probative v. Prejudicial.

"A trial court must balance the probative and prejudicial value of the evidence on the record." *State v. Acosta*, 123 Wn.App.

424, 433, 98 P.3d 503 (2004); *Fuller*, 169 Wn.App. at 829-30. The reason is to permit appellate review. *Acosta*, 123 Wn.App. at 433. “Even when the State's proposed evidence is relevant to show motive, a trial court must evaluate ER 404(b) evidence under ER 403, which requires the trial court to exercise its discretion in excluding relevant evidence if its undue prejudice substantially outweighs its probative value. *Fisher*, 165 Wn.2d at 745.

Here, the Court did not (1) conduct any sort of analysis to determine by a preponderance of the evidence that the no contact order violations actually occurred. (2) The court accepted the state's argument that the evidence was admissible to show motive, but there was no argument to support that hollow conclusion. (3) The court did not determine the relevance of the evidence to prove an element of the crimes. (4) The court did not weigh the probative value against the prejudicial effect of the evidence. *Fisher*, 165 Wn.2d at 745. Simply stating this to be so without analysis does not suffice. *Fisher*, 165 Wn.2d at 745.

Rather, in deciding on a limiting instruction after admitting the evidence without analysis, the court simply stated “I do believe that the evidence would still be admissible under 404(b), that it is

probative, and the prejudice does not substantially outweigh the probative value of the admission of the protection orders themselves or what is contained in the 911 tapes.” RP 390.

The judge’s comments do not in any manner provide this Court with the ability to review the trial court’s rational for refusing to provide a jury instruction directing the jury to disregard the no contact order evidence. Because this evidence would not have been admissible under ER 403 or ER 404, due to a lack of relevance and for being overly prejudicial, this Court must reverse and remand for a new trial.

d. Error Not Harmless

An error in admitting evidence under ER 403 and ER 404(b) mandates reversal, when the error materially affected the outcome of the case within a reasonable probability. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Here, the court admitted direct testimony from both Ms. LeBoeuf and Ms. Hardy and through the 911 tape, that they had no contact orders against Mr. Farrell. RP 390. If the no contact order charges had been dismissed before trial, the evidence of the no contact orders would not have been admissible because their existence did

not establish a motive for Mr. Farrell to commit assault and felony harassment and it was overly prejudicial propensity evidence.

Also, rather than supporting the notion of “motive” it is more likely that the existence of the no contact orders limited Mr. Farrell’s actions as evidenced by his remaining on his property at all times, despite his aggravation. RP 110-11, 176, 209, 243. The evidence of the no contact orders did not establish an element of a charged crime, did not support the notion of “motive”, and likely was considered as propensity evidence. *Fuller, 169 Wn.App.at 831.*

For example in *Fuller*, this Court held that the trial court abused its discretion in admitting a prior robbery plan, and the admission was not harmless “[b]ecause the focus of the State’s case was on the robbery motive, and there is a reasonable probability that Stafford’s testimony affected the outcome of the trial.” *Id.*

Similarly, here, the evidence was inadmissible and not harmless because there is a reasonable probability that the jury considered the evidence to establish that Mr. Farrell was a bad guy with a history against these women and therefore was likely to reoffend. Accordingly, this Court must reverse and remand for a

new trial.

4. TRIAL COUNSEL WAS INEFFECTIVE
FOR FAILING TO MOVE FOR A
MISTRIAL.

Defense counsel failed to move for a mistrial after the court dismissed the two no contact order charges that were improperly charged. RP 365; CP131-32.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883,

204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus not immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's

unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

The failure to move for a mistrial in this case cannot be considered tactical because the defense objected to the evidence of the no-contact orders and articulated that it was impossible to unring the bell since the no contact order information had flooded through the case. RP 375-76, 380-81. Defense counsel also understood that the curative instruction offered by the state and given by the court was inadequate. RP 403; CP 76.

Nonetheless, counsel did not take the final and necessary step to protect Mr. Farrell’s right to a fair trial: moving for a mistrial. Counsel’s failure to move for a mistrial was deficient representation and prejudicial because the evidence was not admissible under ER 403, ER 404(b), or for any other reason. The evidence was not relevant to prove an element in any of the remaining charges, it was no evidence of motive, but rather was propensity evidence with

a prejudicial impact that far outweighed any probative value to the state. ER 402, ER 403; ER 404(b).

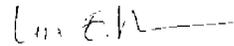
Accordingly, counsel's performance was deficient, Mr. Farrell was prejudiced, and this Court must remand for reversal for a new trial.

D. CONCLUSION

Mr. Farrell respectfully requests this Court reverse and dismiss his two assault convictions and dismiss with prejudice and remand for a new trial on the remaining charges.

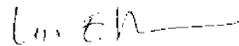
DATED this 11th day of May 2016

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office 'pccpatcecf@co.pierce.wa.us' and Dale Farrell DOC# 939188 Coyote Ridge Corrections Center P. O. Box 769 Connell, WA 99326 on May, 11 2016. Service was made by electronically to the prosecutor and to Mr. Farrell by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

May 11, 2016 - 10:57 AM

Transmittal Letter

Document Uploaded: 7-483092-Appellant's Brief.pdf

Case Name: State v. Dale Farrell

Court of Appeals Case Number: 48309-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us