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NO. 67415-3-I

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

REC'D
APR 17 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PELKEY,

Appellant.

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

The Honorable Monica Benton, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred and denied appellant a fair trial when it declined to give a defense-proposed limiting instruction.

Issue Pertaining to Assignment of Error

In criminal trials, defendants have the right to a limiting instruction when the State admits evidence of other bad acts or crimes to ensure jurors do not use the evidence for an improper purpose under ER 404(b), i.e., the defendant's propensity to commit the charged crime. Did the trial court err, and deny appellant a fair trial, when it declined to give a requested instruction at his trial?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Michael Pelkey with one count of Domestic Violence Felony Violation of a Court Order, in violation of RCW 26.50.110(1), (5). The violation was charged as a felony based on Pelkey's two prior convictions for violating a protection order. CP 12.

Only a single witness testified at Pelkey's trial – Auburn Police Officer John Clemmons. RP 65. Clemmons testified that on November 24, 2010, he responded to a tip that he would find

Pelkey at an apartment with Destiny West despite no-contact orders prohibiting Pelkey from having contact with West. RP 68-70.

Clemmons drove to the apartment complex and approached an upstairs unit in which he believed West was staying. RP 71. From just outside the door, he could hear a conversation between a man and a woman. RP 71. Officer Clemmons knocked on the door and West answered. RP 72. Based on a conversation with West, Officer Clemmons believed Pelkey was inside the apartment. RP 72-73. After obtaining permission to enter and search the apartment, Clemmons and a second officer found Pelkey in a back bedroom and arrested him. No one else was in the apartment. RP 74-75.

The State admitted trial exhibit 1, which is a domestic violence no-contact order from Auburn Municipal Court. The order, signed and filed October 1, 2010, prevents Pelkey from having any contact with West or coming within 500 feet of her. It is valid for two years. Exhibit 1; RP 65, 78-81. Pelkey stipulated that he had two prior convictions for violating the provisions of a no-contact order. CP 30; RP 88.

Defense counsel requested limiting instructions concerning the two prior convictions and concerning exhibit 1, the no-contact

order from Auburn Municipal Court, to ensure jurors did not use their existence as evidence that Pelkey had a propensity for bad acts and crimes and therefore should be convicted on the current charge. CP 36-38; RP 92, 102-103.

Regarding the two prior convictions, defense counsel proposed, and the trial court gave, the following instruction:

> Evidence has been introduced in this case on the subject of prior convictions of a no contact order. You must not consider this evidence for any other purpose than determining whether the defendant had at least two prior convictions for violating a no contact order.

CP 29, 36.

Regarding the no-contact order out of Auburn Municipal Court, defense counsel was particularly concerned about certain language contained in the order's first paragraph:

> 1. Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant had been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW. . . .

Exhibit 1; RP 60. Although the trial court declined to redact this language, the court indicated it was willing to give a limiting instruction aimed at the exhibit. RP 60-64.

Defense counsel proposed the following instruction:

> Evidence has been introduced in this case on the subject of a no contact order. You must not consider this evidence for any other purpose than determining whether the no contact order was valid.

CP 38; RP 92, 102. The prosecutor objected, arguing the second line improperly implied the State bore the burden to prove a valid no-contact order as an element of the offense. RP 103-104. The court did not give the instruction. See CP 18-34.

Jurors convicted Pelkey, the court imposed a standard range 51-month sentence, and Pelkey timely filed his Notice of Appeal. CP 39, 44, 50-51.

C. ARGUMENT

THE TRIAL COURT'S FAILURE TO GIVE A LIMITING INSTRUCTION CONCERNING JURORS' CONSIDERATION OF THE NO-CONTACT ORDER DENIED PELKEY A FAIR TRIAL.

ER 404(b) prohibits trial courts from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Under this rule, prior misconduct is inadmissible to show the defendant is a

"criminal type" and therefore likely to have committed the crime charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). The prohibition covers bad acts, unpopular behavior, and any other evidence demonstrating a person acted in conformity with his character. State v. Foxhoven, 161 Wn.2d 168, 174-175, 163 P.3d 786 (2007)

Where evidence of other misconduct is admitted at trial, upon request, the trial court must provide a limiting instruction directing the jury to disregard its propensity aspect and focus solely on its proper purpose. ER 105[1]; Foxhoven, 161 Wn.2d at 175; see also State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out "vital importance" of instruction to stress limited purpose of evidence). In fact, in the context of ER 404(b), "once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012).

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1 ER 105 provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

At Pelkey's trial, defense counsel requested a limiting instruction addressing jurors' use of the October 2010 no-contact order. It was not given, apparently, based on the prosecutor's objection to the second line, which indicates, "You must not consider this evidence for any other purpose than determining whether the no contact order was valid." CP 38; RP 102-104.

The prosecutor was correct that the State does not bear the burden of proving a valid no-contact order as an element of a charged violation. See State v. Miller, 156 Wn.2d 23, 27-32, 123 P.3d 827 (2005). But the proper response was not to strike the proposed instruction in its entirety. The trial court could have simply modified the second line to indicate, "You must not consider this evidence for any other purpose than determining whether there was a no contact order in place." The existence of a no-contact order certainly was an element of the State's proof. See CP 27 (requiring proof that "there existed a no-contact order applicable to the defendant.").

The failure to give an ER 404(b) limiting instruction is harmless only if, within reasonable probabilities, it did not materially affect the outcome at trial. Gresham, 173 Wn.2d at 425. Jurors would have properly recognized that the only limiting instruction

they received pertained solely to their use of Pelkey's prior convictions for violating a no-contact order. See CP 29. In contrast, they would have felt free, and been free, to use the evidence of the October 2010 order however they chose, including as evidence of Pelkey's propensity to commit criminal acts.

The defense argument at trial was that the State had failed to prove a knowing violation of the no-contact order because it had not presented evidence of the events leading up to Pelkey's or West's arrival at the apartment. West herself may have just entered the apartment – and not had contact with Pelkey in the back bedroom – when Officer Clemmons approached the door and gained access. The conversation Clemmons heard may have been the television and not, as he presumed, an interaction between Pelkey and West. Moreover, the State had not even established that the apartment belonged to West, and Pelkey may have had every right to be on the premises. RP 126, 128-132.

Jurors were more likely to reject this defense, and find Pelkey guilty of the charge, based on the content of exhibit 1, which made it clear Pelkey had previously been charged, arrested, and/or convicted of a domestic violence offense and that a protection order was necessary "to prevent a possible recurrence of violence."

Exhibit 1. Without a limiting instruction, jurors were free to use this evidence as proof that Pelkey is dangerous, has a propensity to commit criminal offenses and, therefore, should be convicted on the current charge.

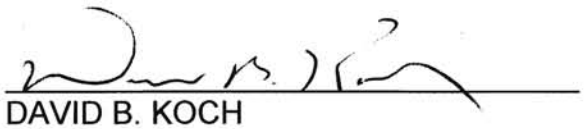
D. CONCLUSION

This Court should reverse and remand for a new trial in which jurors are properly instructed.

DATED this 17th day of April 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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v.	)	COA NO. 67415-3-I
	)	
MICHAEL PELKEY,	)	
	)	
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 17TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL PELKEY
DOC NO. 788751
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF APRIL 2012.

x Patrick Mayovsky

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