

FILED

DEC 10, 2013

Court of Appeals
Division III
State of Washington

31662-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TRAVIS J. M. PATTEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. THE COURT ERRED BY ADMITTING INTO EVIDENCE ALL MATTERS INCLUDED IN THE PROSECUTOR'S PRETRIAL MOTION.
2. MR. PATTEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

B. ISSUES

1. The State filed a motion summarizing testimony of several witnesses and incorporating the police officer's Statement of Facts and asking for a pretrial ruling finding the evidence admissible under the recognized exceptions to ER 404(b). Did the court err in ruling the evidence admissible without identifying specific statements, identifying the purpose for which they were to be admitted or weighing their probative value and prejudicial effect?
2. The court granted a single motion for admission into evidence of several witnesses' testimony describing a series of events that occurred following the alleged assault and involved numerous instances of unlawful, wrongful and otherwise improper conduct. The testimony had little if

any probative value, tended to support the inference the defendant was likely to have committed the charged crime because of his involvement in the subsequent activities, and obscured the fact that the victim of the assault did not identify the knife found by police and allegedly used in the assault. Was the error harmless?

3. Defense counsel failed to challenge the court's procedure in making a single pretrial ruling on the admissibility of a large body of proffered evidence, and repeatedly failed to object to evidence of wrongful conduct, including evidence that was not clearly included in the trial court's threshold ruling. Did counsel's performance violate the defendant's constitutional right to counsel?

C. STATEMENT OF THE CASE

Officer Aaron Kirby investigated a reported hit and run collision in the parking lot of the Thai Bamboo restaurant. (RP 99-100) According to witness Aaron Hall, shortly after he arrived at the home of fiancée Cathreen Adams, he saw a woman get out of his car, take stuff out of his car, get into a white vehicle and drive away. (RP 48-50) He and Ms. Adams drove around looking and eventually found the suspect white

vehicle in a parking lot on Division. (RP 50-51) Mr. Hall recognized the woman sitting in the front seat as the one who had broken into the car at his home. (RP 51) He saw a man come around the car and get into the backseat of the car. (RP 51)

According to Mr. Hall, Ms. Adams parked her car directly behind the white vehicle. (RP 51) Mr. Hall jumped out of the car, walked up to the passenger side window of the white vehicle, and said to the occupant: "you just broke into my car." (RP 52) The passenger said he didn't, and Mr. Hall said, "that's my stereo right there." (RP 52) Mr. Hall reached in and tried to take his stereo and, according to Mr. Hall, the passenger grabbed a knife and stabbed at him. (RP 52) Mr. Hall described the knife as "a long knife, about as long as my forearm. It was a very long blade, and he like tried to stab at me." (RP 52) "I don't know if you guys ever seen the movie 'Crocodile Dundee.' It was kind of like that knife. It was a huge knife, and the blade was humongous, and it was wide and wasn't thin. It was a wide blade." (RP 52) Mr. Hall jumped back, grabbed the window and broke it. (RP 54, 58) The driver of the white vehicle backed into Mr. Hall's car several times, maneuvered the white vehicle out of the parking lot and drove away with a flat tire. (RP 50, 54)

Officer Kirby obtained the license number of the suspect vehicle and determined that it was a white Mercury Mountaineer (the SUV)

registered to Kaylee Zornes. (RP 99-103) Based on information provided by citizens in the neighborhood, Officer Kirby obtained and executed a search warrant for the garage in which Ms. Zornes's vehicle was parked. (RP 111-115) He seized a knife found on the front passenger seat of the vehicle. (RP 117) The garage belonged to a Dustin Clark, whose wife is Ms. Zornes's sister. (RP 91) Mr. Clark identified Travis Patten as the passenger in Ms. Zornes's SUV. (RP 91)

The State charged Ms. Zornes with first-degree robbery and second-degree assault, to which she pled guilty. (CP 1, 15) Mr. Patten was not charged with either of those offenses, as either a principal or an accomplice; he was charged with one count of second-degree assault. (CP 2)

Before Mr. Patten's trial, the deputy prosecutor asked the court to rule on the admissibility of evidence of everything that happened, not only between the time Mr. Hall first saw the woman in his parked car up to the time Ms. Zornes and Mr. Patten drove away from the parking lot in Division, but everything that occurred thereafter until the investigating officer had located Ms. Zornes's vehicle and identified the passenger as Travis Patten. (RP 23-28) The State filed a written motion summarizing the evidence sought to be introduced and purporting to incorporate an attached Affidavit of Facts, and the deputy prosecutor orally summarized

the proffered evidence at a hearing on the motion. (CP 13-15; RP 23-25) No affidavit of facts was, however, attached to the motion. A Statement of Facts was filed in the trial court on August 16, 2012, and was presumably available to the court when the motion was heard on October 18, 2013. (Supp. CP ___)

Defense counsel argued that since Mr. Patten was merely a passenger in the vehicle, and had not been charged with any offense involving damage to Ms. Adams or her car or any stolen car stereos, none of the evidence of Ms. Zornes's conduct in ramming Ms. Adams's car and the events after the white vehicle left the scene of the alleged assault was relevant. The deputy prosecutor responded that the evidence was relevant to show flight as evidence of guilt and to show motive for the display of the knife, and was admissible as part of the *res gestae* of the crime. (RP 32)

The court ruled the proffered evidence admissible to show opportunity, intent, plan, identity, and flight. (RP 34) The court stated it would entertain objections to the admission of the evidence at trial if it differed from the evidence presented in the State's motion *in limine*. (RP 34)

The charges against Mr. Patten were tried to a jury. Mr. Hall described the events leading up to his confrontation with Mr. Patten.

(RP 51-52) He then went on to describe in detail how Ms. Zornes rammed his car and assaulted Ms. Adams:

Q: What happened next?

A: She tugged the wheel and turned, and it ripped my front bumper off, and then Cathy got out of the passenger side because the driver side door from her breaking into it, something happened to it. She couldn't get out. She tried climbing over to the passenger side and going out the passenger window because that's the side they hit, and the door wouldn't open. So she tried getting out of the window and by the time they were coming back around, they almost ran her over. So I started chasing it down, running after them.

(RP 54)

Ms. Adams testified that she could not see what happened when Mr. Hall approached Ms. Zornes's car. (RP 64) She was, however, able to describe, in detail, the property damage and personal injuries she sustained in the course of Ms. Zornes's efforts to get out of the parking lot:

A: I heard glass break, and then I seen Aaron jump back from that vehicle, and then my car started -- they ran into my car.

Q: They actually physically move your car when they hit it?

A: Not the first time.

Q: Eventually did they move your car?

A: Yeah.

Q: Was there damage done to your car at that time?

A: Oh, yeah.

(RP 65) Photographs of Ms. Hall's car were admitted into evidence.

(RP 66-67; Exh 4-6)

Q: And what are we looking at right there?

A: There's the passenger side door.

Q: Does your car have any damage before that incident in the parking lot of the Thai Bamboo?

A: No.

Q: Can you show us Exhibit Number 4, please? Again, is this an accurate depiction of how your car looked after that encounter with the SUV in the parking lot?

A: Yeah.

Q: Can we see picture 5, please? Was there any damage to this side of the car?

A: No, not on the outside.

Q: Finally, if you could show us Number 6, please? What is that?

A: That's the bumper that was ripped off.

Q: Did that fall off during the encounter with the SUV from the parking lot?

A: Yeah.

(RP 66-67) Ms. Hall went on to describe the personal injuries she suffered

as a result of her car being rammed by Ms. Zornes:

Q: When you were rammed by the SUV, did you suffer any injuries?

A: Yeah, to my neck and my back.

Q: And after you were hit, what did you do next when you were hit by the car?

A: I tried to move my car. I tried to move my shifter out of park, but it wouldn't move. Then --

Q: Did you remain in the car?

A: I then tried to open my car door. My door would not open from the inside. It never did after the accident. I tried then after I couldn't try to get the door open, I tried to roll down the window. The window wouldn't really roll down. I finally got it down enough to try to get out of it.

Q: Were you able to get out of your car?
A: Eventually, yeah, out of the window.
Q: You actually crawled out of the window; is that right?
A: Yeah.
Q: The pictures I've just handed you, what are those pictures of, Ms. Adams?
A: They're of my legs when I was trying to get out of the window.
Q: Are they accurate depictions of how your leg looked after you crawled out of the window?
A: Yeah.
...
Q: What was the effect of this incident on you, Ms. Adams, what happened in that parking lot of the Thai Bamboo restaurant?
A: Well, physically, I was hurt for a while. In my neck, I had headaches real bad, you know, for months. I suffered stomach pain real bad from the seatbelt jerking me over and over, and just emotionally it caused, you know, a lot of anxiety, a lot of stress, you know.

(RP 68-70)

Pastor Myron Person had provided Officer Kirby with information about the location of Ms. Zornes's SUV. (RP 78-79) He was also able to describe for the jury his personal opinions and assumptions about the events he had observed, along with substantial detail about the appearance and conduct of the vehicle's occupants:

I'd been studying for a couple hours, and I turned on my computer, and I have an app on there for scanner, and I happened to shortly after I turned on the scanner, there was a dispatcher who said that there was an individual who was driving a white SUV at a high rate of speed down an alley somewhere around Wellesley between Addison and Standard, and the thing that attracted my attention said it was throwing car stereos out the window.

Q: What did you do after you heard that dispatch?

A: I sat down wondering why someone would be throwing car stereos out a window. About a minute later, I heard some squealing tires to the east of the church. I looked out my window down Dalke, and shortly thereafter, heard the sounds of what I would say would be typical of a flat tire, and that vehicle then as it kind of came through next to the duplex by our building, I got up and walked to another room to see what was going on as that vehicle was, also, traveling pretty rapidly, and I looked out at the corner of Addison and Dalke and saw the vehicle sitting there, and inside the vehicle at that particular point, I noticed someone wearing a red baseball cap and another occupant, which I couldn't identify either of them because I was looking at an angle from the back right corner to the front of the vehicle, and so there were two people in there.

Q: Could you tell the sex of either one of those necessarily, sir?

A: I made an assumption just from the look of the individual that was in the driver seat with the red baseball cap that it was a male, and the other one looked like a female. Again, I didn't -- I couldn't see the face, so I couldn't tell you that at that point.

Q: Could you describe the vehicle for us?

A: It was a white U.S. like vehicle. I'm not that great in telling the make and model, but we have a video camera set up at the church with about 16 monitoring cameras, and later on was able to identify I think as a Monterey, but, you know, I don't think that part of identification is up to me. It was a white SUV that was there sitting at that corner. The thing that really struck me odd is that the person looked very impatient like they wanted to get across. There's a stop sign at Dalke and Addison, quite a bit of cross traffic going on, and eventually when they pulled across the street, they pulled into oncoming traffic coming eastbound on Dalke, and they were sitting there in a very animated conversation with two individuals who were out next to a black sedan, and the animated conversation eventually led to one of them pointing toward the alley. I don't

remember if it was the male or the female, but they then pulled back out around. There was a car that was coming toward them, and I know that they were pretty confused. They looked confused as to what to do. They pulled around and went down the alley and disappeared on the west side of the four plex that's there.

Q: You said you heard something that in your opinion sounded like a flat tire. Did you see a flat tire on that car?

A: I did, and I believe -- I believe it was the right front, but, you know, that's almost a year ago. It was pretty obvious sound, though, of that slapping sound of a flat tire coming down the street.

Q: When you saw the car go down the alley, what did you do next, sir?

A: When I saw it go down the alley, then, you know, I remembered the white SUV throwing car stereos. That was odd enough, but the odd behavior of pulling into oncoming traffic and the animated conversation and the pointing toward the alley. They pulled down the alley. Shortly thereafter, the people with the black car came back out toward their car, and two individuals came around, a guy wearing a red baseball cap and a young lady that was with him. They kind of moved quickly down to the second unit of that four plex. One of them tried to get in. I don't remember which one, but the door was locked and that to me was fairly obvious that they didn't live there. Then when they turned around and apparently asked for the keys, and I saw them exchange the keys with the couple by the black sedan, they went in, gave the keys back to them, and then the people in the black sedan left, and the person with the red baseball cap and the lady went into that duplex. It was at that point that I thought too many things seem odd here. The behavior was apparently not their duplex, their place where they lived, and that they had gotten help from somebody else to what I thought was probably hide that white vehicle. So I went out, and on our video which shows me going out walking down Dalke, I looked down the alley, and I could see the tire

tracks of what looked like a flat tire track, wider than normal, and it went into one of those garage units there.

(RP 76-79)

Jonathan Conklin described what he saw that evening:

Well, I was in back setting posts, and then a light colored I believe it was white, early to mid '90s or even late '90s Ford Explorer come charging up the alley from I was kind of pissed that somebody was traveling through my alley at 25 or so miles per hour, and then I noticed it had a flat tire, and then it pulled in at my old house. . . .

I seen them pull in there. There was a female driving the car. I remember that, and I yelled back to my wife, who was in the backyard with my grandsons, and said call Jerod, who is the owner of the house, where they pulled in at, and they just acted suspicious. I come trotting up or walking up or whatever you know off to the edge of 529's garage and just seen people exit the vehicle and then jump back in and go to back up, and I just stood in the center of the alley, and I was asked, you know, sir, please move by the female driver, and I said no, and they were blocked at the Standard side from leaving -- yeah, Standard -- no, Addison side because of the utility vehicle. So I was standing closer, you know, direction of Standard so they couldn't go back on Standard so they wouldn't -- I know after the lady said, sir, could you please move, I told her no. Somebody that was in the rear of the vehicle said just back up. He'll move, and I tapped on the glass and said no.

Q: Could you tell was it a male voice or female voice?

A: Male voice.

Q: Did you get a good look at the male in the back?

A: No. Dark glass.

Q: What happened next, sir?

A: They drove up to the busy street Addison that exited the alley to where the service truck was and just kept laying on the horn until the people that were doing the service or whatever, you know, moved their vehicle. Then they went around, and the house that's directly behind 529 East Sanson, they pulled in and put it in the garage of

that house and the occupants, the renters, came to the back fence and was talking to me and Jerod while they were like that and then we told them that you need to tell them to leave, just get the crap out of the neighborhood, and then we found stereos just off Jerod's property onto Sheena's property.

(RP 82-84) Mr. Conklin identified photographs showing where the car stereos had been left on a neighbor's property and described them for the jury. (RP 84-86; Exh. 7-10).

Officer Kirby described for the jury his discovery of a black-handled kitchen knife on the front seat of the SUV, and identified a photograph of the knife. (RP 112-114) He then identified an actual knife, Exhibit P-1, as the knife he had found and photographed. (RP 117) He testified that the knife had an eight-inch-long blade and that in his experience he had seen injuries "up to death result from a knife of that size" (RP 125)

Forensic specialist Lori Preuninger testified that she had checked the knife for fingerprints and none were found. (RP 141-42) She explained that the knife handle has a textured surface that "isn't good for leaving behind a fingerprint." (RP 142)

The jury found Mr. Patten guilty of second-degree assault while armed with a deadly weapon. He appeals.

D. ARGUMENT

1. THE COURT'S BLANKET RULING ADMITTING INTO EVIDENCE ALL MATTERS INCLUDED IN THE PROSECUTOR'S SUMMARIES AND THE OFFICER'S AFFIDAVIT WAS ERROR.

Admission of evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

“Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith.” *Powell*, 126 Wn.2d at 258. When determining whether evidence is admissible under ER 404(b), the trial court engages in a four-step analysis: it must (1) determine, by a preponderance of the evidence, whether the prior bad act occurred; (2) determine the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged or to rebut a defense; and (4) balance, on the record, the probative value of the evidence and its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The trial court is required to weigh the proposed evidence of wrongful conduct on the record for two reasons:

First, the process of enunciating the reasons for its decision tends to ensure that the trial court makes a careful and conscious decision: “[A] judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue.” *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984).

Second, the lack of sufficiently specific trial court record may preclude effective appellate review:

Evidence can be admitted under ER 404 . . . for several substantive purposes. Unless the trial court identifies the purpose for which it believes the evidence is relevant, it is difficult for that court (or the reviewing court) to determine whether the probative value of the evidence outweighs its prejudicial effect.

Id.

The court’s failure to perform the required balancing of the probative value and prejudicial effects on the record does not require reversal, *provided* the trial court carefully sets forth its reasons for admission. *State v. Hepton*, 113 Wn. App. 673, 688, 54 P.3d 233 (2002), *review denied*, 149 Wn.2d 1018, 72 P.3d 762 (2003).

Here, the court and counsel failed to provide a record from which this court may determine whether any part of the four-part test has been met. The State's motion incorporated numerous "bad acts" and at no point did the court ask the State to identify the specific acts sought to be proven nor did the court address any particular acts in making its ruling. It is impossible to determine from this record whether the court made any effort to determine whether the alleged acts occurred or, assuming that they did, for what purpose the evidence thereof could be admitted and whether any of the wrongful conduct was relevant to prove any element of the charged offense. The record clearly discloses that the court did not separately weigh the relative probative and prejudicial value of each of the dozens of prior acts mentioned in the prosecutor's motion, on the record or otherwise.

The court's blanket assertion that the proffered evidence was, in its entirety, admissible to prove "opportunity, intent, plan, identity, and flight" does not meet the minimum requirement of carefully setting forth its reasons for admission.

Had the court identified specific evidence that would be admissible for a particular purpose, it may be that this court could readily have determined whether that evidence had substantial probative value, perhaps sufficient to outweigh the prejudicial effect. In the event, however, the

State's oral argument, the summary set forth in the written motion, and the incorporated Statement of Facts are so general and inclusive that there is no basis for identifying what evidence was introduced in reliance on the court's threshold ruling or for determining whether the court would, in properly exercising its discretion, have ruled that evidence admissible.

The court's threshold ruling was error.

2. THE RULING ADMITTING INTO EVIDENCE ANY MATTERS INCLUDED IN THE VARIOUS SUMMARIES PROVIDED TO THE COURT WAS NOT HARMLESS.

The prosecutor argued that the evidence described in the State's motion and affidavit was admissible under the *res gestae* exception to ER 404(b). (CP 13) Although the court did not cite *res gestae* in its ruling, the concept might be considered applicable in determining whether much of the evidence at Mr. Patten's trial was relevant for any purpose.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. “Evidence which is not relevant is not admissible.” ER 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of

undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403. The *res gestae* doctrine, whether viewed as an exception to ER 404(b) or a gloss on the relevancy rules, has generally been limited to evidence that has some probative value that outweighs its prejudicial effect. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012).

Evidence that Mr. Patten assisted Ms. Zornes in stealing Mr. Hall’s radio, along with Mr. Hall’s testimony that he accused Mr. Patten of stealing the radio, may have probative value in establishing a motive for Mr. Patten’s alleged display of the knife, and could support an inference that Mr. Patten intended to frighten or harm Mr. Hall. Evidence that Officer Kirby found a knife, shortly after the alleged assault, in the SUV registered to Ms. Zornes would be probative as to the existence and nature of the alleged deadly weapon described by Mr. Hall. It should be noted, however, that Mr. Hall was not asked to identify the knife found by Officer Kirby as resembling the knife with which he claimed to have been threatened.

But the State also presented evidence that, as she drove away from the scene, Ms. Zornes rammed Ms. Adams’s car causing substantial property damage (RP 54-55, 65-67, Exh. 4-6), assaulted Ms. Adams and caused her to suffer both physical and emotional injuries (RP 54, 67-70),

continued to drive at excessive speeds for some time (RP 76, 82), and pulled out into oncoming traffic and blocked the roadway (RP 77-78); that either Mr. Patten or Ms. Zornes was throwing car stereos out the window and abandoning them in alleys (RP 78, 84-86, Exh. 7-10), acting suspicious (RP 83), and attempting to enter another person's duplex and to hide the SUV (RP 79, 82-83); and that Mr. Patten threatened a person who was blocking the alley. (RP 83)

None of this evidence has any probative value respecting the elements of the offense of assault or the deadly weapon enhancement. Details of the process by which law enforcement officers locate crime-related evidence is apparently of great interest to the television viewing public as well as the deputy prosecutor in this case (RP 175-77) and perhaps members of the jury, but it has no probative value as to the guilt of the person accused of the crime. How Officer Kirby went about locating the knife he found in the SUV does not in any way authenticate the knife. Where Ms. Zornes parked her SUV after leaving the scene of the crime has no probative value whatsoever.

This evidence was incorporated, in summary form, in the State's motion for an advance ruling on the admissibility of evidence whose prejudicial value might or might not be deemed to outweigh its probative value. The evidence is, in fact, highly prejudicial as it combines to show

that Mr. Patten was involved in an ongoing criminal enterprise involving the theft of property by force – a crime with which he was not charged – and that he committed the alleged assault in the company of a woman who proceeded to engage in a variety of criminal and otherwise offensive behavior. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

“Evidentiary errors under ER 404 are not of constitutional magnitude’ and are harmless unless the outcome of the trial would have differed had the error not occurred.” *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999) (quoting *State v. Jackson*, 102 Wn.2d at 689). To determine whether the error was harmless, this court “must measure the admissible evidence of . . . guilt against the prejudice . . . caused by the inadmissible testimony.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error is harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Bourgeois*, 133 Wn.2d at 403.

The testimony that was relevant and probative was not much more extensive than the irrelevant prejudicial evidence that not only took up

much of the jury's time and attention at trial but also required extensive discussion in closing arguments. The central issue, at least from an analytic standpoint, was whether Mr. Hall's description of Mr. Patten's action and demeanor during their brief encounter in the Thai Bamboo parking lot was sufficient, and sufficiently credible, to persuade the jury that Mr. Patten actually displayed a knife and also did so in a manner that supported a reasonable inference that he did so with an intent to cause harm or fear. The extensive evidence designed to portray Mr. Patten as a criminal person who was acting as an accomplice in the commission of an ongoing criminal enterprise involving theft, property damage and assault along with incidental rude, suspicious and offensive conduct was sufficiently prejudicial and distracting to have affected the outcome of the trial. The evidence was of more than minor significance and the relevant evidence was somewhat less than overwhelming.

While the evidence may have been sufficient to support the inference that the knife that was found in the SUV was indeed the knife with which Mr. Patten threatened Mr. Hall, it must be noted that the evidence, without more, does not establish with any certainty that they are the same knife, and Mr. Hall did not identify the knife at trial. Whether the knife introduced at trial and the knife described by Mr. Hall were the same is a question for the jury. But the elaborate trail of testimony and

exhibits that purported to connect the two knives may well have confused the jury and prevented thoughtful consideration of the fact that Mr. Hall did not identify the knife at trial.

The court's evidentiary ruling resulted in the presentation of such an extensive array of irrelevant prejudicial evidence that it cannot be deemed harmless.

3. MR. PATTEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant is guaranteed the right to effective representation by both the Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in *Strickland*, 466 U.S. at 687, and subsequently adopted in Washington. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). To demonstrate ineffective assistance, the defendant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32–33 (citing *Strickland*, 466 U.S. at 687; *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)). The defendant bears the

burden of proving both parts, and the failure to establish either part defeats the ineffective assistance claim. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687).

In its threshold ruling that the State's proposed evidence was admissible under ER 404(b), the court did not close the door on defense objections either to evidence that differed from that which was presented in the prosecutor's pretrial motion or to evidence that was inadmissible on other grounds. (RP 34)

Much of the testimony presented by the State at trial, and described in the previous sections of this brief, included assertions that had not been incorporated in the State's pretrial motion, as well as prejudicial hearsay testimony (RP 75) and speculations and assumptions for which no factual basis was provided. (RP 75-79) Such testimony was subject to defense objections. No objections were made.

The wholesale admission of substantial prejudicial and irrelevant evidence could have been avoided by a timely argument before trial pointing out the lack of specificity in the State's motion and the trial court's ruling, or by specific objections to evidence that was arguably not subject to the court's threshold ruling or which, in the context of the entire trial, justified seeking specific rulings on prejudicial evidence as it was introduced.

In making no effort to reduce the introduction of evidence that was overwhelming in quantity as well as irrelevance and prejudicial effect, defense counsel failed to afford the representation to which Mr. Patten was entitled under the constitution. While specific instances of counsel's failure to object might be justified as tactical decisions, counsel's performance in failing to object to such a quantity of inadmissible evidence was simply deficient. The ruling under which the evidence was presumably admitted was not harmless error. Likewise, counsel's failure to offer any objections that could effectively reduce the quantity of such evidence seriously prejudiced the defense.

E. CONCLUSION

Very early . . . we came to a realization that the key to the administration of criminal justice was that there must, in every case of serious consequence be a counsel for the prosecution, a counsel for the defense, and a judge. And we likened that to a three-legged stool, or a tripod, of which you will be hearing more and more as time goes on, and we concluded that the system cannot work without all three.

Like the stool or the tripod, if you can take one leg away or weaken it, you impair the entire system.

PROCEEDINGS AT THE 1969 JUDICIAL CONFERENCE, 49 F.R.D.

347, 358 (1969). The administration of justice in this case may be likened to a stool with three unacceptably weak legs. The resulting conviction should be reversed.

Dated this 10th day of December, 2013.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31662-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
TRAVIS J. M. PATTEN,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on December 10, 2013, 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
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I certify under penalty of perjury under the laws of the State of Washington that on December 10, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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#315479
Washington Correction Center
PO Box 900
Shelton, WA 98584

Signed at Spokane, Washington on December 10, 2013.


Janet G. Gemberling
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