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Court of Appeals
Division III
State of Washington

NO. ~~32886-X~~-III
329828

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

STATE OF WASHINGTON,

Respondent,

v.

RUSTY ABRAMS,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's convictions for Assault in the Second Degree and Assault in the Third Degree violate double jeopardy prohibitions.

2. Defense counsel was ineffective for failing to object to evidence establishing that appellant's prior contacts with police related to criminal activities.

3. The trial court erred when it admitted evidence that defendant had been in jail before.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of Assault in the Second Degree and Assault in the Third Degree based on the same assaultive act. The Legislature has made clear, however – in the language of the assault statutes and statutes pertaining to crimes divided by degree – its intent that courts only enter conviction for one crime under these circumstances. To avoid a double jeopardy violation, must the conviction for Assault in the Third Degree be vacated?

2. Appellant was accused of using pepper spray on a police officer, and identity was an issue at trial. Therefore, the officer involved could properly testify that he recognized appellant

from “prior contacts” with him. What he could not testify to, however, were the circumstances of those contacts that made it clear they involved suspected criminal activities. Defense counsel did not object to this testimony. Nor did he object when a second officer, who did not witness the alleged assault, testified that he also was familiar with appellant from past contacts. Did these failures deny appellant his right to effective representation and a fair trial?

3. The defense moved to exclude a letter appellant wrote while in jail that appeared to mention the alleged assault. One of the statements in that letter made it clear that appellant had been incarcerated before. Did the trial court err under ER 403 and ER 404(b) when it admitted this portion of the letter?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grant County Prosecutor’s Office charged Rusty Joe Abrams with (count 1) Assault in the Second Degree, with an aggravating circumstance that the crime was committed against a law enforcement officer, and (count 2) Assault in the Third Degree. CP 16-17. Both charges were based on an assault against Ephrata Police Officer Patrick Canady. CP 16-17.

A jury convicted Abrams and found the aggravating circumstance proved. CP 44-45, 47. The Honorable John M. Antosz entered a judgment of conviction on both charges. CP 50, 53. Although noting the two assault convictions might be a single offense for double jeopardy purposes, Judge Antosz merely treated them as “same criminal conduct” for purposes of Abrams’ offender score before imposing an exceptional 96-month sentence on count 1 and a concurrent standard range 60-month sentence on count 2. 1RP¹ 54, 56; CP 48-49, 52-54. Abrams timely filed his Notice of Appeal. CP 70.

2. Substantive Facts

At about 1:00 a.m. on April 27, 2014, Ephrata Police Officer Pat Canady spotted a gentleman walking westbound along Nat Washington Way. 3RP 264. Canady pulled his patrol car along side the man, illuminated him with his spotlight, and identified him as Rusty Abrams, whom he recognized from prior interactions. 3RP 262-264. Although the man turned away from the bright light, Canady felt certain in his identification. 3RP 270. Canady knew

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 30 and December 16, 2014; 2RP – December 10, 2014; 3RP – December 11, 2014; 4RP – December 12, 2014; 5RP – December 15, 2014.

the Grant County Sheriff's Office was looking for Abrams to serve an arrest warrant on him. 3RP 265, 458.

Using his car radio, Officer Canady contacted Officer Jack McLauchlan at the nearby police station, informing him that he believed he had located Abrams. 3RP 265, 457. McLauchlan headed for the area in his own police vehicle. 3RP 458. While Canady waited for McLauchlan, he watched the suspect turn south onto A Street. 3RP 271-272.

Officer Canady followed the suspect down A Street, drove past the individual, and made a u-turn. The suspect then took off running northbound. 3RP 272. Canady turned on his overhead lights and followed, but the suspect cut around a fence and headed west, causing Canady to lose sight of the man. 3RP 272-273. Canady drove to the general area where he believed the suspect had run and parked his car. 3RP 274. He spotted the suspect squatting down near the ground. 3RP 274-277. Canady pulled out his taser and, from a distance of about 20 feet, instructed the suspect to get on the ground. 3RP 278-279. Instead, the suspect ran away. 3RP 279-280.

Canady gave chase and yelled, "Taser Taser Taser Stop!" 3RP 280. The suspect, who had his sweatshirt pulled up over his

face, ran between two trailers. 3RP 281-282. As Canady closed to within five feet of the suspect, he saw the suspect's right hand rise over his left shoulder and then saw a mist in the air. 3RP 283, 349. Canady was at a full sprint, could not stop, and ran through the mist, which appeared to be pepper spray. 3RP 284-285, 338. He could not see, began coughing, and had difficulty breathing. 3RP 283, 285-286.

Canady stopped the pursuit and retreated behind a nearby pickup truck. 3RP 287-288, 291-292. Officer McLauchlan found him there. 3RP 288, 465. He assured McLauchlan he was okay, although in pain and defenseless. 3RP 337, 465. Officer McLauchlan left briefly to look for the suspect, whom he did not find. 3RP 466. Canady got into his own patrol car and wiped his face with a towel. 3RP 295-296. He could now see with one eye and was breathing better, so he decided to drive to a nearby hospital rather than wait for an ambulance or have McLauchlan take him there. 3RP 297-299, 477.

At the hospital, Canady washed his face and eyes with baby shampoo. 3RP 300-302. Within about an hour, he had returned to duty and was taking photographs back at the scene. 3RP 302, 304, 343, 351-352.

Abrams was located and arrested the following day without incident. 3RP 443-448, 480-481. A search incident to that arrest revealed a can of pepper spray in one of his pockets. 3RP 448-449, 482. Officer Canady sprayed the contents of the can onto a piece of paper and determined that it smelled like the substance he had been sprayed with the day before. 3RP 322, 487-488.

At the Grant County Jail, Officer Canady contacted Abrams to advise him of the charges against him. Abrams was sleeping, so Canady woke him up. According to Canady, when Abrams saw him, he said, "I'm sorry what happened" or "I'm sorry. What happened?" 3RP 324, 345. Canady was surprised and asked Abrams to say it again, which he did. 3RP 324.

Several months later, corrections officers at the jail confiscated a letter Abrams had written because it discussed the use of mace and police. 4RP 538-543. Portions of the letter admitted at trial indicate, "A-Tank isn't what it used to be"; "I had an empty can of mase [sic] the police giving chase dropping like fly – out of the race. The pepper spray to the face"; and "Turned old

Irwin into a believer told him that pepper spray takes stupid away.”²

Exhibit 27.

A defense expert explained that pepper spray is an “oleoresin capsicum” spray derived from cayenne peppers and mixed with oil. 3RP 368-369, 426. Exposure typically results in pain, involuntary eye closure, tearing, production of mucus, and inflammation of mucous membranes. 3RP 425. Most individuals are “fairly functional” about an hour after exposure. 3RP 426.

At the close of evidence, the State argued that it had established beyond a reasonable doubt that Abrams was the individual who sprayed Officer Canady with pepper spray because Canady recognized him at the time, Abrams later apologized at the jail, and Abrams wrote the confiscated letter that mentioned use of pepper spray. 4RP 609-613. The State also argued his conduct satisfied the elements for both assault charges and the aggravating circumstance. 4RP 613-626.

The defense argued that Officer Canady’s identification of Abrams at the scene was not trustworthy given the circumstances of the encounter, including poor lighting and the stress of the

² Although not disclosed to jurors, “Irwin” is a reference to a jail guard named “Urwin,” who – when asked about the letter – replied that Abrams is “always saying bizarre stuff.” 4RP 531.

situation. 4RP 630-631. The defense maintained that the alleged confession in the Grant County Jail – which defense counsel described as “I’m sorry. What happened?” – was nothing more than an inquiry. 4RP 641-642. And, counsel also discounted the significance of the confiscated letter because it was written after Abrams had been informed of the accusations against him and appeared to be nothing more than a somewhat poetic summary of those accusations. 4RP 638-641.

Regarding proof of the crimes, counsel challenged sufficiency of the State’s evidence for Assault in the Second Degree, arguing the State had not proved an intent to inflict bodily harm, instead merely proving an intent to stop the chase, and had not proved the pepper spray qualified as a “deadly weapon.” 4RP 631-637, 642-643. Counsel argued that if jurors concluded Abrams was the individual who sprayed Canady, the only crime for which he could possibly be convicted was Assault in the Third Degree. 4RP 642-643.

As noted above, jurors convicted Abrams on both assault charges and found the aggravating circumstance satisfied. CP 44-45, 47. Using a special verdict form addressing Assault in the Second Degree, jurors indicated they did not find that Abrams had

used a deadly weapon but did find that he had administered to Canady, or caused Canady to take, a noxious substance. CP 46.

C. ARGUMENT

1. ABRAMS' CONVICTIONS FOR BOTH ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE THIRD DEGREE, BASED ON PRECISELY THE SAME ACT, VIOLATE DOUBLE JEOPARDY PROHIBITIONS.

The double jeopardy clauses of the Fifth Amendment³ and article I, section 9 of the Washington Constitution⁴ prohibit "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted for a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)). Abrams' case involves the third class of violation – multiple punishments for the same offense.

A double jeopardy claim may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Whether there has been a double jeopardy

³ The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb."

violation is a question of law this Court reviews de novo. Turner, 169 Wn.2d at 454. And, although this issue involves a constitutional protection, in deciding whether multiple punishments are allowed, the judicial inquiry is limited to one question: what did the legislature intend? State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

To determine intent, this Court first considers any express or implicit legislative representations. Evidence of these representations alone may warrant a conclusion regarding the Legislature's intent. State v. Freeman, 153 Wn.2d 765, 771-772, 108 P.3d 753 (2005). This intent may be "clear on the face of the statute," found in the structure of the statutes, or apparent from other sources. Id. at 773. Only where legislative intent remains unclear do courts then look to the Blockburger⁵ test or merger analysis to determine intent. Id. at 772-773.

The Legislature's intent that a single assaultive act will result in a conviction for *either* Assault in the Third Degree *or* Assault in

⁴ Article 1, § 9 provides, "[n]o person shall be . . . twice put in jeopardy for the same offense." It provides the same degree of protection as its federal counterpart. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

⁵ Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

the Second Degree is found in the language and structure of the statutes themselves. As charged in this case:

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

.....

- (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault .

...

RCW 9A.36.031(1)(g) (emphasis added). The underlined language is critical because it makes the Legislature's intent clear: an individual is guilty of Assault in the Third Degree if the circumstances do not rise to the level of First or Second Degree. If they do rise to the greater offense, the defendant is guilty of the greater offense and *only* the greater offense.

The Legislature used similar language for Assault in the Second Degree. As charged in this case:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

.....

- (c) Assaults another with a deadly weapon; or

- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance

RCW 9A.36.021(1)(c)-(d) (emphasis added). Again, this language makes apparent the Legislature's intent that, in circumstances where a defendant's conduct satisfies the elements for more than one degree of assault, the defendant should be convicted solely for the highest degree established.

RCW 10.43.020 and RCW 10.43.050 lend additional support. RCW 10.43.020 provides:

When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

RCW 10.43.050 provides in pertinent part:

Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

These statutes support a finding that the Legislature intended, when a crime is divided into different degrees, that a defendant should be convicted of one level of that crime rather than several.

In light of the Legislature's clearly expressed intent, it is not necessary for this Court to evaluate the two statutes under the Blockburger test. But that test results in a similar conclusion:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304; see also Freeman, 153 Wn.2d at 772 ("If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes.").

As charged in Abrams' case, Assault in the Third Degree did not require proof of any fact not also required for Assault in the Second Degree. While Assault in Second Degree *typically* does not require proof that the victim was a law enforcement officer performing his or her official duties, under the aggravating circumstance added to that charge in this case, jurors were required to find, "The crime was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, and the defendant knew the victim was a law enforcement officer." CP 42; RCW 9.94A.535(3)(v) (applicable

only where “victim’s status as a law enforcement officer is not an element of the offense”). This added to proof of Assault in the Second Degree the only element from Assault in the Third Degree not otherwise required to prove that greater crime.

Notably, the Supreme Court recently held that convictions for Assault in the Second Degree and Assault in the Fourth Degree, based on one assault, violate double jeopardy. See State v. Villanueva-Gonzalez, 180 Wn.2d 975, 979-986, 329 P.3d 78 (2014). There simply is no reason to apply a different rule here.

In Abrams’ case, prosecutors seemed to understand the assault charges were filed in the alternative, although the record is not crystal clear on this point. At one point, when Abrams was facing three assault charges, a prosecutor indicated, “These counts are all charged in the alternative of each other, in a sense.” 1RP 4-5; CP 8-10. After the charges had been reduced to one count each of Assault in the Second and Third degrees, a different prosecutor indicated that, although the crimes had not been charged in the alternative, “they are most likely going to be alternatively charged, I mean.” 2RP 4.

At sentencing, Judge Antosz noted that Abrams’ two assault convictions “may even be the same offenses for double jeopardy

purposes; I'm not sure." 1RP 54. Unfortunately, however, the issue was not pursued any further. Even though the crimes were treated as "same criminal conduct" when calculating Abrams' offender score and even though both sentences were run concurrently, one conviction must be vacated to avoid a double jeopardy violation. See State v. Womac, 160 Wn.2d 643, 650-660; 160 P.3d 40 (2007); Calle, 125 Wn.2d at 774-775. That conviction is Assault in the Third Degree. See State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006) (proper remedy is to vacate conviction on lesser offense), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO SPECIFIC EVIDENCE SURROUNDING OFFICERS' PRIOR CONTACTS WITH ABRAMS UNDER ER 403 AND ER 404(B).

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that

counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The identity of the individual who used pepper spray while trying to flee Officer Canady was a disputed issue at trial. Therefore, Officer Canady could properly testify that he recognized Abrams from prior contacts with him. See State v. Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989) (officer's assertion that he knew defendant from "prior contacts," while suggestive of a bad act, did not conclusively establish such an act and did not warrant reversal), review denied, 114 Wn.2d 1005, 788 P.2d 1079 (1990); State v. Wilson, 3 Wn. App. 745, 746, 477 P.2d 656 (1970) (prosecutor's assertion in opening statement that officer recognized defendant from "prior contact" not error where identity an issue).

Canady should not, however, have been permitted to establish that these prior contacts related to suspected criminal activities. See Commonwealth v. Young, 578 Pa. 71, 77, 849 A.2d 1152 (2004) (while a mere reference to "prior contacts" does not amount to reversible error, "references that expressly or by reasonable implication also indicate some involvement in prior criminal activity . . . rise to the level of prejudicial error."). Moreover, since Officer McLauchlan did not even see the suspect,

he should not have been permitted to mention any previous contacts with Abrams. Defense counsel did not object to this evidence, however, thereby denying Abrams his right to effective representation at trial.

Most of the objectionable evidence was elicited during the State's direct examination of Officer Canady:

Q: All right. Were you working on April 27th of this year, 2014?

A: I was.

.....

Q: Okay. And during that shift did you come into contact with anyone in this court?

A: I did.

Q: And would you identify him, please?

A: Mr. Abrams, the gentleman in the white shirt next to defense counsel.

Q: Okay. And do you know Mr. Abrams?

A: I do.

Q: And have you had contact with Mr. Abrams in your professional capacity prior to April 27th of this year?

A: Yes, I have.

Q: Do you know how many times?

A: I believe there was like three documented times. And then undocumented times, multiple. You know, just stop and talk to him and . . .

Q: Do you have those dates?

A: I do. They're in my report, if I can look at them and refresh it?

Q: Certainly.

COURT: You may.

A: One of them was on 2-1 of 2014 on G Street Southeast.

Q: Okay.

A: Another one was on 8-19 of 2013. His friend was at their house burglarizing. That was –

COURT: No, you're – the question was just –

WITNESS: Sorry.

COURT: -- times for contact, not a –

WITNESS: Sure.

COURT: -- narrative of what took place.

WITNESS: Okay.

PROSECUTOR: Judge, thank you.

Q: Go ahead.

A: And then 5-1 of 2010 I had contact with him then, too.

Q: Okay. Now, were these contacts just a brief, walk-by contact? Or where they –

A: No.

Q: -- face to face talking?

A: They were face-to-face. They were calls or contacts with other officers with him.

Q: Okay. And would it be fair to say that you know what Mr. Abrams looks like?

A: Oh, yes.

3RP 262-264.

The prosecutor also had Officer McLauchlan reveal that he knew Abrams:

Q: Now, do you know Rusty – or know of Rusty Abrams?

A: Yes.

Q: And have you had personal contact with him before?

A: Yes.

Q: Do you know what he looks like?

A: yes.

Q: Is he in the courtroom today?

A: Yes.

3RP 457-458.

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met here.

First, there was no legitimate tactic behind defense counsel's failures. Since identity was an issue, the State could rightfully present evidence that Officer Canady knew Abrams from "prior contacts" with him. But there could be no tactic or strategy behind permitting Officer Canady to provide details concerning his contacts with Abrams, which prejudicially suggested a criminal history. Those details revealed that the contacts were in Canady's "professional capacity," three had been documented in police records, one involved a friend of Abrams committing a burglary, some were in response to calls and involved other officers, and there were multiple additional "undocumented" contacts. 3RP 262-264. Nor could there be a legitimate tactic or strategy behind failing to object to evidence that Officer McLauchlan also knew Abrams (and thus recognized him in court), since McLauchlan did

not even see the fleeing suspect. This testimony reinforced the improper notion that law enforcement in general was all too familiar with Abrams.

Second, objections would have been sustained. Evidence must be relevant to be admissible. ER 402. It must have a “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. Even if relevant, however, evidence must be excluded where any relevance is substantially outweighed by the danger of unfair prejudice ER 403. Moreover, the rules prohibit evidence of prior crimes or wrongs “to prove the character of a person in order to show action in conformity therewith.” ER 404(b).

As discussed above, Officer McLauchlan’s prior contacts with Abrams were irrelevant. Any defense objection would have been sustained. And while the fact of Officer Canady’s prior contacts with Abrams was relevant to the disputed issue of identity, Canady did not have to testify to any of the objectionable evidence (i.e., contacts in “professional capacity,” documented in police records, one involved Abrams’ friend committing burglary, some in response to calls involving additional officers). This information

strongly suggested Abrams had run afoul of the law before and also had friends engaged in criminal behavior.

Defense counsel was aware generally that jurors should not hear about Abrams' criminal past. For example, counsel successfully moved in limine to exclude identification or description of Abrams' prior convictions. See CP 14; 2RP 39. Counsel attempted, but failed, to preclude the prosecution from eliciting the fact there was a warrant for Abrams' arrest on April 27, 2014, which Officer Canady knew about. 2RP 40-42. And counsel attempted to prevent jurors from seeing any portion of Abrams' letter, confiscated in the jail, based on its tendency to show criminal propensity. CP 15; 2RP 215-216, 218-220, 239-251, 498-500.

In contrast, counsel made no effort whatsoever to preclude the circumstances under which police had contacted Abrams over the years. In fact, at one point, *Judge Antosz* was forced to intervene on Abrams' behalf – when defense counsel did nothing – to stop Officer Canady from revealing details of the documented contacts with Abrams. 3RP 263. A pretrial objection to all of this evidence under ER 403 and ER 404(b) would have been sustained.

Third, this improper evidence made a difference. To show prejudice, Abrams need not demonstrate counsel's performance more likely than not altered the outcome of the proceeding. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability the outcome would have been different but for counsel's mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

While Officer Canady testified that Abrams was the individual who used pepper spray while running away, because the individual successfully eluded capture, there was reason to doubt that identification, an identification the defense disputed in light of the poor lighting and stress of the situation. 4RP 630-631. The defense also challenged the State's proof that use of the pepper spray was done with intent to inflict bodily harm, an element of Assault in the Second Degree. 4RP 631-637, 642-643; CP 30. Jurors were more likely to overlook any deficiencies in the State's proof, however, once they learned of Abram's lengthy and apparently significant history with local law enforcement, a history

that jurors would have correctly deduced went well beyond the warrant for his arrest on April 27, 2014.

Because Abrams was denied his right to effective representation and a fair trial, reversal is required.

3. THE TRIAL COURT ERRED UNDER ER 403 AND 404(B) WHEN IT ADMITTED EVIDENCE THAT ABRAMS HAD BEEN IN JAIL BEFORE.

Defense counsel objected to admission of any portion of the confiscated letter based on relevance, unfair prejudice, and its proof of criminal propensity. CP 15; 2RP 215-216, 218-220, 239-251, 498-500. The trial court erred when it admitted that portion of the letter discussing Abrams' prior experience in "A-tank."

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). "An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds." Id. (citing State v. Dixon, 159 Wn.2d 65, 147 P.3d 991 (2006)). While trial judges are in the best position to determine relevance and prejudicial impact, a trial court's balancing of these considerations will be overturned if no reasonable person could take the view adopted by the court. State v. Posey, 161

Wn.2d 638, 648, 167 P.3d 560 (2007); State v. Johnson, 185 Wn. App. 655, 670-671, 342 P.3d 338 (2015).

Although jurors did not see most of Abrams' letter, one portion they did see was Abrams' assertion that "A-Tank isn't what it used to be." Exhibit 27. The State argued this was relevant to prove Abrams wrote the letter because he was housed in A-Tank, a fact the prosecutor promised the State would establish through the testimony of jail officers. 3RP 241.

Judge Antosz accepted the State's argument that – in light of evidence that Abrams was in A-Tank – his statement about A-tank was relevant under ER 401 to show he was the letter writer. 3RP 505. Regarding prejudice, Judge Antosz indicated this statement gave him the greatest concern "because it does show that – or would infer that Mr. Abrams has been in jail before." 3RP 504. But Judge Antosz reasoned there was no additional prejudice from this statement given that jurors already knew about the outstanding warrant for Abrams' arrest. 3RP 505. He also found that a limiting instruction was not appropriate regarding the letter's content. 3RP 504.

As an initial matter, despite the State's offer of proof, neither of the two prosecution witnesses from the Grant County Jail

testified that Abrams was housed in A-tank. See 4RP 538-543. Even if they had so testified, the relevance of this statement would have been slim at best, particularly in light of the other evidence that Abrams was the letter writer – i.e., he listed himself on the envelope as the sender and discussed the use of pepper spray on police. See State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079 (availability of alternative means of proof should be considered in assessing admissibility under ER 403), review denied, 108 Wn.2d 1024 (1987). But because there was no testimony that Abrams was in A-tank, this statement indicating he had been in jail before was irrelevant to any proper purpose.

Moreover, Judge Antosz's analysis regarding the resulting improper prejudice missed the mark. The fact Abrams had a warrant for his arrest does not equate to prior time spent in jail. Warrants often are issued for individuals who have not previously been incarcerated. Abrams' statement lamenting the fact A-tank had changed was the only evidence establishing that he had previously served jail time. Not only did this outweigh any probative value under ER 403, it violated the prohibition under ER 404(b) against evidence of past acts establishing general propensity to commit crime.

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Judge Antosz should have excluded the evidence at Abrams’ trial.

Where evidence is erroneously admitted under ER 403 and ER 404(b), the question is whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (quoting State v. Smith, 106 Wn.2d at 780). That Abrams had previously been incarcerated supported the notion that he was a “criminal type” and therefore more likely to be the individual who sprayed Officer Canady with mace in an attempt to avoid arrest. Like the evidence that officers were familiar with Abrams because of prior criminal investigations, this improper evidence made it less likely jurors would find reasonable doubt and more likely they would convict.

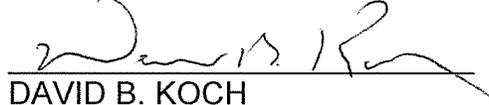
D. CONCLUSION

Ineffective assistance of counsel and trial court error denied Abrams a fair trial. His convictions must be reversed and the case remanded for a new trial. Moreover, double jeopardy protections prevent convictions for both Assault in the Second Degree and Assault in the Third Degree based on the same assaultive act.

DATED this 16th day of October, 2015.

Respectfully submitted,

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State v. Rusty Abrams

No. 32982-8-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 16th day of October, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 16th day of October, 2015.

x 