

**FILED**  
Aug 06, 2012  
Court of Appeals  
Division III  
State of Washington

30552-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DORELL NICKERSON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

APPELLANT'S BRIEF

---

Jill S. Reuter  
Attorney for Appellant

Janet G. Gemberling  
Attorney for Appellant

JANET GEMBERLING, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

**INDEX**

A. ASSIGNMENT OF ERROR .....1

B. ISSUE .....1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT .....6

    1. DEFENSE COUNSEL’S FAILURE TO  
    REQUEST A LIMITING INSTRUCTION  
    REGARDING THE ER 404(b) EVIDENCE  
    VIOLATED MR. NICKERSON’S SIXTH  
    AMENDMENT RIGHT TO EFFECTIVE  
    ASSISTANCE OF COUNSEL.....6

E. CONCLUSION.....11

## TABLE OF AUTHORITIES

### WASHINGTON CASES

IN RE DETENTION OF COE, 160 Wn. App. 809, 250 P.3d 1056 (2011).....	7
STATE V. FORTUNE, 128 Wn.2d 464, 909 P.2d 930 (1996).....	9
STATE V. FOXHOVEN, 161 Wn.2d 168, 163 P.3d 786 (2007).....	7, 8
STATE V. GRANT, 83 Wn. App. 98, 920 P.2d 609 (1996).....	7
STATE V. GRIER, 171 Wn.2d 17, 246 P.3d 1260 (2011).....	7, 10
STATE V. LOUGH, 125 Wn.2d 847, 889 P.2d 487 (1995).....	7, 8
STATE V. MAGERS, 164 Wn.2d 174, 189 P.3d 126 (2008).....	7
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6, 8, 9
STATE V. RUSSELL, 171 Wn.2d 118, 249 P.3d 604 (2011).....	8
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987).....	6, 8, 9

### SUPREME COURT CASES

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6, 8
--	------

### CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT.....	1, 6, 8, 11
----------------------	-------------

**STATUTES**

RCW 26.50.110(4)..... 2  
RCW 26.50.110(5)..... 2

**COURT RULES**

ER 404(b)..... 1, 2, 4, 6, 7, 8, 9

A. ASSIGNMENT OF ERROR

1. Defense counsel's failure to request a limiting instruction regarding ER 404(b) evidence violated Mr. Nickerson's Sixth Amendment right to effective assistance of counsel.

B. ISSUE

1. The trial court admitted evidence, pursuant to ER 404(b), that Mr. Nickerson had a prior conviction for domestic violence assault against Ms. Kellerman. Defense counsel did not request, and the trial court did not give, a limiting instruction regarding this evidence. Was Mr. Nickerson's Sixth Amendment right to effective assistance of counsel violated?

C. STATEMENT OF THE CASE

Sonia Kellerman<sup>1</sup> is married to Dorell Nickerson. (RP<sup>2</sup> 53-54, 65). On October 11, 2011, a no-contact order was in place prohibiting Mr. Nickerson from having contact with Ms. Kellerman. (RP 55-56, 81-82,

---

<sup>1</sup> Throughout the record, Sonia Kellerman is also referred to as Sonia Nickerson. (RP 52-70).

<sup>2</sup> Citations to the RP refer to the transcript volume including the hearings held on December 19, 2011, December 20, 2011, and January 11, 2012.

84-87, 111-112; Ex. P10). On that date, police officers arrived at Ms. Kellerman's apartment after a neighbor called 911. (RP 56, 77, 81, 90-92, 152). Spokane Police Officer Casey Jones spoke with Ms. Kellerman and saw that she had a laceration on her forehead. (RP 92-93, 96). Spokane Police Officer Adam Valdez arrested Mr. Nickerson outside of Ms. Kellerman's apartment building, within a one-block radius. (RP 80-82).

The State charged Mr. Nickerson with one count of felony violation of a domestic violence no-contact order, in violation of RCW 26.50.110(4) or, in the alternative, RCW 26.50.110(5). (CP 3-4). The State alleged that Mr. Nickerson knowingly violated the restraint provisions in the no-contact order, and:

[1] [D]id intentionally assault another in a manner that does not amount to an assault in the first or second degree and/or engaged in conduct that was reckless and created a substantial risk of death or serious injury to another . . . [or]  
[2] . . . the defendant has at least two prior convictions for violating the provisions of an order issued under Chapters 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW, or there is a valid protection order as defined in RCW 26.52.020 . . . .”

(CP 3-4).

The trial court admitted evidence, in the form of certified copies of judgment and sentences, that Mr. Nickerson had three prior convictions for violating protection or no-contact orders. (RP 18-35, 115-122; Ex. P12, P13, P14). The State sought to admit evidence, pursuant to

ER 404(b), that Mr. Nickerson had a prior conviction for domestic violence assault against Ms. Kellerman. (CP 5-11, 19-24; RP 18-35; Ex. P11). The trial court ruled:

[I]f Ms. Kellerman presents recantation testimony, the assault DV . . . would also be admissible. It would be admissible to show her state of mind, it would be admissible so the jury can evaluate the relationship between the parties. Although it certainly is, as I indicated, prejudicial, it is also probative of why Ms. Kellerman may have told one story at one point and another story at another point. And that can come in if indeed that is how her testimony comes out in court.

(RP 28-29).

Ms. Kellerman testified that on the date in question, the police came to her apartment. (RP 56). She told the court she sustained injuries that night after she fell and slid into a cabinet door. (RP 56-57, 63, 65). Ms. Kellerman testified that Mr. Nickerson was not at her apartment that night, and that he did not cause her injuries. (RP 61, 63, 67-68). She also testified that she does not remember what happened that night, and that she was on medications that affected her memory. (RP 60, 66-67).

A written statement made by Ms. Kellerman on the night in question was admitted into evidence. (RP 94-95; Pl.'s Ex. P17). Ms. Kellerman testified that her daughter told her what to write in the second paragraph of the statement, and that she was under the influence at the time. (RP 61-63).

Subsequent to Ms. Kellerman's testimony, pursuant to its previous ruling under ER 404(b), the trial court admitted a certified copy of the judgment and sentence for Mr. Nickerson's prior conviction of domestic violence assault against Ms. Kellerman. (RP 122-124; Ex. P11). Defense counsel did not request, and the trial court did not give, a limiting instruction regarding this evidence. (CP 25-43; RP 128-142, 148, 168-180). The only limiting instruction given at trial, requested by defense counsel, addressed the certified copies of judgment and sentences showing that Mr. Nickerson had three prior convictions for violating protection or no-contact orders:

Certain evidence has been admitted in this case only for a limited purpose. This evidence consists of certified copies of judgment and sentences and may be considered by you only for the purpose of determining if defendant has been previously convicted of a violation of a no-contact order. You may not consider the contents of the judgment and sentences for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

(CP 34; RP 132, 174).

Eliseo Barreiro, the neighbor who called 911, testified that on the night in question, he heard a man and a woman, whose voices he did not recognize, arguing and fighting in the apartment above his. (RP 151-152). He also testified that he saw Mr. Nickerson come out of Ms. Kellerman's apartment. (RP 153-155, 162). Mr. Barreiro told the court that after Mr.

Nickerson came out of the apartment, he saw Ms. Kellerman “all beat up in the door, in her door well.” (RP 153-155). Mr. Barreiro could not identify Mr. Nickerson or Ms. Kellerman by name, and he testified that the day of trial was the first time he identified Mr. Nickerson as the person who he saw coming out of Ms. Kellerman’s apartment. (RP 160-162).

The trial court instructed the jury that in order to find Mr. Nickerson guilty of felony violation of a domestic violence no-contact order, it had to find that the following five elements were proven beyond a reasonable doubt:

- (1) That on or about 11 October 2011 there existed a domestic violence no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That
  - (a) The defendant’s conduct was an assault or
  - (b) The defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) The defendant’s acts occurred in the State of Washington.

(CP 36).

In its rebuttal closing argument, the State told the jury:

Now, [Ms.] Kellerman may have gotten up and she may have stated that she didn’t know what she was saying and she was on medication, but she also stated the defendant never assaulted her in the past. We know that’s not true because we have an assault conviction from to [sic] 2011, October 2011, that shows the defendant assaulted [Ms.]

Kellerman, and that's where the no contact order came from in this case.

(RP 191).

The jury convicted Mr. Nickerson as charged. (CP 44; RP 196).

Mr. Nickerson appealed. (CP 67-80).

#### D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION REGARDING THE ER 404(b) EVIDENCE VIOLATED MR. NICKERSON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, 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) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct:

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.

ER 404(b).

In addition, “prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.” *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008); *see also State v. Grant*, 83 Wn. App. 98, 106-09, 920 P.2d 609 (1996).

If prior bad acts evidence is admitted under ER 404(b), the trial court must give a limiting instruction to the jury, specifying how the evidence may be used. *See State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (*citing State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)); *see also In re Detention of Coe*, 160 Wn. App. 809, 819, 250 P.3d 1056 (2011) (*citing Foxhoven*, 161 Wn.2d at 175). The trial

court is not required to give a limiting instruction *sua sponte*. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011).

Here, pursuant to ER 404(b) the trial court admitted evidence of a prior domestic violence assault of Ms. Kellerman by Mr. Nickerson. (RP 122-124; Ex. P11). Defense counsel did not request, and the trial court did not give, a limiting instruction regarding this evidence. (CP 25-43; RP 128-142, 148, 168-180). Defense counsel's failure to request such limiting instruction violated Mr. Nickerson's Sixth Amendment right to effective assistance of counsel. *See Strickland*, 466 U.S. at 685-86.

Defense counsel's failure to request a limiting instruction regarding Mr. Nickerson's prior domestic violence assault of Ms. Kellerman was deficient performance, falling outside the range of reasonable representation. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). If evidence is admitted pursuant to ER 404(b), a limiting instruction is required, so the jury knows the proper use for the evidence. *See Foxhoven*, 161 Wn.2d at 175 (*citing Lough*, 125 Wn.2d at 864). It is the defense counsel's responsibility, not the trial court's, to ensure that such an instruction is given. *See Russell*, 171 Wn.2d at 124. Under the jury instructions given at trial, the jury was free to use Mr. Nickerson's prior domestic violence assault of Ms.

Kellerman to conclude that he acted similarly here, which is prohibited under ER 404(b).

Defense counsel's failure to request a limiting instruction regarding Mr. Nickerson's prior domestic violence assault of Ms. Kellerman prejudiced Mr. Nickerson. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that, absent this error, the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Although the State alleged that Mr. Nickerson committed felony violation of a domestic violence no-contact order in two alternative ways, sufficient evidence must support each alternative. *See State v. Fortune*, 128 Wn.2d 464, 467, 909 P.2d 930 (1996) (stating "if sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without giving express unanimity on which alternative means was employed by the defendant."); *see also* CP 36 (setting forth the two alternative methods). Thus, sufficient evidence must show that Mr. Nickerson both (1) violated a provision of the no-contact order and assaulted Ms. Kellerman, and (2) violated a provision of the no-contact order and had two prior convictions for violating a court order. (CP 36).

There is a reasonable probability that the lack of a limiting instruction regarding Mr. Nickerson's prior domestic violence assault of Ms. Kellerman affected the jury's verdict with respect to whether he assaulted Ms. Kellerman on the date in question here. Ms. Kellerman testified that Mr. Nickerson did not assault her on the date in question. (RP 61, 63, 67-68). She also provided an explanation as to why she provided a written statement to the police that may be construed as contradictory. (RP 61-63). No one testified that they directly observed an assault take place that night. The jury's finding that an assault occurred hinged directly on Ms. Kellerman's testimony, and therefore, the lack of a limiting instruction regarding the evidence that Mr. Nickerson had assaulted her before affected the jury's verdict. The jury was also directed towards considering the prior domestic violence assault by the State's rebuttal closing argument. (RP 191).

Defense counsel's failure to request a limiting instruction regarding Mr. Nickerson's prior domestic violence assault of Ms. Kellerman was not a tactical decision. *See Grier*, 171 Wn.2d at 33. If the jury had been instructed on the proper use of this evidence, it would have eliminated the option of using it as propensity evidence, to conclude that Mr. Nickerson assaulted Ms. Kellerman in this case.

Mr. Nickerson has proved the two-prong test for ineffective assistance of counsel. His trial counsel's failure to request a limiting instruction regarding his prior domestic violence assault of Ms. Kellerman was deficient performance, and he was prejudiced thereby. Therefore, this court should reverse his conviction.

E. CONCLUSION

Mr. Nickerson's conviction should be reversed because he was denied his Sixth Amendment right to effective assistance of counsel.

Dated this 6th day of August, 2012.

JANET GEMBERLING, P.S.

  
Jill S. Reuter #38374  
Attorney for Appellant

  
Janet G. Gemberling #13489  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30552-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DORELL NICKERSON,	)	
	)	
Appellant.	)	

---

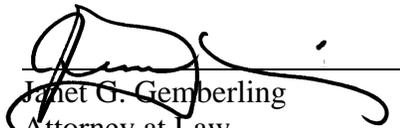
I certify under penalty of perjury under the laws of the State of Washington that on August 6, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey  
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on August 6, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Dorell Nickerson  
#301098  
PO Box 768  
Connell, WA 99326

Signed at Spokane, Washington on August 6, 2012.

  
Janet G. Gemberling  
Attorney at Law