

FILED
Court of Appeals
Division II
State of Washington
8/23/2019 4:41 PM

No. 51895-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SAUNDERS,

Appellant.

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

APPELLANT'S REPLY BRIEF

TIFFINIE B. MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tiffinie@washapp.org

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

Counsel is constitutionally ineffective where he fails to object to
unduly prejudicial evidence with little to no probative value; the
State’s argument incorrectly presumes the admissibility such
evidence. 1

B. CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012)4

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 4

State v. Jaime, 168 Wn.2d 857, 233 P.3d 554 (2010) 3

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....4

State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986)..... 1

WASHINGTON COURT OF APPEALS CASES

State v. Gorman-Lykken, 51254-8-II, 2019 WL 3797976 (Wash. Ct.
App. Aug. 13, 2019) 2, 3

State v. Haq, 166 Wn. App. 221, 268 P.3d 997 (2012)5

RULES

ER 402 1, 3

ER 404(b)..... 1

A. ARGUMENT IN REPLY

Counsel is constitutionally ineffective where he fails to object to unduly prejudicial evidence with little to no probative value; the State's argument incorrectly presumes the admissibility such evidence.

As discussed in the opening brief, defense counsel failed to object to portions of Ms. Saxon's testimony which were irrelevant and unduly prejudicial. Br. of Appellant at 8-12. There was no legitimate, tactical reason for this failure, particularly in light of Mr. Saunders's stipulations to virtually all elements of the offense of failure to register as a sex offender. The State's argument is misguided because it presumes the relevance and admissibility of this evidence.

Irrelevant evidence is always inadmissible. ER 402; *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Even where relevant, evidence must be excluded if the danger of unfair prejudice substantially outweighs any probative value it may have. *Id.* at 776. Evidence of other bad acts is also inadmissible to show "the character of a person in order to show action in conformity therewith." ER 404(b). These rules must be read together to determine the admissibility of evidence. *Smith*, 106 Wn.2d at 775.

Here, due to counsel's failure to object, Ms. Saxon was permitted to testify to highly prejudicial and irrelevant evidence that was largely unnecessary given Mr. Saunders's numerous stipulations. The State called Ms. Saxon presumably to show Mr. Saunders had knowledge of his registration requirement, yet later testimony by a Pierce County Sheriff's records custodian, and Mr. Saunders's own stipulation, established this fact. RP 112; CP 15-17.

Instead of presenting evidence Mr. Saunders knew of his duty to register, the State proceeded to elicit testimony from Ms. Saxon regarding Mr. Saunders's various DOC violations and general bad behavior. Without objection from defense counsel, Ms. Saxon explicitly told the jury that Mr. Saunders: (1) committed a sex offense against a child, (2) used drugs, (3) frequently violated curfew and lied about his whereabouts, (4) cut off his GPS monitor and roamed Tacoma unmonitored, and (5) was a risk to the community. RP 111-29; Br. of Appellant at 9.

This Court's recent decision in *State v. Gorman-Lykken*, 51254-8-II, 2019 WL 3797976 (Wash. Ct. App. Aug. 13, 2019), is instructive. In that case, a corrections officer was merely stationed next to the defendant as he testified. *Id.* at 1. While this Court determined it was

not inherently prejudicial, it recognized “that the potential for prejudice is greater when a security officer is stationed next to a testifying defendant than when an officer or officers merely are present elsewhere in the courtroom.” *Id.* at 4. This is because such security measures may “single out defendants as particularly dangerous or guilty,” which “threatens their right to a fair trial because those measures erode the presumption of fairness.” *Id.* at 2 (citing *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010)).

If the mere presence of a corrections officer near a testifying defendant increases the potential for prejudice, the testimony of a corrections officer highlighting a defendant’s “bad acts” and dangerousness is certainly unduly prejudicial. Ms. Saxon’s testimony revealed unnecessary and damaging details about Mr. Saunders’s past bad conduct which were irrelevant to the charge of failure to register. ER 402. More importantly, the prejudicial effect of this evidence substantially outweighed any probative value. ER 403. Rather than simply implying he might be dangerous, as in *Gorman-Lykken*, Ms. Saxon explicitly told the jurors Mr. Saunders was a “risk to the community,” used drugs, committed sex offenses against children, cut

off his GPS monitor, was repeatedly incarcerated, and moved about Tacoma unsupervised. RP 111-29.

None of this evidence was relevant to the charge of failure to register, and counsel's lack of objection served no legitimate tactical end. Contrary to the State's contention, objecting to this highly prejudicial evidence would not have "emphasized the importance of Defendant's" behavior or encouraged harmful jury speculation. Br. of Respondent at 15. Indeed, this type of testimony is classic bad acts evidence which is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). There is no discernable reason why competent counsel would not have objected to this evidence. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Mr. Saunders was prejudiced by his counsel's deficient performance. A defendant demonstrates prejudice where he shows there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, Mr. Saunders testified he registered as required by law with the Pierce County Sheriff's Department on July 19, 2017, three

days after he was released from jail. RP 277. He believed the Sheriff's Department had lost his paperwork. RP 285-86. However, counsel's failure to object to Ms. Saxon's irrelevant and unduly prejudicial testimony deprived Mr. Saunders of a fair trial in which the jury could impartially weigh Mr. Saunders's testimony against that of the State's witnesses. Because this evidence of uncharged misconduct or damaging behavior had little to no probative value, its sole effect was to "arouse an emotional response" rather than "a rational decision by the jury," unfairly prejudicing Mr. Saunders in the minds of the jurors. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). By failing to object to Ms. Saxon's testimony, counsel permitted the jury to hear this highly damaging testimony, prejudicing Mr. Saunders's right to a fair trial. Reversal is required.

B. CONCLUSION

For the reasons state above and in Appellant's Opening Brief,
this Court should reverse.

DATED this 23rd day of August 2019.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma (51420)
Attorney for Appellant
Washington Appellate Project (91052)
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 51895-3-II
v.)	
)	
CHRISTOPHER SAUNDERS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF AUGUST, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ERICA RUYF, DPA [PCpatcecf@co.pierce.wa.us] [eeggert@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> CHRISTOPHER SAUNDERS 712811 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF AUGUST, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 23, 2019 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51895-3
Appellate Court Case Title: State of Washington, Respondent v. Christopher Saunders, Appellant
Superior Court Case Number: 17-1-02830-6

The following documents have been uploaded:

- 518953_Briefs_20190823164027D2748808_7058.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.082319-07.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- eeggert@co.pierce.wa.us
- greg@washapp.org
- kate@luminatalaw.com

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190823164027D2748808