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NO. 53030-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BEONKA DOTY,

Appellant.

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

The Honorable Gregory Gonzales, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant a fair trial by admitting irrelevant and unfairly prejudicial evidence regarding her behavior after seeking medical treatment for her child.

2. Trial counsel was ineffective in agreeing to an erroneous jury instruction.

Issues pertaining to assignments of error

1. Appellant was charged with second degree criminal mistreatment based on allegations that she recklessly withheld medical treatment from her child. Over defense objection the court admitted evidence regarding appellant's conduct after the child was admitted to the hospital, including evidence that she did not see the child at the hospital on Christmas. Did admission of this irrelevant and highly prejudicial evidence deny appellant a fair trial?

2. Where defense counsel agreed to a jury instruction which misstated the law and lowered the State's burden of proof, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

On December 23, 2016, appellant Beonka Doty brought her 12 year old daughter L.D. to the emergency room with a pilonidal abscess.

RP 229-30, 383, 430. The abscess was advanced and required incision and drainage under general anesthesia. RP 323, 335. L.D. was transferred to a pediatric hospital in Portland, where the procedure was performed the following day. RP 229, 259. Based on L.D.'s reports that she had told her mother about her condition several days before she was taken to the hospital, Doty was charged with second degree criminal mistreatment. CP 1.

Prior to trial the defense moved to exclude evidence of Doty's conduct after she sought medical treatment for her daughter, arguing it was not relevant to the charge. Counsel agreed that Doty's behavior when she initially brought her child to the hospital was probably relevant, but once the child was admitted and under the care of medical professionals, Doty's actions did not contribute to the alleged mistreatment. RP 70-71, 75, 83. Counsel argued that evidence that Doty did not see her daughter at the hospital on Christmas was particularly prejudicial and should be excluded. RP 75-76.

The court allowed evidence regarding times Doty was not in the room with her daughter after she was admitted. RP 86. It found that Doty's absence from the hospital December 24 through December 26 was an admissible fact. RP 88. Counsel argued that there was no relevance to the fact that Doty left her child alone on Christmas, but that fact was

extremely inflammatory and could only result in unfair prejudice. RP 88. The court ruled that it would allow evidence that Doty was not present at the hospital December 24 through December 26, but it would not allow the State to address the fact that it was Christmas. RP 89-91.

L.D. testified that she started feeling pain in her backside after she fell at the mall on Saturday December 17, 2016. RP 413, 415. She did not tell her mother about it that day, because she thought it was a bruise that would go away. RP 416, 421. L.D. testified at one point that she did not tell Doty about it the next day either, and then later testified that she first told Doty on Sunday. RP 421, 442. But she explained that when the pain continued to get worse, she told Doty that her bottom had been hurting and she thought it could be an abscess, which she had had before. RP 423. L.D. testified that Doty told her she would be fine. RP 423. She next talked to Doty about going to the hospital on Wednesday, but she did not let Doty look at the area. RP 426, 443. Doty took L.D. to the hospital Friday December 23, and she had surgery December 24. RP 430.

L.D. testified that Doty was with her at the pediatric hospital the first night and for a while the next day, but then she left. RP 436. Doty was not with her when she went into surgery or when she got out, and L.D. did not see her at all on December 25. RP 436-37.

When she was admitted to the pediatric hospital, L.D. told the nurse who was treating her that she started feeling pain a week earlier, but she first felt the mass that day. RP 234. There was testimony that L.D.'s abscess would have been extremely painful. RP 322, 339. If left untreated it could have become life threatening, but it was not life threatening at the time medical care was sought. RP 231-32, 330, 352-53, 389. Although L.D. was brought to the hospital on Friday morning, the procedure was not performed until after 6:00 p.m. on Saturday. RP 341. While awaiting the procedure L.D. was on the general admission floor, not in critical or intensive care. RP 237, 354.

A social worker at the pediatric hospital testified that he worked with L.D. on December 25, and at no point during that day did he see Doty with her daughter. RP 269, 282. He had tried to call Doty multiple times that morning, and when she finally returned his calls that afternoon she said she would not be able to come to the hospital that day. RP 269-70. Doty asked if L.D. could be returned home in an ambulance when she was discharged, and when she was told that was not possible, she agreed to come pick her up. RP 270, 274. The social worker testified that Doty had not arrived by the time he left for the day. RP 275. Another social worker testified that Doty was not in the room with L.D. when she saw her on December 26, 27, or 28. RP 300-01.

Statements Doty made during an interview with police were admitted. In the interview Doty said that L.D. told her she was in some pain and might need to go to the emergency room. Doty had a headache and couldn't think straight, so she told her they would go in the morning. RP 492-93. She took L.D. to the hospital the next morning. RP 493. Doty explained that after checking L.D. in, she moved her car out of 15-minute parking and got something for them to eat. RP 493. She waited with L.D. for a while and then decided to take her purse home. On the way back to the hospital she stopped to get a flu shot. RP 494-95. She was confused when she was told L.D. had to be transferred to a hospital in Portland, because the last time she had an abscess it was treated in the emergency room. Doty was stressed about not having her car or her purse with her in Portland and about missing work. RP 496-97. Doty stayed with L.D. overnight and went home the next day, asking to be called when L.D. was ready to be discharged. RP 497-98.

The detective told Doty that L.D. had said it was eight days from the time she told Doty she was in pain until Doty took her to the hospital. RP 503. Doty responded that L.D. had mentioned the pain, but she did not say how severe it was until the night before they went to the hospital. RP 505. If L.D. had been crying that she was in pain sooner, she would have taken her to the doctor sooner. RP 508.

C. ARGUMENT

1. THE TRIAL COURT DENIED DOTY A FAIR TRIAL BY ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE REGARDING HER BEHAVIOR AFTER SEEKING MEDICAL TREATMENT FOR HER CHILD.

Both the state and federal constitutions guarantee criminal defendants a fair trial. U.S. Const. Amend V; U.S. Const. Amend XIV; Const. art. 1 § 3; *see State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). The rule does allow for the introduction of other acts evidence if it is relevant for some legitimate purpose, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or

absence of mistake or accident.” ER 404(b)<sup>1</sup>. But such evidence is admissible only if the trial court finds the substantial probative value of the evidence outweighs its prejudicial effect. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This cautious approach recognizes the inherent prejudice of evidence of other bad acts. *State v. Sexsmith*, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible,” and the State must meet a substantial burden when attempting to bring in evidence under one of the exceptions to ER 404(b). *DeVincentis*, 150 Wn.2d at 17. A trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). “The abuse of discretion standard is not, of course, unbridled discretion.” *In re Parentage of Jannot*, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), *affirmed*, 149 Wn.2d 123 (2003). A court abuses its discretion if its decision is contrary to relevant law, based on untenable grounds, or supported by untenable reasons. *Thang*, 145 Wn.2d at 642; *Jannot*, 110

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<sup>1</sup> ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wn. App. at 22; *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997).

In *Perrett*, the defendant was arrested for second degree assault with a deadly weapon after he pointed a shotgun at a tenant. 86 Wn. App. at 314. Police arrested the defendant and, after advising him of his Miranda rights, asked him to produce the shotgun he used. Perrett refused, saying the last time the sheriffs took his guns, he did not get them back. *Id.* at 315. Perrett moved to exclude this statement, but the trial court admitted it, explaining that the jury needed to understand the totality of the circumstances to judge Perrett's demeanor on arrest. *Id.* at 319. On appeal, this Court held that admission of the statement was an abuse of discretion. Perrett's demeanor on arrest was not relevant to any element of the crime charged. Moreover, the statement was unfairly prejudicial, as it raised the inference that he had committed a prior crime with a gun and thus it was more likely he committed the charged offense. *Id.* at 319-20.

Here, as in *Perrett*, Doty moved to exclude evidence of certain conduct on the grounds that it was irrelevant to the charge and unfairly prejudicial. Over defense objection, the court below admitted evidence that Doty was absent from the hospital during L.D.'s procedure and on Christmas day. RP 88-89. The court's admission of this irrelevant and

unfairly prejudicial evidence was an abuse of discretion which denied Doty a fair trial.

To convict Doty of criminal mistreatment in the second degree as charged in this case, the State had to prove Doty, acting recklessly, (a) created an imminent and substantial risk of death or great bodily harm to her child, or (b) caused substantial bodily harm to her child, by withholding a basic necessity of life. RCW 9A.42.030(1)<sup>2</sup>; CP 1-2, 68. The criminal mistreatment statute is aimed at those who recklessly endanger their dependents by withholding basic necessities. *State v. McGary*, 122 Wn. App. 308, 315, 93 P.3d 941 (2004). Basic necessities include food, shelter, clothing, and health care. *State v. Dunn*, 82 Wn. App. 122, 127, 916 P.2d 952, *review denied*, 130 Wn.2d 1018 (1996).

There was no question that Doty is L.D.'s mother and responsible for her care. The issue was whether Doty recklessly endangered L.D. by withholding medical treatment. *See McGary*, 122 Wn. App. at 316-17 (State must prove defendant withheld a basic necessity of life to prove criminal mistreatment). Thus, evidence of Doty's conduct up to the point L.D. was admitted to the hospital was relevant to the charge, because it could establish the elements of the offense. Her conduct after medical

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<sup>2</sup> The criminal mistreatment statute was amended in 2017 to require a showing of criminal negligence rather than recklessness, but Doty was charged under the prior version of the statute.

treatment was sought, however, sheds no light on any element of the charged offense.

Defense counsel argued that once the child was admitted to the hospital under the care of medical professionals, any alleged mistreatment ceased and Doty's conduct after that point was not relevant. Evidence that Doty was not at the hospital during the procedure and did not see L.D. on Christmas was highly inflammatory and served only to show her as a thoughtless mother. RP 70, 87-89. The court did not specifically identify a purpose for the challenged evidence, but it ruled that Doty's absence from the hospital December 24 through December 26 was an admissible fact. RP 88. It excluded specific reference to Christmas, but allowed discussion of the dates and the fact that Doty was absent. RP 89, 91.

To be admissible under ER 404(b), evidence of other conduct must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." *State v. Salterelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). While there was no dispute that Doty left the hospital prior to L.D.'s procedure and did not see her the following day, there was also no relevance to that fact, because Doty was charged with withholding medical treatment prior to L.D.'s admission to the hospital. Moreover, criminal mistreatment requires risk of bodily harm, not emotional harm.

*State v. Van Woerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998), *review denied*, 137 Wn.2d 1039 (1999). The impact of Doty's actions on her child's feelings once at the hospital is therefore irrelevant. The implication that the child was scared and alone at the hospital doesn't make any element more or less probable, but it does have a strong emotional impact.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. *Salterelli*, 98 Wn.2d at 361-62. Evidence is unfairly prejudicial if it is more likely to arouse an emotional response than a rational decision by the jury. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). That is the case here.

The jury was presented with evidence Doty left her child alone in the hospital on Christmas. Even though the court said it would not allow reference to "Christmas" the witnesses and prosecutor quite clearly identified the date as December 25. *See e.g.* RP 269, 300, 437, 670. It is unreasonable to believe jurors would not equate that date with the holiday, or that such a fact would not cause an emotional response. While not serving to make any fact of consequence more or less likely, this evidence does portray Doty as a callous mother, leading to the forbidden inference that she is guilty because she is the type of person who would commit the

charged offense. See *Wade*, 98 Wn. App. at 336; *Perrett*, 86 Wn. App. at 319-20.

An evidentiary error is harmless only if it is reasonably probable the error did not materially affect the jury's verdict. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

The State's case against Doty was not strong enough to make a conviction reasonably probable absent the impermissible propensity inference. There was a question as to how much Doty knew and when, prior to seeking medical care. L.D. admitted she did not tell her mother everything she was experiencing right away, and she never let Doty see the infection. RP 416, 421, 443. And while the abscess required incision and drainage, there was testimony it had not developed into a life threatening condition at the time medical care was sought, although it could have if left untreated. RP 231-32, 330, 352-53, 389. L.D. was placed on the general admission floor, rather than intensive or critical care, and the procedure was not performed until late the following day. RP 237, 341, 354. Thus, the jury could have reasonable questions about whether Doty acted recklessly or either created a risk of death or great bodily harm

or caused substantial bodily harm. Without the highly prejudicial and irrelevant evidence that Doty failed to visit her daughter in the hospital on Christmas day, it is reasonably probable the jury would have returned a not guilty verdict. The court's error was not harmless, and the conviction must be reversed.

2. TRIAL COUNSEL WAS INEFFECTIVE IN AGREEING TO AN ERRONEOUS JURY INSTRUCTION.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Where a criminal defendant has been denied effective assistance of counsel, the resulting conviction must be reversed and the case remanded for a new trial. *Id.*

To establish ineffective assistance of counsel, the defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Representation is deficient if, after consideration of all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a

reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 34.

In this case, trial counsel's performance fell below an objective standard of reasonableness because he agreed to a jury instruction that misstated the applicable law.

Doty was charged with criminal mistreatment in the second degree. CP 1-2; RCW 9A.42.030(1). Under that charge, the jury could return a guilty verdict if it found she recklessly created a risk of great bodily harm to her daughter by withholding medical treatment. CP 68. For the purpose of a criminal mistreatment charge, "great bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

Defense counsel initially proposed WPIC 38.25, which sets forth the statutory definition from RCW 9A.42.010(2)(c). RP 585; WPIC 38.25. The State proposed WPIC 2.04, however, which defines great bodily harm as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." RP 585-86; WPIC 2.04. This definition is taken from RCW 9A.04.110,

which indicates that the definition applies “unless a different meaning is plainly required.”

The comments to WPIC 38.25 indicate that the Legislature has provided two different definitions of great bodily harm. The definition given in RCW 9A.04.110 applies generally to offenses defined in RCW 9A, but the definition in RCW 9A.42.010 applies in cases of criminal mistreatment. WPIC 38.25.

Defense counsel initially objected to the State’s proposed instruction, pointing out that WPIC 38.25 states the correct statutory definition of great bodily harm applicable to a criminal mistreatment charge. RP 590. The State, apparently misreading the comments to the pattern instructions, insisted that WPIC 2.04 was the appropriate instruction. RP 585-90. Defense counsel eventually agreed to the State’s proposal. RP 591. Thus the jury was instructed that great bodily harm involves a probability of death rather than a high probability of death, as required under RCW 9A.42.010(2)(c). CP 72.

A jury instruction must properly inform the jury of the applicable law. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). An instruction that misstates the law is erroneous. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Moreover, an attorney has a duty to research the

applicable law and should reasonably appreciate an error of law in a jury instruction. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Counsel's agreement to an instruction which failed to apply the relevant law fell below an objective standard of reasonableness. *See Kyлло*, 166 Wn.2d at 868. "There is no legitimate strategic reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof." *In re Wilson*, 169 Wn. App. 379, 391, 279 P.3d 990 (2012) (citing *Kyлло*, 166 Wn.2d at 869). Therefore, counsel's performance was deficient.

The next question is whether the deficient performance prejudiced Doty. To convict Doty, the jury had to find not only that she was reckless in withholding medical treatment, but that her conduct created an imminent and substantial risk of great bodily harm or caused substantial bodily harm. The instruction agreed to by counsel allowed the jury to convict if it found she created a risk of bodily injury that creates a probability of death, even though the statute under which she was charged requires proof she created a risk of bodily injury that creates a high probability of death.

The medical evidence at trial established that while L.D. was very ill, she did not meet the criteria for sepsis, which could result if an untreated infection enters the blood stream. RP 232, 247. Moreover, while in theory if left untreated the infection could spread and become life

threatening, it would have been very unusual for that to occur because the pain involved would prompt medical intervention. RP 330, 352. The evidence showed that L.D.'s condition was not life threatening when Doty brought her for medical treatment. RP 353.

The faulty instruction made it easier for the jury to convict Doty on based on the risk of great bodily harm. If the jury had been instructed that great bodily harm means bodily injury that creates a high probability of death, rather than merely a probability of death, there is a reasonable probability that the outcome would have been different. Doty received ineffective assistance of counsel, and she is entitled to a new trial.

D. CONCLUSION

The improper admission of irrelevant and highly prejudicial evidence denied Doty a fair trial. In addition, trial counsel's agreement to a jury instruction which misstated the law constitutes ineffective assistance of counsel. Doty's conviction must be reversed and her case remanded for a new trial.

DATED July 1, 2019.

Respectfully submitted,



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CATHERINE E. GLINSKI

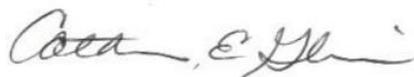
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I certify under penalty of perjury of the laws of the State of Washington  
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Catherine E. Glinski  
Done in Manchester, WA  
July 1, 2019

**GLINSKI LAW FIRM PLLC**

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