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Court of Appeals  
Division III  
State of Washington  
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NO. 36062-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ARNULFO BRAVO,

Appellant.

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

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REPLY BRIEF

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A. ARGUMENT

1. BECAUSE THERE WAS NO REASONABLE STRATEGIC REASON TO PERMIT THE ADMISSION OF THE PRIOR HOMICIDE, MR. BRAVO'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

The State takes the position that the defense admitted to the crimes of theft following Ms. Kipp's death, which added to Mr. Bravo's credibility and, as such, to the credibility of the defense case. Brief of Respondent (Br. Resp.) at 8. Thus, the State argues Mr. Bravo's counsel "made a strategic choice" to permit the 1991 judgment and sentence (J & S) go to the jury unredacted and including his prior homicide conviction. Id. That defense counsel made a "choice," rather than an error, is not supported by the record or by the law.

a. The State fails to show defense counsel's failure to object was deliberate or part of reasonable trial strategy.

The State argues that the defense decision to admit to stealing Ms. Kipp's jewelry and other property is equivalent to a decision to admit to a prior homicide. Br. Resp. at 8. This argument is disingenuous at best. See, e.g., ER 404(b); State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998); State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987); see State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Evidence of prior bad acts is inadmissible to show “the character of a person in order to show action in conformity therewith.” ER 404(b). Our Supreme Court has held ER 404(b) to be a categorical bar to the admission of evidence admitted to prove a person’s character, or to show a propensity to act in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Here, the jury was permitted to view a 1991 J & S that included Mr. Bravo’s 1977 negligent homicide conviction – almost the identical charge of which he was ultimately convicted here. CP 60. This previous conviction was so remote in time – and so potentially prejudicial to Mr. Bravo – that the State had not moved to admit it during pre-trial motions in limine. RP 41-48.<sup>1</sup>

In Saunders, this Court reversed for ineffective assistance of counsel in similar circumstances. 91 Wn. App. at 581. Mr. Saunders was convicted of possession of a controlled substance after his own counsel failed to object– and even elicited evidence of – his client’s prior conviction for the same crime. Id. The Court found that, as in

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<sup>1</sup> The 1975 conviction washed out when Mr. Bravo was sentenced in this matter. CP 60. It is inconceivable that defense counsel would not have objected to the admission of this homicide conviction at a murder trial.

Mr. Bravo’s case, trial counsel did not challenge the admission of the prior conviction before trial, “so had no reason to believe the evidence would come in if offered by the State.” Id. at 578. As here, the State did not even attempt to prove this 1977 prior homicide conviction in its case in chief. Id. This Court stated it could “discern no reason from the record why counsel ‘would not have objected to such damaging prejudicial evidence.’” Id. at 579 (quoting Hendrickson, 129 Wn.2d at 78).<sup>2</sup> This Court determined that counsel’s failure to prevent the admission of the prior conviction for the same conduct fell below an objective standard of reasonableness and reversed. Saunders, 91 Wn. App. at 580.

b. This Court should find that counsel’s error prejudiced Mr. Bravo, changing the outcome.

In assessing prejudice, this Court must view the erroneously admitted prior homicide against the backdrop of the evidence in the record. Id.; Hendrickson, 129 Wn.2d at 80.

To show prejudice under the second Strickland prong, Mr.

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<sup>2</sup> In the opening brief, Mr. Bravo argued the Hendrickson Court found trial counsel ineffective. Opening Brief at 13. In fact, the Court found that although Mr. Hendrickson’s counsel’s performance was deficient, since the record showed there was no legitimate tactical reason for counsel’s actions, the prejudice prong of Strickland was not met. 129 Wn.2d at 80. The Court did hold, however, that the prior conviction would not have been admissible. Id.

Bravo first must show the trial court would have sustained his attorney's objection to the introduction of his 1977 homicide conviction, had trial counsel made one. Hendrickson, 129 Wn.2d 61, 79-80. As the Hendrickson Court held, such a prior conviction certainly would not have been admissible, because its prejudicial effect would have outweighed its probative value. Id.

Then Mr. Bravo must establish that without the admission of the prior conviction, and but for counsel's errors, the outcome would have been different. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Here, the evidence against Mr. Bravo was "not overwhelming," but was equivocal. Saunders, 91 Wn. App. at 580. The evidence presented the jury with Ms. Kipp's unwitnessed death, disagreeing experts who diverged on the cause of death, a house full of pills, an alleged victim who was already terminally ill and experiencing a leukemia relapse, Ms. Kipp's prior suicide attempt upon her initial leukemia diagnosis, missing or destroyed forensic evidence,<sup>3</sup> and a decades-long delay in trial.

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<sup>3</sup> Dr. Wigren testified that almost 30 years had passed since the autopsy. RP 394 (noting the slides are missing). The State's pathologist, Dr. Rappe, testified with advanced Parkinson's and advanced retinal disease; he was mostly blind at the time he testified. RP 267.

It is disingenuous for the State to suggest that defense counsel made a strategic choice to tell the jury that Mr. Bravo had previously killed someone, and now, “with 20/20 hindsight,” believes this was a poor choice. Br. Resp. at 8. No reasonable or responsible defense attorney would have made that choice. Trial counsel’s decision to admit to the theft of Ms. Kipp’s jewelry and other property was clearly strategic, and the decision to admit the 1991 J & S for the Theft 1 conviction supports that strategic choice. However, trial counsel’s choice to admit the prior history on page 2 of that J & S containing the previous homicide conviction was inadvertent. No reasonable strategic advantage could support this choice. Saunders, 91 Wn. App. at 580; Escalona, 49 Wn. App. at 255.

Counsel is deficient if there is no legitimate, tactical reason for the challenged act, and the accused is prejudiced by this. McFarland, 127 Wn.2d at 336; see Strickland, 466 U.S. at 693.

Here, there is a reasonable probability that absent counsel’s deficient performance, the result of the proceedings would have been different. The jurors were given Exhibit 23, with the detective’s highly prejudicial comments, as well as Exhibit 80, a J & S which informed

them that Mr. Bravo had already been convicted of negligent homicide – a charge similar to that before them.

Defense counsel’s failure to object to the admission of this legally irrelevant and highly prejudicial evidence was objectively unreasonable, depriving Mr. Bravo of a fair trial. Reversal is required.

2. THE STATE’S EXPERT WITNESS INVADED THE PROVINCE OF THE JURY.

An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008).

Dr. Rappe’s specific language should be noted; he twice used the specific language of the legal standard: “beyond a reasonable doubt.” RP 283. The State’s expert witness testified this defense theory was impossible, because “it was beyond a reasonable doubt that ... she did not last more than four hours.” RP 283.

The State does not address Montgomery; rather, it argues that Dr. Rappe did not offer an opinion on guilt, but an opinion on cause of death. Br. Resp. at 10 (“This is well within his preview [sic] as the medical examiner”).

Here, the charge against Mr. Bravo was murder, and the cause of death was the issue in dispute. Whether Ms. Kipp was strangled or whether she died of asphyxiation or by overdose of her sleeping pills was the issue before the jury. For Dr. Rappe to testify “beyond a reasonable doubt” is to offer an opinion on the ultimate issue and to invade the province of the jury. See Montgomery, 163 Wn.2d at 594. Nor does the State address City of Seattle v. Heatley, although, arguably, Dr. Rappe’s testimony is more egregious, since it was “framed in conclusory terms that merely parroted the relevant legal standard.” 70 Wn. App. 573, 581, 854 P.2d 658 (1993).

Because the improper opinion testimony is manifest constitutional error, and because the improper testimony was not harmless, this Court should reverse.

B. CONCLUSION

For the foregoing reasons, Mr. Bravo respectfully requests this Court reverse his conviction and remand for a new trial without the inadmissible evidence. In the alternative, the Court should strike the discretionary legal financial obligations.

DATED this 26th day of July, 2019.

Respectfully submitted,

s/ Jan Trasen

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RESPONDENT,	)	
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v.	)	NO. 36062-8-III
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	)	
APPELLANT.	)	

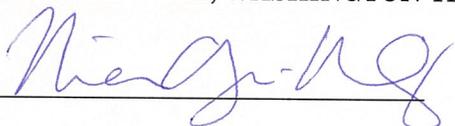
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SIGNED IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF JULY, 2019.

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# WASHINGTON APPELLATE PROJECT

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