

FILED
Court of Appeals
Division III
State of Washington
12/2/2019 8:00 AM

No. 36721-5-III

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

STATE OF WASHINGTON, Respondent

v.

MIGUEL SANCHEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY
THE HONORABLE JUDGE CARRIE L. RUNGE

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT..... 5

 A. Mr. Sanchez Received Ineffective Assistance of Counsel
 In Violation Of His Constitutional Rights..... 5

 1. Arrest Warrants and Police Photos 8

 2. Improper Opinion Testimony..... 10

 B. The Trial Court Erred When It Admitted Irrelevant and
 Overly Prejudicial Propensity Evidence..... 15

 1. Improper Admission Under ER 403. 16

 2. The Evidence About A Relapse Was Improper
 and Inadmissible Character Evidence 18

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Cases

<i>In re Pers. Restr. of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994) ..	20
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	6
<i>State v. Ashley</i> , 186 Wn.2d 32, 375 P.3d 673 (2016).....	20
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	11
<i>State v. Crow</i> , 8 Wn.App.2d 480,438 P.3d 541 (2019).....	6
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	18
<i>State v. Fortun-Cebada</i> , 158 Wn.App.158,241 P.3d 800 (2010)...	10
<i>State v. Foxhoven</i> , 161 Wn.2d 168,163 P.3d 786 (2007).....	15
<i>State v. Freeburg</i> , 105 Wn.App. 492, 20 P.3d 984 (2001)	12, 13
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	13
<i>State v. Hendrickson</i> ,129 Wn.2d 61, 917 P.2d 563 (1996)	7
<i>State v. Jeffries</i> , 105 Wn.2d 398, 717 P.2d 722 (1986).....	6
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	14
<i>State v. Kendrick</i> 47 Wn.App. 620, 736 P.2d 1079 (1987)	17
<i>State v. Lehman</i> , 8 Wn.App. 408, 506 P.2d 1316 (1973).....	14
<i>State v. Lei</i> , 59 Wn.2d 1, 365 P.2d 609 (1961).....	7
<i>State v. Madison</i> , 53 Wn.App. 754, 770 P.2d 662, (1989)	11
<i>State v. Magers</i> , 164 Wn.2d 174,189 P.3d 126 (2008)	19
<i>State v. McDaniel</i> , 155 Wn.App. 829, 230 P.3d 245 (2010).....	13
<i>State v. Messinger</i> , 8 Wn.App. 829,509 P.2d 382 (1973)	8
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	6
<i>State v. Nichols</i> , 5 Wn.App. 657, 491 P.2d 677 (1971)	12
<i>State v. Powell</i> ,126 Wn.2d 244, 893 P.2d 615 (1995).....	15
<i>State v. Reichenbach</i> , 153 Wn.2d 126,101 P.3d 80 (2004)	7

<i>State v. Rennenberg</i> , 83 Wn.2d 735, 522 P.2d 835 (1974).....	18
<i>State v. Rundquist</i> , 79 Wn.App. 786, 905 P.2d 922 (1995).....	16
<i>State v. Sanders</i> , 66 Wn.App. 380, 832 P.2d 1326 (1992).....	11
<i>State v. Scherf</i> , 192 Wn.2d 350, 429 P.3d 776 (2018).....	11
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	16
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963).....	15
<i>State v. Taylor</i> , 60 Wn.2d 32, 371 P.2d 617 (1962).....	14
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	6
<i>State v. Thrift</i> , 4 Wn.App. 192, 480 P.2d 222 (1971).....	8

Federal Cases

<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).....	15
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6

Constitutional Provisions

Const. art. 1§22	6
U.S.Const. Amend.VI.....	6

Court Rules

ER 401	10, 16
ER 403	15
ER 404(b).....	15

I. ASSIGNMENTS OF ERROR

- A. Mr. Sanchez Received Ineffective Assistance Of Counsel In Violation Of His Sixth Amendment.
- B. The Trial Court Erred When It Admitted Irrelevant And Unfairly Prejudicial Testimony About Alleged Drug Use.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Was Mr. Sanchez denied his constitutional right to effective assistance of counsel where his attorney failed to object to unduly prejudicial evidence?
- B. Was Mr. Sanchez denied his right to effective assistance of counsel where his attorney failed to object to improper opinion testimony?
- C. Did the trial court err when it admitted irrelevant and overly prejudicial propensity evidence without conducting the required analysis on the record?

II. STATEMENT OF FACTS

Benton County prosecutors charged Miguel Sanchez by amended information with assault in the second degree, by strangulation, with an allegation of aggravated domestic violence, witness tampering, and three counts of violation of a no-contact order, each with a domestic violence allegation. CP 8-11.

Pretrial Motions

The prosecutor sought to admit testimony that the alleged assault occurred because Ms. Candelaria accused Mr. Sanchez of having relapsed by using methamphetamines. RP 18-19. Defense counsel objected the information would be unduly prejudicial. RP 18. The court ruled the statements about drug use were admissible “for purposes of the victim being able to tell her story and what led up to any sort of confrontation between her and Mr. Sanchez that its relevant and probative.” 1RP 20.

Testimony At Trial

On December 18, 2018, Victoria Candelaria and Miguel Sanchez were home with her 5-year old and their baby. 1RP 108,112. He did not go to work that day. 1RP 109. She reportedly confronted him about drug use, which he denied. 1RP 109-110. Angered at her accusations, he began packing his clothing to leave. 1RP 110. As the argument continued she said he came toward her and choked her. 1RP 110-111.

She testified he put his hand around her throat and squeezed “a little.” 1RP 112. She could not remember if her breathing was obstructed and said it lasted for “no more than a few seconds.” RP 118, 125.

Ms. Candelaria went outside through a slider door and tried to jump the fence. She slipped and fell. Mr. Sanchez grabbed her leg and dragged her toward the door. 1RP 111. He hit and punched her, and then “it was like he snapped back to reality and stopped and left.” 1RP 113.

Ms. Candelaria went through the front door and flagged down a car at a stop sign. 1RP 113-14. The driver of the car reported she was frantic but not crying. 1RP 29-30. He said she did *not* have difficulty breathing. 1RP 32. They called 911. 1RP 30. Without objection, he testified she said, “My husband hit me. He is high on meth and he has got the children in the house.” 1RP 31. Without objection, the witness further testified, “When I heard the word ‘meth’, and I have been in situations where I know that its taken more than one of us to take somebody down on meth, I wasn’t at 72 years old going to walk in there and try to take somebody down who might be on meth.” 1RP 33. The driver maneuvered his car to Ms. Candelaria’s home, and she got her children. 1RP 32-33.

Officer Gilbert was dispatched to the home. 1RP 49. In contrast to the driver, Officer Gilbert testified Ms. Candelaria had difficulty breathing. 1RP 51. He said she was upset, had difficulty

speaking, and coughed. 1RP 50. Without objection, Gilbert testified “And then she got upset with him [Sanchez] because she believed that he was using narcotics again. Meth is what she said. She got upset with him and they got into a verbal argument over that.” 1RP 50-51.

Officer Gilbert testified Ms. Candelaria had bloodshot eyes. 1RP 53. He also testified she told him that Mr. Sanchez grabbed her where she had had surgery on her neck. 1RP 54. Ms. Candelaria later testified she had not had surgery but had merely taken a pill to deal with a thyroid condition. 1RP 119.

Officer Baker testified he saw Mr. Sanchez a few days later near a Wal-Mart. 1RP 71. Without objection, he testified, “We told him to get his hands up in the air, you know, that he was under arrest. He has some *warrants*.” 1RP 72. He further testified, without objection, “He kept asking us questions which is a common tactic for somebody that doesn’t want to be arrested. Usually leads into a foot chase is my experience. It’s kind of a delay tactic and that’s exactly what happened.” 1RP 73.

Detective Flohr identified Ms. Candelaria and Mr. Sanchez as the individuals talking on recorded phone calls from the jail. 1RP 103. Defense counsel asked, “ I am afraid you haven’t told us at all

how you were able to identify the voices. Do you know Mr. Sanchez?" Flohr answered, "I know him through police photos is how I know him." When asked how he identified his voice, Flohr answered, "Because I listened to two video recorded jail phone calls that he had with Sonia, with Valerie's daughter." Defense counsel asked, "How did you know that was him in those?" Flohr: "Because of how he looked in the tattoos on his face and neck." Defense counsel: "Oh, you are talking about the video?" "So just from two videos you were able to identify his voice on the other phone calls with Ms. Candelaria; is that right?" Flohr: "And comparing them with the photos, police photos, yes, that we have." 1RP 103.

The jury found Mr. Sanchez guilty on all charges. CP 75-87. Based on the aggravating factor, the court imposed a 102-month sentence. CP 94,99. He makes this timely appeal. CP 101.

III. ARGUMENT

A. Mr. Sanchez Received Ineffective Assistance of Counsel In Violation Of His Constitutional Rights.

Guilt or innocence should not depend on the performance of the defendant's trial counsel. *State v. Crow*, 8 Wn.App.2d 480, 506,

438 P.3d 541 (2019). Under the federal and state constitutions, to protect a defendant's right to counsel, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S.Const. Amend.VI; Const. art. 1§22.

A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). An ineffective assistance of counsel claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

To establish ineffective assistance of counsel, the defendant must show (1) defense counsel's representation was deficient because it fell below an objective standard of reasonableness; and (2) the deficient representation prejudiced the defendant because there was a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722 (1986).

This presumption of effective representation is overcome when there is no conceivable legitimate tactic or strategy explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Additionally, there must be some indication on the record that counsel was actually pursuing the alleged strategy. See *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996). "The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial." *State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961).

Here, counsel failed to object to irrelevant, and overly prejudicial testimony, for which there was no discernable reason not to object. First, counsel failed to object to the officer's testimony that Mr. Sanchez had "some warrants" 1RP 72. Second, on witness voir dire defense counsel himself asked how a detective knew Mr. Sanchez and learned it was from "police photos." 1RP 103. Third, counsel failed to object when the officer editorialized about the arrest of Mr. Sanchez saying, "He kept asking us questions *which is a common tactic for somebody that doesn't want to be arrested. Usually leads into a foot chase is my experience. It's kind of a delay tactic and that's exactly what happened.*" 1RP 73.

1. Arrest Warrants and Police Photos

The officer's remark about the arrest warrants is similar to the testimony in *State v. Thrift*, 4 Wn.App. 192, 480 P.2d 222 (1971). There, the defendant was charged with violating the Uniform Narcotic Drug Act. During opening argument and in direct examination, the prosecutor brought out information there was a warrant for Thrift's arrest, unrelated to the crime for which he was charged. *Id.* at 193-194. The Court held the officer's testimony about the unrelated arrest warrant was inadmissible because it was not relevant or necessary to prove an essential element of the charged crime. *Id.* at 194-95.

Likewise, here the officer's testimony about warrants (plural) was entirely unnecessary to prove an essential element of the charged offenses. It was a collateral matter which did not fit into any recognized exception, and its introduction was erroneously prejudicial. The failure to object left the jury to speculate, or worse, conclude that Mr. Sanchez was wanted by the police on other unrelated criminal matters. The comment about "warrants" should have been inadmissible both on grounds of irrelevance and the highly prejudicial effect on the jury. *State v. Messinger*, 8 Wn.App. 829, 834, 509 P.2d 382 (1973).

Similarly, the discussion of police photos was problematically prejudicial. Defense counsel elicited testimony from Detective Flohr as to how he recognized Mr. Sanchez's voice. Initially counsel asked: "Detective, I am afraid you haven't told us at all how you were able to identify the voices. Do you know Mr. Sanchez?" RP 103. The officer reported knew "through police photos is how I know him." RP 103. Rather than objecting and having that answer stricken, counsel asked, "Photos? How did you identify his voice?" After reporting he had listened to two video recorded jail calls, and saw Mr. Sanchez's tattoos, counsel asked "So just from two video calls you were able to identify his voice on the other phone calls...." To which the officer replied, "And comparing them with the photos, police photos, yes, that we have." RP 103.

The questioning allowed the officer to twice say that he recognized Mr. Sanchez from "police photos." Again, the implication for the jury was that Mr. Sanchez had a criminal history that included booking photos. Rather than objecting on the basis of the information being irrelevant or overly prejudicial, and asking for a curative instruction, counsel objected that the foundation for the jail calls was inadequate. 1RP 104.

The failure to object to the irrelevant and prejudicial testimony was ineffective assistance of counsel. Under ER 401, relevant evidence is generally admissible, but it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. If evidence is admissible, the failure to object is not ineffective assistance of counsel. *State v. Nichols*, 151 Wn.2d at 14-15. However, if an objection would likely have been sustained, the defendant has met his burden. *State v. Fortun-Cebada*, 158 Wn.App. 158, 172, 241 P.3d 800 (2010). Here, an objection should and would have been sustained because information about warrants and police photos was unnecessary, irrelevant, and unfairly prejudicial.

2. Improper Opinion Testimony

During motions in limine, the State sought to admit evidence of that Mr. Sanchez left the home immediately after the incident, and his attempted flight from officers two days later. 1RP 14.

Defense counsel argued:

I just - - I think a lot of the circumstances aren't relevant to this case. I guess if they went through a process of looking for him and located him and then arrested him, I mean, I don't think the process is relevant Judge. And it does kind of - - it does put him in a bad light, I guess, so that's why I am asking to restrict that evidence. 1RP 15.

THE COURT: The court finds that that's part of the case and evidence of flight is admissible. It's just essentially testimony regarding the circumstances about making contact with the defendant; so, at this point I would expect that that evidence would be admissible.

1RP 15.

The testimony from the arresting officer was an editorialized account of the arrest encounter, describing Mr. Sanchez's questions as a delay tactic by someone who does not want to be arrested. He said: "*Usually leads into a foot chase is my experience. It's kind of a delay tactic and that's exactly what happened.*" 1RP 73.

This resulted in an improper opinion on guilt. The general rule is that witnesses are to state facts, and not to express inferences or opinions. *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). A witness, lay or expert, may not testify about a defendant's guilt or innocence, whether by direct statement or inference. *State v. Scherf*, 192 Wn.2d 350, 389, 429 P.3d 776 (2018); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion as to guilt of a defendant is particularly prejudicial and improper when it is expressed by a government official, such as a police officer. *State v. Sanders*, 66 Wn.App. 380, 387, 832 P.2d 1326 (1992).

The point of the officer's testimony was to guide the jury to easily infer that he considered Mr. Sanchez a guilty person, who would try to flee like other guilty individuals. Had he simply stated the facts, that Mr. Sanchez attempted to flee, the information might have been admissible if it created a "reasonable and substantive inference" that his departure was "a deliberate effort to evade arrest or prosecution." *State v. Nichols*, 5 Wn.App. 657, 660, 491 P.2d 677 (1971).

However, even evidence of an attempted flight may be somewhat attenuated with marginal probative value as to substantial evidence of guilt, because it requires four inferences: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *State v. Freeburg*, 105 Wn.App. 492, 498, 20 P.3d 984 (2001).

It is the third step of the analysis: 'consciousness of guilt to consciousness of guilt concerning the crime charged' which the evidence cannot substantiate. One officer testified Mr. Sanchez had arrest warrants. There was no evidence he knew he was being

arrested for the alleged crime against his partner. The testimony that he attempted to flee was irrelevant and unfairly prejudicial.

In *State v. McDaniel*, 155 Wn.App. 829, 230 P.3d 245 (2010), the Court reasoned that evidence of flight “tends to be only marginally probative as to the ultimate issue of guilt or innocence [,so] the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” *Id.* at 854 (Citing to *State v. Freeburg*, 105 Wn.App. 492, 498, 20 P.3d 984 (2001)).

The failure to object to the editorialized version of the arrest encounter put highly prejudicial information before the jury as substantive evidence. Counsel’s failure to ask the remark to be stricken, and the jury instructed to disregard it was not part of a discernible trial strategy or tactic. Moreover, “the relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)). Here, the choice was neither strategic nor reasonable.

Under *Strickland*, a defendant must show a reasonable probability that but for counsel’s errors, the result of the proceeding

would have been different, that is, a probability sufficient to undermine confidence in the outcome of the trial. *Grier*, 171 Wn.2d at 34. A reasonable probability is lower than a preponderance standard. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

In *State v. Lehman*, 8 Wn.App. 408, 506 P.2d 1316 (1973), an FBI agent testified he participated peripherally in obtaining a picture of the suspected bank robber. *Id.* at 415. He said, "...my office advised that they would obtain it or at least try to obtain a photograph of him from McNeill Island Penitentiary." *Id.* Defense counsel objected immediately, and the court directed the remark to be stricken and the jury to disregard it. *Id.* at 416. The Court on review said, "Nonetheless, the injection by an experienced law enforcement officer of the 'McNeill Island Penitentiary' language cannot be condoned." *Id.* The Court quoted:

This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a convictionThe witness...is one with long experience in law enforcement...Surely, he was conscious of the rules of evidence that prohibit such actions of a witness.

(citing to *State v. Taylor*, 60 Wn.2d 32, 37, 371 P.2d 617 (1962)).

Here, the remarks were not objected to, the court was not given an opportunity to instruct the jury, and when combined, the remarks opened the door to the jury considering impermissible character evidence which implied guilt.

B. The Trial Court Erred When It Admitted Irrelevant and Overly Prejudicial Propensity Evidence.

The trial court erred in allowing testimony about Mr. Sanchez's alleged illegal use of a controlled substance. The evidence was irrelevant to the charges under ER 403 and improper character evidence under ER 404(b).

Due process does not guarantee every person a perfect trial, but rather, a fair trial untainted by inadmissible, overly prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). Erroneous evidentiary rulings deprive the defendant of the constitutional guarantee of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168,174, 163 P.3d 786 (2007). The trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A

decision is based on “untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

1. Improper Admission Under ER 403.

Evidence is only relevant where it makes the existence of a fact of consequence in an action more or less likely. ER 401. The evidence must be material to an essential ingredient of the charged crime, and relevant for an identified purpose other than demonstrating the defendant’s propensity to commit certain crimes. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Ms. Candelaria’s account that the basis for the argument was her suspicion that Mr. Sanchez had relapsed did not relate to any essential element of the charged assault. Officer Gilbert testified Ms. Candelaria was upset because she believed Mr. Sanchez was using meth and Andrew Grego reported he did not want to be involved with Mr. Sanchez because of his experience with people who were on meth. 1RP 31,33, 50,109. The admission of the evidence was unduly prejudicial.

A trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence

significantly outweighs its probative value. ER 403. In weighing the admissibility of evidence to determine whether the danger of unfair prejudice substantially outweighs its probative value, a court should consider (1) the importance of the fact that the evidence is intended to prove, (2) the strength and length of the chain of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick* 47 Wn.App. 620, 628, 736 P.2d 1079 (1987)(citing M. Graham, *Federal Evidence* § 403.1, at 180-181 (2d Ed. 1986)).

First, as described above, whether Mr. Sanchez and Ms. Candelaria argued because she accused him of a drug relapse was irrelevant to the charge. The State's justification for introduction of the accusation was that it would be extremely confusing to the jury about why they were fighting if Ms. Candelaria did not explain the circumstances. This does not stand up to scrutiny: whether they argued about drugs, or something else, was irrelevant to what the State had accused Mr. Sanchez.

Second, the accusation was unnecessary to any chain of inferences that would establish the fact of assault in the second degree. Rather, the inference for the jury to make was that Mr.

Sanchez hurt Ms. Candelaria because he had relapsed. Alleged unlawful use of a controlled substance, such as methamphetamine, is not only a crime, but “in view of society’s deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror.” *State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974).

Third, the information was so irrelevant to the charge, regardless of whether it was disputed, it made no difference. Fourth, there was no other means of proving whether Mr. Sanchez had relapsed. And finally, a potential limiting instruction would have been even more prejudicial to Mr. Sanchez. The very crafting of an instruction which would in essence tell the jury it could only consider alleged drug relapse to explain why the alleged assault occurred would be to place more emphasis on the testimony.

2. The Evidence About A Relapse Was Improper and Inadmissible Character Evidence

Generally, evidence of a defendant’s prior bad acts is inadmissible to demonstrate the accused’s propensity to commit the current crime. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Here, the State was required to prove that Mr.

Sanchez unlawfully assaulted Ms. Candelaria. Introduction of the alleged prior bad act of a methamphetamine relapse was unduly prejudicial because it was improper propensity evidence.

Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the other “crime, wrong, or act” actually occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d at 745. The trial court must conduct this analysis on the record. *State v. Foxhoven*, 161 Wn.2d at 175. Here, the trial court erred as a matter of law by failing to perform each step of the ER 404(b) analysis.

“By generally allowing admission of highly prejudicial evidence of prior bad acts to be admitted at trial, the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant's past. ER 404(b) protects against this type of prejudicial and biased trial.” *State v. Magers*, 164 Wn.2d 174, 198, 189 P.3d 126 (2008) (Johnson, dissenting). The court erred in allowing the testimony

about a relapse because it was irrelevant, unduly prejudicial, and improper character evidence.

Erroneous admission of evidence is harmless unless there is a reasonable probability that, but for the error, the verdict would have been materially different. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016). Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Here, the combination of defense counsel's errors, the trial court's failure to conduct an ER 404(b) analysis, and statements about methamphetamine use and relapse resulted in a reasonable probability that had the errors not occurred the outcome of the trial would have been materially affected. *State v. Smith*, 106 Wn.2d at 780.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Sanchez respectfully asks this Court to reverse his convictions and remand for a new trial.

Respectfully submitted this 2nd day of December 2019.

Marie Trombley

Marie Trombley, # 41410
Attorney for Miguel Sanchez
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on December 2, 2019 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Benton County Prosecuting Attorney at prosecuting@co.benton.wa.us and to Miguel Sanchez/DOC#415462, Coyote Ridge Corrections Center, PO Box 769 Connell, WA. 99326



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920

MARIE TROMBLEY

December 02, 2019 - 1:28 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36721-5
Appellate Court Case Title: State of Washington v. Miguel Angel Sanchez
Superior Court Case Number: 18-1-01551-4

The following documents have been uploaded:

- 367215_Briefs_20191202012711D3313101_8920.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Sanchez AOB.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- prosecuting@co.benton.wa.us
- terry.bloor@co.benton.wa.us

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net
Address:
PO BOX 829
GRAHAM, WA, 98338-0829
Phone: 253-445-7920

Note: The Filing Id is 20191202012711D3313101