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NO. 36062-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ARNULFO BRAVO,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Bravo received ineffective assistance of counsel when counsel failed to object to the admission of evidence of Bravo's prior homicide conviction, and the court erred by entering the judgment and sentence.

2. The State's expert witness invaded the province of the jury.

3. The trial court abused its discretion when admitting prior-acts evidence under ER 404(b).

4. The trial court incorrectly imposed discretionary legal financial obligations on Mr. Bravo.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to the effective assistance of counsel is denied where counsel's performance is deficient and prejudices the outcome of trial. Where defense failed to object to highly prejudicial evidence that Mr. Bravo was previously convicted in a negligent homicide case – did counsel's performance fall below an objective standard of reasonableness, affecting the verdict?

2. The jury is the sole fact-finder at trial. When a trial witness testifies concerning the ultimate issue before the jury, this is reviewable

as a manifest constitutional error under certain circumstances. The State's pathologist testified Ms. Kipp died within four hours of the event, "beyond a reasonable doubt" – a critical time period in determining whether the cause of death was murder or suicide by overdose. Did the pathologist's repeated use of this legal standard invade the province of the jury, requiring reversal?

3. Evidence of misconduct other than the crime charged is not admissible to show a defendant's character or propensity to commit the charged acts. Although the trial court admitted evidence related to the previous relationship between Mr. Bravo and the decedent, purportedly to show intent, the evidence was offered to suggest Mr. Bravo had a propensity to commit domestic violence and had, in fact, been violent on the date in question. Did the trial court abuse its discretion in admitting this evidence without properly balancing the prejudice to Mr. Bravo?

4. Under the current statute regarding legal financial obligations, which has been determined to apply prospectively to cases on appeal, discretionary fees may not be imposed on indigent defendants such as Mr. Bravo. Did the sentencing court lack the

authority to impose the filing fee and the sheriff's service fee, and should they thus be stricken?

C. STATEMENT OF THE CASE

1. Barbara Kipp's final months

In the months before Barbara's Kipp's death in the autumn of 1991, Arnulfo Bravo and Ms. Kipp began living together in Moses Lake. RP 208-09, 336-37. Shortly after they began dating, Ms. Kipp invited Mr. Bravo to move into her home. RP 336-37. Charles Flowers, who Ms. Kipp had previously dated, continued to live with the couple. RP 336-37.

Ms. Kipp was suffering from leukemia, which had been diagnosed two years earlier – when she was 38 years old – and she had undergone her first course of chemotherapy. RP 260, 298, 407-09, 412-13, 429-30. At the time of her diagnosis, Ms. Kipp's prognosis would have likely given her an additional three to five years to live. RP 407.¹

In fall of 1991, according to Ms. Kipp's adult daughter, Kristi Rambo, symptoms of the leukemia had returned. RP 410. Ms. Rambo told detectives that Ms. Kipp told her the leukemia was “acting up

again.” RP 410. Ms. Kipp was having trouble sleeping and keeping food down, was losing weight, and “felt like she did before she went into remission.” Id. Ms. Rambo acknowledged that when Ms. Kipp had received her initial diagnosis in 1989, Ms. Kipp had been so distraught that she had attempted to take her own life by overdosing with pills. RP 393², 409, 494.

At the time of her death in 1991, Ms. Kipp was taking “uppers” without a prescription, to stay awake during her night shift in Othello. RP 344, 492-93. Following Ms. Kipp’s death, the Moses Lake Police Department found a bottle of these stimulants in Ms. Kipp’s bedroom. RP 344. Both Mr. Flowers and Ms. Rambo identified the pills as the stimulants or “speed” used by Ms. Kipp. Id. at 344, 492-93 (also called “hearts” by Mr. Flowers, who conceded that Ms. Kipp used them).

2. Mr. Bravo’s last evening at home.

On a Sunday night in late September in 1991, Ms. Kipp and Mr. Bravo were at home together. RP 228. Ms. Kipp asked Mr. Bravo to go pick up a few things at the grocery store, which he did. Id. Mr.

¹ Defense expert pathologist Dr. Carl Wigren opined that with the available treatments in 1989, a diagnosis of chronic myelogenous leukemia was “a death sentence”).

Bravo returned home and placed the bag of groceries and the beer on the floor of the kitchen, and turned around to find Ms. Kipp lying motionless on the floor. Id. at 229-30. Distraught – and believing her to be dead – Mr. Bravo kneeled beside her, weeping. Id. He listened to see if she was breathing, and let his tears fall onto her sweater. Id.

Mr. Bravo did not know what to do; he had been in trouble in his past, and the police had never listened to him before. RP 233. He concluded there was no reason for them to believe him now, so he sadly left Ms. Kipp lying on the floor. RP 233. He took their shared car, as well as some of their shared income and the jewelry that was important to Ms. Kipp. He called his friend, Ritchie Norman, from the road, explaining that he wanted to safeguard the items that were “most precious” to Ms. Kipp, to return them to her family. Ex. 20 at 7. A few days later, Mr. Bravo returned to Washington from California, returned any items that were not part of the couple’s community property, and was charged with theft. Ex. 80. He pled guilty to the theft charge and served a 43-day sentence. CP 80 (judgment and sentence from 1991 theft conviction).

² Ms. Rambo had been notified by the Red Cross that she should travel to Moses Lake from her home in Montana, to tend to her mother following the

Mr. Bravo stayed in Washington for some time in late 1991 and early 1992, after resolving the theft allegation. RP 343-44; Ex. 80. Meanwhile, neither the Moses Lake Police Department nor the Grant County prosecutor had moved forward with determining a cause of death for Ms. Kipp. RP 276, 280. When Mr. Bravo was released from his jail sentence on the theft charge, no cause of death had been determined, and no warrant had issued for Mr. Bravo, nor for anyone else. With no charges pending, no warrant, and no advisory to stay in Washington, Mr. Bravo left the state for the next 25 years. RP 246-47.

3. Investigation and Trial

Dr. Gerald Rappe, the pathologist who conducted the autopsy in 1991, stated his initial conclusion was that he simply could not determine a cause of death for Ms. Kipp. RP 276. Although Dr. Rappe initially considered strangulation as a possible cause of death, Ms. Kippe's body presented with a "foam cone" at the nose and mouth, which indicated a possible drug overdose. RP 276-77. Ms. Kipp also had a somewhat high alcohol level (.1 gm), she was a smoker, and her kidneys showed acute tubular necrosis; these factors led Dr. Rappe to send the case for a toxicology screen. RP 276-77 ("A lot of things were

1989 suicide attempt. RP 393.

running through my mind in this case.”). Dr. Rappe also considered that strangulation was contradicted by the lack of bruising or scratches on the neck that would support a finding of a death following a struggle, as well as the lack of damage to the neck’s hyoid bone. RP 272-74. Dr. Rappe ultimately put the file aside and “forgot about the case.” RP 280, 299.³

Over six months after Ms. Kipp’s death, the Grant County Coroner’s office urged Dr. Rappe to reopen his file; Dr. Rappe then “changed [his] report.” RP 280. Only then did he conclude that Ms. Kipp’s cause of death was strangulation. RP 280. Dr. Rappe determined that strangulation was possible with an intact hyoid and no signs of struggle evidenced by scratches. RP 290-92. Dr. Rappe also concluded that Ms. Kipp could have only remained alive and unconscious for four hours, and therefore overdose was not the cause of death, as any drugs in her system could not have been metabolized. RP 283.⁴

³ Q: “So you forgot about a homicide case?”

A: “Yes, I forgot about a homicide case.” RP 299 (Dr. Rappe).

⁴ The toxicology report indicated none of the substances tested for were present; therefore, the State’s position was that Ms. Kipp had died recently, so substances would not have had time to metabolize. The defense suggested the body had been alive but unconscious for a longer period of time. RP 398-99.

Approximately a quarter-century after Ms. Kipp's death, Mr. Bravo was pulled over in a traffic stop in Texas in 2016. RP 2, 246-47. When he appeared in Grant County, Mr. Bravo was charged with murder in the second degree. CP 1.

At the 2018 trial, Dr. Rappe, retired and suffering from Parkinson's Disease, testified about his original autopsy in 1991. RP 264-300. He twice informed the jury that Ms. Kipp had only been unconscious for four hours, and that if she had been alive for longer, drugs would still be detected – "beyond a reasonable doubt." RP 283.

Dr. Carl Wigren, a forensic pathologist, testified for the defense as an expert witness. RP 376-454. He considered Ms. Kipp's diagnosis of leukemia, her recent relapse, and her prior suicide attempt to be critical factors related to her death. RP 422. He testified, "That is the key to this case." Dr. Wigren also found Ms. Kipp's behavior during a trip to Montana to visit her daughter and grandchildren to be extremely relevant to the cause of death. RP 429-31. Shortly before her death, Ms. Kipp and Mr. Bravo had visited Ms. Rambo; Ms. Rambo told detectives that during this time period, Ms. Kipp had a reemergence of leukemia symptoms. RP 429. Ms. Kipp's behavior during this trip was described by her daughter as unusually calm, and she discussed in detail

with her daughter how she wanted to be buried – what she wanted to be wearing, that she wanted to be buried next to the grandmother, and that she left her watch and jewelry in Montana with Ms. Rambo. RP 430-31.⁵ Dr. Wigren opined that his experience, not only as a forensic pathologist, but as a longtime volunteer with a suicide crisis hotline, informed him that Ms. Kipp was making plans for her death, and this was a “huge red flag.” RP 431.

At trial, the State introduced the 1991 Judgment and Sentence (J & S) from Mr. Bravo’s guilty plea for theft, related to some of the items Mr. Bravo had taken from the home following Ms. Kipp’s death. Ex. 80. In the criminal history section of the J & S, the jury learned that Mr. Bravo had previously been convicted of negligent homicide. Ex. 80 at 2. Defense counsel did not object to the jury’s receipt of this information. RP 374-75.

Following trial, the jury acquitted Mr. Bravo of murder in the second degree, convicting him of the lesser-included offense of manslaughter in the first degree. CP 44, 45.

⁵ Ms. Rambo also testified about Mr. Bravo and Ms. Kipp’s alleged “stormy relationship” from decades earlier. RP 41-43. Mr. Bravo objected pursuant to ER 404(b) to the admission of this propensity evidence. *Id.*

D. ARGUMENT

1. MR. BRAVO WAS DENIED HIS RIGHT TO AN EFFECTIVE ADVOCATE, CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 22.

- a. A criminal defendant has the right to representation by an effective advocate.

The Sixth Amendment of the federal constitution and Article I, Section 22 of the Washington Constitution protect an accused person's right to the effective assistance of counsel. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 926 (2010); Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish an ineffective assistance of counsel claim, an accused must show that his attorney's performance fell below an objective standard of reasonableness, and that he was prejudiced as a result. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. at 687. Counsel is deficient if there is no legitimate, tactical reason for the challenged act, and the accused is prejudiced thereby. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). The "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528

U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). This Court reviews a claim of ineffective assistance of counsel de novo. State v. Rafay, 168 Wn. App. 734, 775, 285 P.3d 83 (2012).

- b. Defense counsel was ineffective for failing to object to the admission of the unduly prejudicial 1991 theft J & S, which listed Mr. Bravo's previous homicide conviction in the criminal history section.

Defense counsel failed to object to the admission of the J & S from Mr. Bravo's 1991 theft conviction, although this document referred to Mr. Bravo's prior conviction for "negligent homicide." Ex. 80 at 2. The reference to the prior conviction was contained in the criminal history section on page 2 of the J & S, as seen below:

∴

2.2 CRIMINAL HISTORY: The court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360:

1. CRIME: Negligent Homicide; SENTENCING DATE: 05-04-77; ADULT/JUVENILE: Adult; CRIME DATE: 10-10-76;

Ex. 80, at 2.⁶

Counsel failed to object to the admission of the 1991 J & S from the theft case. RP 374-75. During a recess, the prosecutor discussed

⁶ The complete J & S from the 1991 theft case is included as Appendix A.

his intention to move to admit the 1991 J & S before resting in front of the jury. RP 373. Defense counsel stated, “I have no objection to that being admitted.” Id. Following this conversation, the jury entered the courtroom and the prosecutor moved to admit the J & S. RP 374-75. Defense counsel stated, “I have no objection to that,” and the court admitted the document. RP 375; Ex. 80.

Irrelevant evidence is always inadmissible. ER 402; State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Even where evidence may be relevant, it must be excluded where the danger of unfair prejudice substantially outweighs any probative value the evidence may have. Smith, 106 Wn.2d at 776. Evidence of other bad acts is also inadmissible to show “the character of a person in order to show action in conformity therewith.” ER 404(b). These rules must be read together to determine the admissibility of evidence. Smith, 106 Wn.2d at 775.

Counsel failed to object to the admission of Mr. Bravo’s prior conviction for negligent homicide – nearly the same crime for which he was convicted here. There is no legitimate tactical reason for counsel to have agreed to the admission of this prior conviction. Doogan, 82 Wn. App. at 189.

In State v. Hendrickson, a defendant was charged with delivery of a controlled substance, subject to enhancements, which the State attempted to prove by introducing the judgments and sentences from two prior drug-related offenses. 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The Supreme Court found Hendrickson’s counsel ineffective for failing to object to the admission of these documents, which showed prior convictions for the same charge at issue at trial. Id. The Court could not “discern a reason why Hendrickson’s counsel would not have objected to such damaging and prejudicial evidence,” as “there was no compelling need for the jury to know the cause of that [prior] incarceration.” Id.

The evidence in Mr. Bravo’s case was even more prejudicial than in Hendrickson. Mr. Bravo was charged with intentional murder and, as a lesser included, manslaughter, in connection with the death of Ms. Kipp. The admission of the 1991 J & S revealed legally irrelevant and highly prejudicial information about Mr. Bravo’s past – that he had been convicted of a homicide in 1977 – and therefore had already been held responsible for the death of another person.

Defense counsel did not move to exclude this evidence under ER 402, ER 403, or ER 404(b); State v. Gresham, 173 Wn.2d 405, 420,

269 P.3d 207 (2012). There is no discernible reason competent counsel would have consented to the admission of this evidence. Hendrickson, 129 Wn.2d at 78.

- c. Counsel was ineffective for failing to object to, or request redactions of, portions of Mr. Bravo's interview with Detective Varner.

Defense counsel was additionally ineffective when he failed to move to exclude, or for redactions of, of the October 1991 interview of Mr. Bravo by Detective Varner. RP 330; Ex. 23.

Detective Varner interviewed Mr. Bravo in October 1991, when Mr. Bravo was considered a suspect in Ms. Kipp's death, but a cause of death had not yet been determined. On page 95 of the interview, Detective Varner asked Mr. Bravo about his prior conviction for negligent homicide in 1977 and his experience in state prison. Ex. 23 at 95-96.⁷

⁷ Pages 95-96 of the Varner interview are included as Appendix B.

Bravo: I had about three years with Yakima County and... (unable to understand) Walla Walla...

Varner: But about 18 months in Walla Walla?

Bravo: Inside, yeah.

Varner: Okay uh one thing about Walla Walla uh, and this is a problem that people, why they don't like penitentiaries is that people learn how to do things there which aren't good. They...they learn illegal things. They learn how to do better burglaries. They learn how to be better thieves. They learn how to hurt people better. And one of the things that they can learn while they're in prison is how to...how to kill people. Uh, did you ever have nay problems while you were down there in Walla Walla?

Bravo: (sighs)

Ex. 23 at 96.

Detective Varner's comments in the 1991 interview were highly prejudicial, and while the tone was arguably appropriate for a police interrogation, the comments about learning "how to kill people" in prison would have been excluded from the jury's consideration by competent defense counsel. It is inconceivable that skilled defense counsel would have knowingly refrained from the opportunity to redact the above passage. As a result, the jurors took Exhibit 23 into deliberations with them, and had the opportunity to consider whether they agreed with Detective Varner's hunch – whether Mr. Bravo had, in fact, learned "illegal things" while in Walla Walla in 1977, such as "how to hurt people better," or even "how to kill people." Ex. 23 at 96.

- d. As a result of counsel's unreasonably deficient performance, Mr. Bravo was prejudiced.

Deficient performance is prejudicial within the meaning of an ineffective assistance of counsel claim if there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

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 Varner'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 related to Mr. Bravo's past was objectively unreasonable, resulting in Mr. Bravo being deprived of a fair trial in which the jury could impartially consider the allegations against him as to Ms. Kipp. Due to counsel's ineffectiveness, reversal is required.

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

Dr. Rappe testified that Ms. Kipp could not have remained alive and unconscious in her home for more than four hours. RP 283. Dr. Rappe characterized his certainty as to the time of death, and as to whether illicit drugs could have thus been metabolized by the body, as “beyond a reasonable doubt.” As explained below, this testimony was an impermissible expert opinion.

a. It is the exclusive role of the jury to find facts.

The jury’s fact-finding role is essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 760 P.2d 260 (1989); U.S. Const. amend. VI; Const. art. I, §§ 21, 22. This right is to be held “inviolable” in Washington. Const. art. I, §§ 21, 22. Therefore, “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). 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).

- b. The State's expert witness twice testified to Ms. Kipp's time of death "beyond a reasonable doubt," which invaded the province of the jury.

To determine whether statements are impermissible opinion testimony, courts will consider the circumstances of a case, including: 1) the type of witness who made the statements; 2) the specific nature of the testimony; 3) the nature of the crime charged; 4) the defense; and 5) the other evidence. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). When weighing these factors, Dr. Rappe's testimony was improper.

As to the first factor, Dr. Rappe testified as an expert witness. When considering the similar testimony, courts have noted that such opinions are particularly dangerous when supported by the prestige of expert or law enforcement witnesses. See, e.g., Montgomery, 163 Wn.2d at 595 (police witnesses); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (same); State v. King, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009).

Dr. Rappe's language should also be noted; he twice used the specific language of the legal standard: "beyond a reasonable doubt." RP 283. Mr. Bravo's defense was general denial – through his many interviews with detectives, he acknowledged being with Ms. Kipp on

the night she died, but his defense was that she had died of an overdose (as she had previously attempted), and the substance must have been metabolized, since it had not appeared in the toxicology reports.

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.

STATE: ... let me ask, so did she survive for a period of time after being strangled?

RAPPE: She did survive for a period of time. But taking all of it into account, I felt that it was beyond a reasonable doubt that she lasted more than four hours.

STATE: That she lasted more than four hours or did not last more than four hours?

RAPPE: That she did not last more than four hours.

RP 283 (emphasis added).

Dr. Rappe proceeded to discuss his reasoning for estimating a four-hour time period for death to occur. Id. He then invoked the legal standard again in his testimony: "I felt strongly that drugs would still be detected, even if she did by some odd chance, which is beyond a reasonable doubt, that she lived for, say, 15 hours." Id. (emphasis added).

Mr. Bravo's defense was general denial, and as his defense counsel correctly argued, only the jury was charged with finding the State had proved each element charged against him beyond a reasonable doubt. RP 535, 539. Defense counsel argued:

[W]hat I would like you to consider is with all the advantages they have in this case, it's fair if you hold them to their burden. If you do your duty. That's why they get all the advantages. Because they have the burden of proof. And it's a high burden to prove a case and prove the elements of a charge not to a reasonable doubt, but beyond a reasonable doubt.

RP 535.

Dr. Rappe's expert testimony improperly invoked the "beyond a reasonable doubt" standard, not once, but twice. RP 283. The time of death and the length of time Ms. Kipp's body lay unconscious and unattended went directly to the recklessness of Mr. Bravo's conduct – a critical element of first degree manslaughter. CP 34. By opining on the time of death in terms of "reasonable doubt," this expert witness improperly invaded the province of the jury.

c. The improper opinion testimony constitutes manifest constitutional error.

Improper opinion testimony is manifest constitutional error that can be raised for the first time on appeal when it involves an explicit or almost explicit witness statement on guilt or an ultimate issue of fact

that causes actual prejudice or has practical and identifiable consequences. Montgomery, 163 Wn.2d at 595; Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

The opinion here was more explicit than the opinion in Kirkman, where the court found no manifest constitutional error, since Dr. Rappe testified using the exact words contained in the legal standard, suggesting to the jury that Mr. Bravo's defense should not be considered. 159 Wn.2d at 923. In City of Seattle v. Heatley, this Court found the specific words in a witness's opinion to be important; in Heatley, the Court upheld the witness's opinion because it "was not framed in conclusory terms that merely parroted the relevant legal standard." 70 Wn. App. 573, 581, 854 P.2d 658 (1993); see also State v. Blake, 172 Wn. App. 515, 526, 298 P.3d 769 (2012). Here, Dr. Rappe's opinion twice parroted the relevant legal standard – exactly as this Court stated was forbidden in Blake and Heatley. RP 283.

Mr. Bravo's case is also distinguishable from Montgomery, where the Court indicated it found no evidence the jury was unfairly influenced by the alleged improper opinion testimony, noting there was "no jury inquiry." 163 Wn.2d at 596. Here, the jury showed its concern with Dr. Rappe's testimony concerning the time of death by

asking a question pertaining to the topic. RP 43; RP 556. The jurors sent out a note during deliberations, asking for the exact time and date that Ms. Kipp's body was discovered by roommate Charles Flowers. CP 43. This question indicated the jury's concern about the time of death, the delay, and the discovery of Ms. Kipp's body, and distinguishes Mr. Bravo's case from Montgomery, where the Court found no evidence the jury was unfairly influenced by the improper opinion testimony. 163 Wn.2d at 596.

In both Kirkman and Montgomery, the Court cited the presumption that the jury follows its instructions, absent evidence to the contrary. Id. (citing Kirkman, 159 Wn.2d at 928). In light of the evidence to the contrary here, and because Dr. Rappe's testimony went to Mr. Bravo's guilt, rather than to witness credibility (as in Kirkman), the record establishes manifest constitutional error.

The error had practical and identifiable consequences at trial. The testimony of expert witnesses is particularly prejudicial because it carries the "aura of reliability." See 5B Wash. Prac., Evidence Law and Practice § 702.16 (6th ed.). In addition, Dr. Rappe's opinion went specifically to issues the jury was obligated to resolve; specifically, as to the manslaughter count, as to whether Mr. Bravo's conduct was

reckless. CP 33, 35. The improper opinion testimony about the time of death also affected the jury enough to ask questions concerning the time of death and discovery of the body during deliberations. CP 43.

Given the influential nature of Dr. Rappe's opinion testimony and the consequential nature of the error, the error is manifest.

d. The error is not harmless beyond a reasonable doubt.

Because improper opinions on guilt invade the jury's province as the finder of fact, and thus violate the defendant's constitutional right to trial, the constitutional harmless error test applies. State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). Constitutional errors are presumed prejudicial, and the State bears the burden to show beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The State cannot meet its burden here, because it cannot show beyond a reasonable doubt that, without the improper opinion testimony of Dr. Rappe, the weak remaining evidence of Mr. Bravo's allegedly reckless conduct was sufficient to convict him of manslaughter. This

Court should reverse Mr. Bravo's remaining conviction. Chapman, 386 U.S. at 24.

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED PROPENSITY EVIDENCE UNDER ER 404(b).

The trial court erred when it admitted evidence related to Mr. Bravo and Ms. Kipp's relationship under ER 404(b). RP 41-47. The evidence of the couple's so-called "stormy relationship" was used by the State for the improper purpose of proving that Ms. Kipp was a victim of domestic violence, and that Mr. Bravo acted in conformity with past conduct when he allegedly strangled her. RP 41-43. Because the admission of this evidence was unfairly prejudicial and irrelevant, and because the court failed to balance the probity of this evidence with its prejudicial effect, a new trial is required.

a. Evidence Rule 404(b) is a categorical bar to the introduction of propensity evidence.

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

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).

Where the only relevance of the other acts is to show a propensity to commit similar bad acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character, and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (ER 404(b) is a "categorical bar" to the admission of evidence of prior acts to prove character or behavior in conformity with prior conduct).

Before admitting such evidence, a trial court must first find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown,

132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

b. The trial court erred when it admitted evidence related to the alleged history of domestic violence in the relationship, despite the unfair prejudice to Mr. Bravo.

The State moved to admit evidence that in the weeks before Ms. Kipp’s death, she and Mr. Bravo had argued a number of times, resulting in Ms. Kipp asking Mr. Bravo to leave their home. RP 41-42. The State also made an offer of proof that the couple had argued in a bar, that Mr. Bravo had grabbed Ms. Kipp by the arms during a disagreement, and that Mr. Bravo placed a bullet on a table in front of Ms. Kipp during an argument. Id.⁸

Mr. Bravo objected to the admission of this evidence, arguing it was irrelevant and highly prejudicial. RP 41-43. The State argued that

the prior acts were offered to show motive and intent. Id. The State showed its hand when it argued its purpose for offering testimony concerning the prior allegations: “When he’s the prime suspect in a murder and the murderer is making threats – and the person is making threats to the victim, I think that’s fairly obviously probative.” RP 44 (emphasis added).

The trial court did little analysis or consideration of probity or prejudice, yet the court admitted the evidence, finding its admission would not lead to an emotional response. RP 47.

Our case law is clear that a trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The burden of demonstrating a proper purpose for the admission of ER 404(b) is on its proponent. Id.

In the context of ER 404(b),

[t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable.

⁸ There was no suggestion that Mr. Bravo owned a firearm.

State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even where the evidence is relevant, the court must balance the probative value against the prejudicial effect of the evidence before admitting it. Schaffer, 63 Wn. App. at 768 (citing ER 403).

To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)). “Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value.” Lough, 125 Wn.2d at 863.

The testimony related to the previous relationship shared by Ms. Kipp and Mr. Bravo – as recalled over 25 years later – lacked substantial probative value, and the inherent prejudice derived from that testimony compelled its exclusion. The court erred when it admitted the evidence containing references to these uncharged prior acts. RP 41-47.

The court abused its discretion in admitting portions of the testimony of Ms. Kipp’s daughter, Ms. Rambo, as well as the portions

of Mr. Bravo's statements pertaining to the couple's relationship. RP 212-14; ex. 21 at 10-12; ex. 23 at 77-78, 91-93. The court's ruling did not meet the requirements of ER 404(b); therefore, the decision is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997); DeVincentis, 150 Wn.2d at 17 (trial court's decision to admit ER 404(b) evidence reviewed for an abuse of discretion).

Additionally, the deputy prosecutor compounded the court's error by emphasizing the prior act evidence in closing argument. RP 520-21, 544. The deputy prosecutor urged the jurors to focus on inadmissible allegations of domestic violence, repeating family rumors from decades earlier. RP 520-22 (arguing that Ms. Kipp sounded "scared" or was intimidated by Mr. Bravo); RP 544 (alleging that Mr. Bravo had "threaten[ed]" Ms. Kipp, despite a lack of evidence of this). The prosecutor's reference to uncharged alleged prior conduct was an improper signal to the jury to consider prior alleged acts for an improper propensity purpose. E.g., RP 521.

The State's closing argument invited the jury to do precisely what is forbidden – to use the evidence of the uncharged prior acts "for

the purpose of proving [his] character” and to “show that the person acted in conformity with that character.” Gresham, 173 Wn.2d at 420-21. The court’s determination that the evidence fell under the intent and motive exceptions constitutes an abuse of discretion.

c. This Court should reverse and remand for a new trial.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599. The admission of the evidence of domestic violence was not harmless because without this evidence, the outcome of the trial would have been different.

The evidence in this case was largely circumstantial, as the State conceded. RP 544. The jury likely found the lack of evidence indicating a violent death to be compelling, as they acquitted Mr. Bravo of intentional murder and convicted him of first degree manslaughter. RP 560; CP 44, 45.

It is reasonably probable that Mr. Bravo would not have been convicted of manslaughter, either, if not for the erroneous admission of

propensity evidence that improperly put Ms. Kipp's death into the context of domestic violence. Without the admission of this propensity evidence and the prosecutor's emphasis on it during closing, the jury would have only heard of Ms. Kipp's unwitnessed death while suffering from a leukemia relapse in a room full of pills, Mr. Bravo's discovery of her body while holding a bag of groceries, and his weeping over her body. A reasonable jury would have reached a different result.

Accordingly, Mr. Bravo's manslaughter conviction should be reversed and remanded for a new trial without the erroneous admission of propensity evidence. Gresham, 173 Wn.2d at 420; Freeburg, 105 Wn. App. at 501, 507.

4. THE TRIAL COURT IMPROPERLY IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The legislature has changed the law as to legal financial obligations. Under *State v. Ramirez*, these changes apply to cases on appeal.

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). The previously mandatory \$200 filing fee cannot be imposed on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). It is also improper to impose the

\$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. State v. Ramirez, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. Id. Applying the change in the law, the Ramirez Court ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee and \$50 sheriff fee. Id.

Here, Mr. Bravo has already been determined to be indigent. CP 83-85. The trial court imposed the \$200 filing fee and the \$50 sheriff service fee against Mr. Bravo. RP 595-96; CP 65. As in Ramirez, the change the law applies to Mr. Bravo's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$250 in discretionary fees. Ramirez, 191 Wn.2d at 749-50.

E. 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 4th day of March, 2018.

Respectfully submitted,

s/ Jan Trasen

JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A



VERIFIED

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,
Plaintiff,
v.
ARNULFO ROMERO BRAVO,
WA11020665
MLPD 91-12325
Defendant.

JUDGMENT # MD
91 9 00977 7
No. 91-1-00292-7
JUDGMENT AND SENTENCE
(Felony)

I. HEARING

- 1.1 A sentencing hearing in this case was held on November 22, 1991.
1.2 Present at the sentencing hearing were:
Defendant: ARNULFO ROMERO BRAVO
Defendant's attorney: Eric Weston
Prosecuting Attorney: John D. Knodell
Other:
1.3 The state has moved for dismissal of Count 1.
1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report, and case record to date, the court finds:

- 2.1 CURRENT OFFENSE(S): The defendant was found guilty on November 22, 1991 by guilty plea:
THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(a) and RCW 9A.56.02(1)(a)(CRIME CODE 2504; Date of Crime: between September 28 and October 1, 1991; Incident #: MLPD 91-12325;
() With special verdict/finding for use of deadly weapon on Count(s): N/A
() Current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400(1)): N/A

-1- JUDGMENT AND SENTENCE

FILED
DEDRA J. OSBORN, CLERK
BY MINDY DALEY DEPUTY
NOV 22 1991
RECORDED IN 168-C
VOLUME 10 PAGE 577

AKA

2.2 CRIMINAL HISTORY: The court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360:

1. CRIME: Negligent Homicide; SENTENCING DATE: 05-04-77;
ADULT/JUVENILE: Adult; CRIME DATE: 10-10-76;

2.3 SENTENCING DATA:

COUNT 1: OFFENDER SCORE: 1; SERIOUSNESS LEVEL: II; RANGE:
2 to 6 months; MAXIMUM: 10 years and/or \$20,000 fine;

2.4 EXCEPTIONAL SENTENCE:

() Substantial and compelling reasons exist which justify a sentence above/below the standard range;

Count(s). Findings of Fact and Conclusions of Law are attached in Appendix D.

2.5 CATEGORY OF OFFENDER: The defendant is:

A. () An offender who shall be sentenced to confinement over one year.

B. () An offender who shall be sentenced to confinement one year or less.

C. () A first time offender who shall be sentenced under the waiver of the presumptive sentence range, (RCW 9.94A.030(12), .120(5)).

2.6 RESTITUTION:

Based on information concerning restitution attached, the defendant is responsible for payment of restitution:

() For offense adjudicated herein pursuant to RCW 9.94A.140(1).

() For offenses which were not prosecuted and for which the defendant agreed to make restitution in a plea agreement, which is attached.

III. JUDGMENT

IT IS ADJUDGED that the defendant is guilty of the crime(s) of:

THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(a) and RCW 9A.56.02(1)(a)(CRIME CODE 2504; Date of Crime: between September 28 and October 1, 1991; Incident No. MLPD 91-12325

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below:

4.1 MONETARY ASSESSMENTS:

- () A. RESTITUTION: Restitution payments (with credit for amounts paid by co-defendants, if any) to:

TOTAL RESTITUTION: \$

- (XX) B. COSTS: Court costs, to be taxed by the Clerk of the Court.
- (XX) C. VICTIM ASSESSMENT: Penalty assessment pursuant to RCW 7.68.035; \$100.00
- (X) D. RECOUPMENT FOR ATTORNEY FEES: \$ 200.00
- () E. FINE \$
- () F. DRUG ENFORCEMENT FUND \$
- () G. OTHER \$
- () H. \$1,000 MANDATORY FINE PURSUANT TO RCW 69.50.430(1) \$
- () I. \$2,000 MANDATORY FINE PURSUANT TO RCW 69.50.430(2) FOR A SUBSEQUENT CONVICTION \$
- () J. MANDATORY FINE WAIVED - COURT FINDS DEFENDANT TO BE INDIGENT

The above payment shall be made to the Grant County Superior Court Clerk, P.O. Box 37, Ephrata, WA 98823, by certified check or money order, and according to the following terms:

- (XX) Under the direction as provided by his Community Corrections Officer
- (XX) At the rate of \$ 25⁰⁰ or more per month commencing Dec., 1991
- (XX) The defendant shall provide a copy of receipts of such payments to his Community Corrections Officer.

The Clerk of the Court shall credit monetary payments to the above obligations in the above listed order.

4.2 The court DISMISSES Count 1.

4.3 DETERMINATE JUDGMENT AND SENTENCE (ONE YEAR OR LESS)

(X) A. CONFINEMENT: The defendant is sentenced to a term of total confinement in the Grant County Jail for 43 days/months; with credit for time served, to commence N/A. Defendant has served 43 days in confinement before sentencing, as of November 22, 1991, and the confinement was solely in regard to the offense(s) for which the offender is being sentenced.

() B. ALTERNATE CONVERSION:

a. _____ days/months of total confinement are hereby converted to _____ days/months of partial confinement to be served subject to the rules and regulations of the Grant County Jail.

b. _____ days/months of total confinement are hereby converted to _____ hours of community service to be completed, pursuant to the attached rules and regulations of the Department of Corrections, Division of Community Supervision:

() as directed by defendant's community corrections officer;

() as follows: _____

c. The defendant is eligible for an alternative sentence to total confinement pursuant to RCW 9.94A.380, but alternatives were not utilized because:

4.4 (4) COMMUNITY SUPERVISION:

Defendant shall serve 12 months of community supervision, pursuant to the attached rules and regulations of the Department of Corrections, Division of Community Supervision, to commence:

(4) immediately;

() upon defendant's release from custody;

or, if this matter stayed pending appeal, upon receipt of the mandate. Defendant shall report immediately upon release to the said Department and Division at 229 First Avenue Northeast, Ephrata, Washington, 98823

4.5 (X) OTHER CONDITIONS:

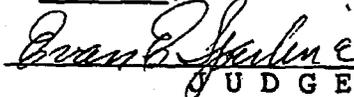
- () a. The offender is restrained from committing new offenses.
- (X) b. The offender shall abide by all conditions of supervision as set forth by his community corrections officer.

The court shall retain jurisdiction over the defendant for a period of ten years for financial obligations. When the period of community supervision ordered above has expired, you must continue to report to and be monitored by the Department of Corrections, Division of Community Corrections, for so long as any financial obligations remain unpaid.

Violations of the conditions or requirements of this sentence are punishable by up to 60 days of confinement for each violation (RCW 9.94A.200(2)).

IT IS FURTHER ORDERED that the representation of the defendant by his court appointed counsel is terminated 30 days from the date hereof.

SIGNED IN OPEN COURT: November 22, 1991



J U D G E

Presented by



John D. Knodell,
Prosecuting Attorney

Approved as to form:

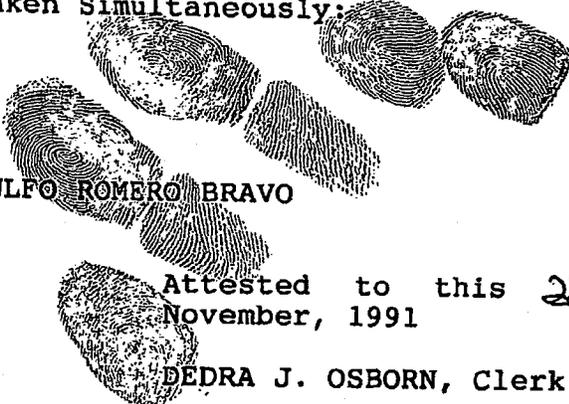
Eric Weston,
Attorney for Defendant

FINGERPRINTS

LEFT FOUR FINGERS Taken Simultaneously:



RIGHT FOUR FINGERS Taken Simultaneously:



Fingerprints of: ARNULFO ROMERO BRAVO

Attested to this 2nd day of
November, 1991

DEDRA J. OSBORN, Clerk

by: Barbara J. Smith
Deputy Clerk

OFFENDER IDENTIFICATION

State I.D. Number: WA11020665
Date of Birth: 10-26-51
Sex: Male
Race: White/Hispanic

APPENDIX B

Bravo: I had about three years with Yakima County and... (unable to understand) Walla Walla...

Varner: But about 18 months in Walla Walla?

Bravo: Inside, yeah.

Varner: Okay uh one thing about Walla Walla uh, and this is a problem that people, why they don't like penitentiaries is that people learn how to do things there which aren't good. They...they learn illegal things. They learn how to do better burglaries. They learn how to be better thieves. They learn how to hurt people better. And one of the things that they can learn while they're in prison is how to...how to kill people. Uh, did you ever have nay problems while you were down there in Walla Walla?

Bravo: (sighs)

Varner: Did you have any problems with any other prisoners?

Bravo: With nobody.

Varner: And you never got in any trouble yourself or?

Bravo: Nothing, huh uh

Varner: Or any...any uh discipline? Any fights or anything?

Bravo: No, I never fight.

Varner: Okay

Bravo: The only thing they did (unable to understand) over there because I was work in the kitchen for over two months. And my first wife, she was in, what do you call, Selah?

Varner: She was in Selah?

Bravo: Out of Toppenish.

Mitchell: Uh huh

Bravo: And she would send me some money some times and I go "hey, no send me some money, you need money." So I started working in...in the kitchen and I worked for two months, for over

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36062-8-III
)	
ARNULFO BRAVO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF MARCH, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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GRANT COUNTY PROSECUTOR'S OFFICE
PO BOX 37
EPHRATA, WA 98823-0037 | ()
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(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> ARNULFO BRAVO
A# 21251674
NORTHWEST DETENTION CENTER
1623 EAST J ST.
TACOMA, WA 98301 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MARCH, 2019.

X _____ 

Washington Appellate Project
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