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Division II
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NO. 53081-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BALDWIN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove the essential elements of Assault in the Second Degree beyond a reasonable doubt because it failed to prove that Mr. Baldwin assaulted Mr. Phillips with a deadly weapon.

2. The trial court abused its discretion when it admitted evidence of Mr. Baldwin's prior domestic violence convictions under ER 609(a) because the prejudicial effect of those convictions outweighs any probative value they might have.

Issues Presented on Appeal

1. Did the state present sufficient evidence to prove the essential elements of Assault in the Second Degree beyond a reasonable doubt when they failed to prove the short, 12-14 inch fish club Mr. Baldwin is alleged to have used during the assault was capable of causing death or substantial bodily harm?

2. Did the trial court abuse its discretion when it admitted evidence of Mr. Baldwin's prior domestic violence convictions under ER 609(a) where the prejudicial effect of

those convictions outweighs any probative value they might have?

B. STATEMENT OF THE CASE

Substantive Facts

James Baldwin lives in a mobile home with his friend Allen Phillips. 11/6/18 RP 32-33, 44-45. About a week before the incident Mr. Phillips left Mr. Baldwin's mobile home to stay with another friend named Mike Laumen. 11/6/18 RP 33. On the incident date, Mr. Baldwin sent a text message to Mr. Laumen containing a message for Mr. Phillips: that he had mail and an EBT card he should come over and pick up. 11/6/18 RP 33-34.

When Mr. Laumen and Mr. Phillips arrived at Mr. Baldwin's mobile home late in the evening, Mr. Baldwin invited them inside and they began to discuss Mr. Phillips's mail. 11/6/18 RP 34-35, 48. According to Mr. Phillips and Mr. Laumen, Mr. Baldwin became angry during the conversation and claimed that Mr. Phillips owed him money. 11/6/18 RP 35, 48. Mr. Baldwin then picked up a small 12-14 inch wooden fish club and struck Mr. Phillips over the head. 11/6/18 RP 35, 48. Mr. Laumen tried to stop Mr. Baldwin from hitting Mr. Phillips, but Mr. Baldwin pulled a knife on him and Mr.

Laumen fled out of the mobile home to call 911. 11/6/18 RP 36-37.

Mr. Phillips remained conscious in the mobile home. 11/6/18 RP 49, 65-66. Mr. Baldwin showed Mr. Phillips the knife but then set it down and told Mr. Phillips that he should move back into the mobile home. 11/6/18 RP 51. Five or ten minutes later, the police arrived and knocked on the door. 11/6/18 RP 52, 61. Initially, Mr. Baldwin did not respond to the knocking, but did so after the police attempted to breach the door to his mobile home. 11/6/18 RP 64-65. The police arrested Mr. Baldwin. 11/6/18 RP 65-66.

Police found a short 12-14 inch wooden fish club in the yard outside the mobile home and seized it as evidence. 11/6/18 RP 62-63. Mr. Phillips described his injuries as “goose eggs” that were not permanent or long-term in nature. 11/6/18 RP 54, 57.

Mr. Baldwin testified that he had been sleeping in his mobile home when Mr. Laumen and Mr. Phillips came over uninvited. 11/6/18 RP 72-73. When Mr. Baldwin woke up, Mr. Phillips was standing over him and started to hit him. 11/6/18 RP 73-74. Mr. Baldwin tried to defend himself by grabbing a knife to chase Mr. Laumen out of the mobile home. 11/6/18 RP 74. Mr. Baldwin denied using the fish club to repel Mr. Phillips. 11/6/18 RP 74. Mr.

Baldwin began to feel sick, so he laid down until he heard the police attempting to breach his door. 11/6/18 RP 74-75.

Procedural Facts

The state charged Mr. Baldwin with one count of Assault in the Second Degree (Domestic Violence) based on him striking Mr. Phillips with the club. CP 1. Mr. Baldwin proceeded to a jury trial. CP 17.

Before the state cross-examined Mr. Baldwin, it moved to admit evidence of his prior felony convictions for violating domestic violence no-contact orders in 2011 and 2014 under ER 609. 11/6/18 RP 75-76. Mr. Baldwin objected on the basis that the probative value of admitting the convictions is outweighed by their prejudicial effect. 11/6/18 RP 80. The trial court overruled his objection and allowed the state to introduce evidence of the convictions during cross-examination. 11/6/18 RP 80-81, 84.

The jury found Mr. Baldwin guilty as charged and answered "yes" on the special verdict form regarding domestic violence. CP 47-48. Mr. Baldwin filed a timely notice of appeal. CP 81-82.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF ASSAULT IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT WHEN IT FAILED TO PROVE THE CLUB CONSTITUTES A DEADLY WEAPON

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong,* 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia,* 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan,* 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of Assault in the Second Degree, the state must prove beyond a reasonable doubt that the defendant assaulted another person with a deadly weapon. RCW 9A.36.021(1)(c). A deadly weapon is any "weapon . . . 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 bodily harm." RCW 9A.04.110(6).

State law defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The degree of harm required to satisfy the "substantial bodily harm" element of Assault in the Second Degree is "considerable and necessarily requires a showing greater than an injury merely having some existence." *State v. McKague,* 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

The state alleged that the short 12-14 inch wooden, fish club used to strike Mr. Phillips constitutes a deadly weapon. CP 1. The legislature has not declared a short fish club a "per se" deadly weapon, therefore the state must prove that the fish club constitutes a deadly weapon "in fact" based on the manner in which it was used. *State v. Samaniego,* 76 Wn. App. 76, 79-80, 882 P.2d 195 (1994) (citing *State v. Thompson,* 88 Wn.2d 546, 564 P.2d 323 (1977)); RCW 9A.04.110(4)(b). Simply establishing that a weapon could cause substantial bodily injury is insufficient to establish

assault in the Second Degree. *McKague,* 172 Wn.2d at 806.

Mr. Phillips testified that Mr. Baldwin struck him with the fish club three times. 11/6/18 RP 54. According to Mr. Laumen, Mr. Baldwin struck Mr. Phillips “really hard” but the only injuries that resulted from those three strikes were a couple of bumps on Mr. Phillips’s head. 11/6/18 RP 35, 54, 57. Mr. Phillips never lost consciousness, he did not fracture any bones, and there was no significant injury of any sort. 11/6/18 RP 40, 49, 66.

Courts reviewing cases for the presence of “substantial bodily harm” have historically required harm greater than what was presented in Mr. Baldwin’s case. In *McKague*, the court found that the state had presented sufficient evidence of “substantial bodily harm” where the victim suffered a concussion and possible fracture of his facial bones as a result of having his head slammed into pavement during the assault. *McKague*, 172 Wn.2d at 804. As a result of these injuries, the victim was not able to stand upright for a time and experienced residual pain for two months after the assault. *McKague*, 172 Wn.2d at 804.

Nothing described in the record of Mr. Baldwin’s trial indicates that the fish club was capable of inflicting anything other than

superficial and temporary injuries on Mr. Phillips. Viewing the evidence in a light most favorable to the state, Mr. Baldwin struck Mr. Phillips hard and still could not inflict any injuries rising to the level of substantial bodily harm.

Here, even viewing the evidence in a light most favorable to the state, the evidence does not establish beyond a reasonable doubt two essential elements of assault in the second degree: that the fish club could constitute a deadly weapon because there was no evidence that it was capable of inflicting substantial bodily harm.

When an appellate court reverses for insufficient evidence and the jury was instructed on a lesser included offense, the court may enter judgment on the lesser offense and remand for resentencing on that charge when the jury necessarily found each element of that offense in reaching its verdict. *In re Heidari,* 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012) (citing *State v. Green,* 94 Wn.2d 216, 234, 616 P.2d 628 (1980)).

The trial court instructed the jury on the lesser included offense of Assault in the Fourth Degree. CP 44-45. The elements of Assault in the Fourth Degree are that (1) the defendant assaulted another person, and (2) the assault occurred in Washington. RCW

9A.36.041(1). The evidence supports the elements of Assault in the Fourth Segree. This court should reverse Mr. Baldwin's conviction for Assault in the Second Degree and remand for resentencing on the lesser included offense of Assault in the Fourth Degree.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF MR. BALDWIN'S PRIOR DOMESTIC VIOLENCE CONVICTIONS AND THE PREJDUICIAL EFFECT OF THAT EVIDENCE OUTWEIGHS ITS PROBATIVE VALUE

A witness in a criminal case may be impeached with a prior conviction if the crime is punishable by death or imprisonment for more than a year, if the trial court determines that the probative value of the conviction outweighs its prejudicial effect. ER 609(a)(1); ER 403(b). When the state seeks to impeach a defendant with a prior conviction under ER 609, the trial court must balance the probative value of the evidence as it relates to the defendant's credibility against any potential prejudice it will cause. *State v. Brown,* 113 Wn.2d 520, 531, 782 P.2d 1013 (1989).

In balancing these two considerations, courts examine the following factors: (1) the length of the defendant's criminal record, (2) remoteness of the prior conviction, (3) nature of the prior crime,

(4) the age of the defendant, (5) centrality of the credibility issue, and (6) the impeachment value of the prior crime. *State v. Alexis,* 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Rulings under ER 609 are reviewed for an abuse of discretion. *State v. Rivers,* 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996) (citing *State v. King,* 75 Wn. App. 899, 910 n. 5, 878 P.2d 466 (1994)).

a. The *Alexis* factors weigh in favor of excluding Mr. Baldwin's prior convictions

The trial court found that four of the six *Alexis* factors weighed in favor of admitting the convictions: Mr. Baldwin's age, the remoteness of the prior convictions, the nature of the prior crimes, and the centrality of the credibility issue. 11/6/18 RP 80-81. The trial court did not make a finding related to the other two factors. 11/6/18 RP 81. Based on these four factors, the trial court allowed the state to impeach Mr. Baldwin with evidence of his convictions for violating domestic violence no-contact orders in 2011 and 2014. 11/6/18 RP 84.

The admission of this evidence constitutes an abuse of discretion because the length of Mr. Baldwin's record sought to be admitted, the nature of the prior crimes, the centrality of the

credibility issue, the remoteness of the prior crimes, and the impeachment value of the prior crimes all indicate that the evidence was highly prejudicial to Mr. Baldwin while offering little probative value. Mr. Baldwin does not dispute that he was an adult at the time of the prior convictions, and therefore his age weighs in favor of admission.

Length of Criminal Record

When balancing the *Alexis* factors, the trial court expressed uncertainty about whether to evaluate the defendant's entire criminal record, or just the number of convictions the state sought to admit under ER 609. 11/6/18 RP 81. In *Gomez,* the Court of Appeals analyzed only the convictions the state was seeking to admit into evidence. *State v. Gomez,* 75 Wn. App. 648, 652, 880 P.2d 65 (1994). The court held that the admission of unnecessarily cumulative prior convictions is prejudicial "because it can lead the jury to convict a defendant based on his criminal history rather than his guilt for the crime with which he is charged." *Gomez,* 75 Wn. App. at 652 (citing *State v. Jones,* 101 Wn.2d 113, 120, 677 P.2d 131 (1984)).

The trial court admitted two of Mr. Baldwin's prior convictions for violating domestic violence no-contact orders. 11/6/18 RP 81. The admission of multiple convictions for the same conduct was unnecessarily cumulative and highly prejudicial because it suggests Mr. Baldwin has a history of domestic violence. Allowing the state to present this evidence to the jury raises the possibility that they convicted Mr. Baldwin based on the state suggesting he has a propensity for violence as opposed to the evidence offered at trial. This factor weighs in favor of excluding the prior convictions.

Nature of the Prior Crimes

In evaluating the nature of the prior crimes, courts must be wary that "[t]he greater the similarity between the prior convictions and the crime charged, the greater the possible prejudice in admitting it." *Gomez,* 75 Wn. App. at 653. To counter this problem, courts can admit prior convictions as generic or unnamed crimes to reduce possible prejudice. *Gomez,* 75 Wn. App. at 653 (citing *Jones,* 101 Wn.2d at 121).

The nature of the prior crimes admitted for impeachment is highly prejudicial to Mr. Baldwin because the instant crime is a domestic violence crime like the priors. 11/6/18 RP 84.

Furthermore, revealing the specific crimes that Mr. Baldwin committed is highly prejudicial in this case because doing so revealed that Mr. Baldwin has had no-contact orders imposed on him in the past, which provided the jury with an improper basis to conclude that Mr. Baldwin is a dangerous person. This factor weighs in favor of excluding the convictions because their admission raises the possibility of the jury convicting Mr. Baldwin because of a pattern of domestic violence offenses rather than the evidence presented during trial.

Centrality of the Credibility Issue

The second *Alexis* factor at issue is the centrality of the credibility issue. Mr. Baldwin's credibility was crucial during his trial because he testified in his own defense to facts that directly contradict the testimony provided by Mr. Phillips and Mr. Laumen. Mr. Phillips and Mr. Laumen testified that Mr. Baldwin was the aggressor and that the assault was an unprovoked attack. 11/6/18 RP 35, 48. Mr. Baldwin testified that the two men arrived at his mobile home unannounced and that his use of force was to protect himself and remove them from his home. 11/6/18 RP 72-74. Mr. Baldwin also denied hitting anyone with the fish club, whereas Mr.

Phillips and Mr. Laumen both testified that Mr. Baldwin struck Mr. Phillips with the club multiple times. 11/6/18 RP 35, 48, 74.

Due to the discrepancy in the evidence, the jury's determination of which witnesses were credible was a crucial consideration in reaching their verdict. This factor weighs in favor of excluding the prior convictions.

Remoteness of the Prior Convictions

When evaluating the remoteness of a conviction, courts should "evaluate the age of each prior conviction and examine its remoteness in time from the current charge and the other convictions to determine its bearing on a defendant's credibility." *Gomez,* 75 Wn. at 652. The older a conviction is, the less probative it is of the defendant's credibility. *Gomez,* 75 Wn. App. at 652 (citing *Jones,* 101 Wn.2d at 121). ER 609 does not make convictions less than 10 years old automatically admissible. *Gomez,* 75 Wn. App. at 652. Rather, the 10-year cutoff reflects the fact that convictions more than 10 years old should generally be excluded because they have "little to no bearing on the defendant's veracity and, therefore the prejudicial effect of admitting those

convictions will almost always outweigh their probative value." *Gomez,* 75 Wn. App. at 652.

Mr. Baldwin's trial occurred in November of 2018. CP 59. The convictions the state used to impeach Mr. Baldwin were from four and seven years before his trial in this case. CP 21. These convictions are not recent and in should have been excluded due to their remoteness to avoid the jury concluding that because Mr. Baldwin has a criminal record, he must be guilty of the current offense.

Impeachment Value of the Prior Crimes

For a prior conviction to have impeachment value, it must have some bearing on the witness' ability to tell the truth. *State v. Calegar,* 133 Wn.2d 718, 723, 947 P.2d 235 (1997) (citing *Jones,* 121 Wn.2d at 118-19). According to the Washington Supreme Court, "few prior offenses that do not involve crimes of dishonesty or false statements are likely to be probative of a witness' veracity." *Calegar,* 133 Wn.2d at 723 (citing *Jones,* 121 Wn.2d at 120). Washington courts have rejected the argument that all prior convictions have impeachment value because being convicted of a

crime inherently involves dishonesty. *Calegar,* 133 Wn.2d at 727; *Jones,* 121 Wn.2d at 655-56.

Violating a no-contact order is not a crime of dishonesty and has no bearing on Mr. Baldwin's veracity as a witness. *See* WPIC 36.51.02. Thus, Mr. Baldwin's prior convictions have little bearing on his ability to tell the truth and offer little probative value for the purposes of impeachment. This minimal probative value is outweighed by the inherent prejudice in admitting prior criminal convictions.

For example, in *Calegar* the defendant was charged with forging a prescription to acquire a controlled substance. *Calegar,* 133 Wn.2d at 721. The defendant had a prior conviction for possessing a controlled substance, which the trial court admitted over the defendant's objection. *Calegar,* 133 Wn.2d at 721. The defendant appealed, and on remand the trial court excluded the conviction. *Calegar,* 133 Wn.2d at 722. The Supreme Court affirmed the trial court's exclusion of the conviction because "[t]he State made no showing that the specific nature of the crime of possession of a controlled substance was probative of the

defendant's ability to tell the truth on the witness stand." *Calegar,* 133 Wn.2d at 727.

Violation of a no contact order like possession of a controlled substance is not a crime of dishonesty and similarly is not probative of Mr. Baldwin's credibility or lack thereof. The only purpose for offering Mr. Baldwin's prior convictions was to degrade his character and show he has a propensity for domestic violence. The state bears the burden of affirmatively demonstrating that the prior convictions have bearing on the witness' ability to tell the truth. *State v. Hardy,* 133 Wn.2d 701, 711-12, 946 P.2d 1175 (1997) (citing *Jones,* 101 Wn.2d at 120). The record shows that the state failed to meet this burden in Mr. Baldwin's case, meaning this factor weighs in favor of excluding the convictions.

b. <u>The error was not harmless</u>

"Errors under ER 609(a) are reviewed under the non-constitutional harmless error standard." *Calegar,* 133 Wn.2d at 727 (citing *State v. Ray,* 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)). Under this standard, a conviction will be reversed if there is a reasonable probability that the error affected the outcome of the trial. *Calegar,* 133 Wn.2d at 727 (citing *Ray,* 116 Wn.2d at 546).

"Cases finding ER 609(a)(1) errors harmless have turned on the fact that the defendant had other prior convictions that *were* properly admissible . . ." *Calegar,* 133 Wn.2d at 728 (emphasis in original) (citations omitted).

Here, under the analysis discussed above, the prior crimes were not admissible under ER 609. Rather there is a reasonable probability that the trial court's error in admitting Mr. Baldwin's prior convictions affected the outcome of his trial because of the extreme risk of conviction based on the prior crimes far outweighed any possible probative value to the state. Under these circumstances, the trial court's error prejudiced Mr. Baldwin's right to a fair trial and was not harmless. His conviction for Assault in the Second Degree should be reversed and the case remanded for a new trial.

D. CONCLUSION

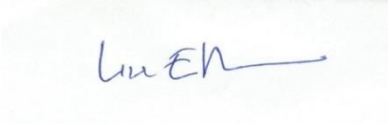
Mr. Baldwin respectfully requests that his conviction for Assault in the Second Degree be reversed, and this court remand the case to the trial court for resentencing on the lesser included offense of Assault in the Fourth Degree because the state failed to present sufficient evidence for a trier of fact to conclude beyond a reasonable doubt that Mr. Baldwin assaulted Mr. Phillips with a

deadly weapon or created substantial bodily injury. .

The trial court's abuse of discretion in admitting Mr. Baldwin's prior convictions under ER 609 was not harmless error, but rather affected the outcome of Mr. Baldwin's trial. For this reason, he respectfully requests that this court reverse his conviction and remand for a new trial.

DATED this 28th day of June 2019.

Respectfully submitted,



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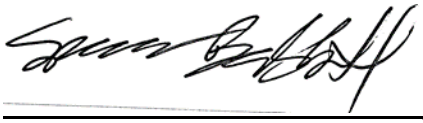

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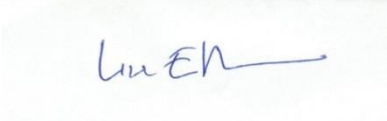

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