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NO. 65071-8-F

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

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DEC 22 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHAM GHE,

Appellant.

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

The Honorable Theresa Doyle, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. FAILUING TO LIMIT THE JURY’S CONSIDERATION OF UNCHARGED MISCONDUCT DEPRIVED CHAM OF A FAIR TRIAL.	1
2. CHAM WAS PREJUDICED BY HIS ATTORNEY’S FAILURE TO REQUEST A LIMITING INSTRUCTION CONSISTENT WITH THE DEFENSE STRATEGY.	4
3. WITH NO PERSONAL EXPRESSION OF INTENT, CHAM DID NOT WAIVE HIS RIGHT TO A JURY TRIAL ON THE AGGRAVATING FACTOR.	5
4. THIS COURT SHOULD REVIEW THE INSTRUCTIONAL ERROR THAT THE <i>BASHAW</i> COURT PRESUMED TO BE MANIFEST AND CONSTITUTIONAL IN NATURE.	7
B. CONCLUSION.	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Detention of Moore</u> , 167 Wn.2d 113, 216 P.3d 1015 (2009)	6
<u>State v. Bacotgarcia</u> , 59 Wn. App. 815, 801 P.2d 993 (1990)	1
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010)	7, 8
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007)	1, 2, 3
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950)	1, 2, 3
<u>State v. Hos</u> , 154 Wn. App. 238, 225 P.3d 389 <u>review denied</u> , 169 Wn.2d 1008 (2010)	6, 7
<u>State v. Johnson</u> , 104 Wn.2d 338, 705 P.2d 773 (1985)	5, 6
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	3
<u>State v. Russell</u> , 154 Wn. App. 775, 225 P.3d 478 <u>review granted</u> , 169 Wn.2d 1006 (2010)	1, 2, 3, 4
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982)	1, 5
<u>State v. Stein</u> , 140 Wn. App. 43, 165 P.3d 16 (2007)	1

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987)5

State v. Wicke,
91 Wn.2d 638, 591 P.2d 452 (1979)6, 7

State v. Williams,
156 Wn. App. 482, 234 P.3d 1174
review denied, ____ Wn.2d ____ (no. 848441, filed Nov. 30, 2010) . . .1, 2

Seattle v. Gardner,
54 Wn.2d 112, 338 P.2d 125 (1959)6, 7

FEDERAL CASES

United States v. Ferreboeuf,
632 F.2d 832 (9th Cir. 1980)6

RULES, STATUTES, AND OTHER AUTHORITIES

ER 404(b) 4

RAP 2.5(a) 7

RCW 9.94A.535.8

RCW 9.94A.537.8

A. ARGUMENT IN REPLY

1. FAILUING TO LIMIT THE JURY'S CONSIDERATION OF UNCHARGED MISCONDUCT DEPRIVED CHAM OF A FAIR TRIAL.

Juries are naturally inclined to treat other bad acts as evidence of criminal propensity. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Courts have long urged the use of limiting instructions when such evidence is admitted to ensure that accused persons are convicted only upon proof beyond a reasonable doubt of the crime charged and not due to perceived bad character. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950). Recently, Washington courts have begun to enhance this protection, requiring a limiting instruction regardless of whether it is requested. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Russell, 154 Wn. App. 775, 777, 225 P.3d 478 (2010), review granted, 169 Wn.2d 1006 (2010). But see State v. Williams, 156 Wn. App. 482, 234 P.3d 1174 (2010), review denied, _____ Wn.2d _____ (no. 848441, filed Nov. 30, 2010).¹ Cham asks this Court to

¹ The Williams court's entire analysis of this question consists of one paragraph:

Mr. Williams also assigns error to the court's failure to instruct the jury on the limited purpose of this evidence. The trial court is required to give the jury a limiting instruction if requested. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007). Mr. Williams did not request a limiting

follow Foxhoven and Russell and hold that without a limiting instruction, the admission of prior bad act evidence violated his right to a fair trial.

The State would have this Court reject the Washington Supreme Court's clear language in Foxhoven, and Division Two's clear application of that language in Russell. Foxhoven, 161 Wn.2d at 175; Russell, 154 Wn. App. at 777. Instead, the State relies on older cases and attacks the underpinnings for Foxhoven and Russell. See Brief of Respondent at 9-10.

But Russell and Foxhoven stand on firm foundations grounded in precedent and policy. First, these cases rest on the shoulders of State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950). As long ago as 1950, Washington courts recognized the courts' independent duty to protect criminal defendants from jurors' natural tendency to convict based on character. Id. at 379. In that case, evidence of other, unrelated sex offenses was admitted, and the court first noted that evidence of uncharged crimes, "may well be better calculated to inflame the passions of the jurors

instruction and therefore waived any right to assign error here. Stein, 140 Wn. App. at 70, 165 P.3d 16. Moreover, the prosecutor effectively gave the jury a limiting instruction during closing argument. The prosecutor cautioned the jury that evidence of prior convictions should not be used to decide that a defendant is a "bad seed," but may only be considered if the prior bad acts had such striking similarities that they showed a common scheme or plan. RP at 613. In this way, the State further reduced any taint from MS's testimony.

156 Wn. App. at 492.

than to persuade their judgment,” and “should be surrounded with definite safeguards.” Id. The court then described those safeguards: “[T]he court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court’s duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.” Id. (emphasis added). The court reversed Goebel’s conviction, reluctantly concluding he did not receive a fair trial:

We dislike to send this case back for a new trial, for if the evidence of the prosecuting witnesses, together with the defendant’s own signed statement, is to be believed, to describe him as a beast is to libel the entire animal kingdom. Nevertheless, he was entitled to a fair trial, and that he did not have when evidence of a highly inflammatory character, proving an independent and unrelated crime, was admitted for the purpose of impeaching him on a purely collateral matter.

Id. at 380.

Forty-five years later in State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995), the court was presented with the opposite scenario. Although evidence of other crimes was admitted, the court held that no prejudice resulted because the jury was presumed to follow the court’s limiting instruction, absent evidence to the contrary. 125 Wn.2d at 864.

Foxhoven and Russell have merely made explicit what was implicit in Goebels and Lough: when evidence of other crimes is admitted, the jury is likely to be influenced to an extent that renders the trial unfair

unless consideration of that evidence is limited by careful instruction.

Cham urges this Court to follow Foxhoven and Russell and grant him a new trial.

2. CHAM WAS PREJUDICED BY HIS ATTORNEY'S FAILURE TO REQUEST A LIMITING INSTRUCTION CONSISTENT WITH THE DEFENSE STRATEGY.

The failure to request a limiting instruction allowed the jury to base its verdict on criminal propensity instead of the facts of the case at hand. This was ineffective assistance. The State responds that counsel made a valid tactical decision not to limit the jury's consideration of prior bad acts in order to point out the inconsistencies in the witnesses' testimony regarding those acts. Brief of Respondent at 13-15. But a limiting instruction would not preclude counsel's defense strategy. The main concern with evidence of prior misconduct is that it will be used to infer criminal propensity. Russell, 154 Wn. App. at 782 (ER 404(b) is designed to "prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged"). Nothing prevented counsel from requesting an instruction prohibiting that inference, leaving open all other lines of argument. For example, an instruction could read, "Evidence that the defendant has engaged in misconduct on other occasions may not be used to infer a general propensity for crime."

The potential for prejudice is inherent in evidence of past crimes, particularly sex offenses. Saltarelli, 98 Wn.2d at 364. The standard for prejudice in ineffective assistance cases is whether there is a “reasonable probability” that but for counsel’s mistake, the outcome would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). That probability is reasonable if it is sufficient to undermine confidence in the outcome. Id. When the jury has been permitted to consider past misconduct as evidence of general bad character or criminal propensity, confidence in the outcome of the trial is undermined. In the event this Court finds it was not error to fail to give the limiting instruction absent a request for one, the failure to make that request was ineffective assistance of counsel that rendered the trial unfair.

3. WITH NO PERSONAL EXPRESSION OF INTENT,
CHAM DID NOT WAIVE HIS RIGHT TO A JURY
TRIAL ON THE AGGRAVATING FACTOR.

The State is correct that a jury trial waiver does not require the same extensive inquiry into a defendant’s understanding of his or her rights as a guilty plea. But that does not mean that no inquiry is required. The cases cited by the State stand for the proposition that the court need not conduct the extended guilty-plea colloquy to inquire into the defendant’s awareness of his rights in order to proceed with a bench trial. Brief of Respondent at 21-22 (citing State v. Johnson, 104 Wn.2d 338, 705

P.2d 773 (1985) and In re Detention of Moore, 167 Wn.2d 113, 216 P.3d 1015 (2009)). But these cases do not absolve the court of any duty to inquire at all.

Washington courts require some expression by the defendant personally, that he or she wishes to waive the right to a jury and proceed with a bench trial on stipulated facts. State v. Hos, 154 Wn. App. 238, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010); State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979). The State does not dispute that Cham has a constitutional right to a jury trial on the aggravating factor just as on other elements of the offense. Brief of Respondent at 21. Instead, the State claims there is a substantive difference between waiving the right to a jury trial on one element and waiving that right overall. But the State cites no authority for this assertion. Brief of Respondent at 21.

The Ninth Circuit's holding in United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980), that the trial court may assume the defendant agrees with trial counsel's stipulation runs counter to controlling Washington precedent in Wicke and Hos, and is instead aligned with a line of precedent that Washington has specifically abandoned. In 1952, the Washington Supreme Court held defense counsel is presumed authorized to waive the defendant's right to a jury trial, absent some showing to the contrary. See Seattle v. Gardner, 54 Wn.2d 112, 113, 338

P.2d 125 (1959). But in 1979, the Wicke court rejected Gardner, noting it was questionable in light of United States Supreme Court precedent. Wicke, 91 Wn.2d at 644-45. On a silent record, like the one in this case, the court in Wicke declined to find a valid waiver. Id. at 645.

This does not mean, as the State suggests, that a full guilty plea colloquy is required every time a defendant stipulates to even one fact. But when a defendant waives the constitutional right to a jury trial, the record must contain some indication of the defendant's personal agreement to do so. Hos, 154 Wn. App. at 252; Wicke, 91 Wn.2d at 645. The mere failure to object to his defense counsel's actions is insufficient to establish a valid waiver. Id.

4. THIS COURT SHOULD REVIEW THE INSTRUCTIONAL ERROR THAT THE *BASHAW* COURT PRESUMED TO BE MANIFEST AND CONSTITUTIONAL IN NATURE.

Although there was no objection or exception to the instruction at trial, in State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010), the court reversed because the erroneous jury instruction required unanimity for a "no" answer to a special verdict. Thus, the Bashaw court apparently assumed this instructional error, which results in a "flawed deliberative process" amounted to manifest constitutional error, which could be considered for the first time on appeal. Id. at 147; RAP 2.5(a).

Yet another indication that this is manifest constitutional error is that the Bashaw court applied a constitutional harmless error test. 169 Wn.2d at 147-48. Apparently presuming the error to be manifest and constitutional, the Bashaw court reversed the sentence enhancements based on the erroneous special verdict instruction. Id. at 148. The same result is compelled here.

The statute governing aggravating circumstances is not clear whether it requires a unanimous verdict for a negative answer. RCW 9.94A.537(3) states, “The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” However, subsequent sections of the statute make clear that a unanimous verdict is required to impose an exceptional sentence. RCW 9.94A.537(6) states, “If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535.” In the absence of unanimity, no exceptional sentence may be imposed. Thus, the practical effect is that a failure to reach unanimity has the same result as a unanimous “no” answer. Where the jury is instructed to the contrary, the result is the “flawed deliberative process” that so troubled the court in Bashaw. Even if this Court affirms Cham’s convictions, it should reverse his exceptional sentence under Bashaw.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Cham requests this court reverse his conviction and grant him a new trial.

DATED this 22nd day of December, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65071-8-1
)	
GHE CHAM,)	
)	
Appellant.)	

DECLARATION 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 22ND DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GHE CHAM
DOC NO. 770938
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*

2010 DEC 22 11:44:27
B