

67506-1

67506-1

NO. 67506-1-1

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

REC'D
JAN 10 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ROGELLE HARRIS,

Appellant.

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

The Honorable Beth M. Andrus, Judge
The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN 10 PM 4:27

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Charges, verdicts, and sentence</u>	1
2. <u>Pertinent pretrial rulings</u>	3
3. <u>Trial testimony and violantion of in limine order</u>	4
C. <u>ARGUMENT</u>	6
THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION FOR A MISTRIAL	6
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Bowen</u> 48 Wn. App. 187, 738 P.2d 316 (1987).....	8
<u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996).....	10
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	7
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	7, 10
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	8
<u>State v. Gresham</u> ___ Wn.2d. ___, ___ P.3d ___, 2012 WL 19664 (Jan. 5, 2012).....	7, 10
<u>State v. Hardy</u> 133 Wn.2d 701, 946 P.2d 1175 (1997).....	8
<u>State v. Johnson</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	7
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968).....	10
<u>State v. Perrett</u> 86 Wn. App. 312, 936 P.2d 426 <u>review denied</u> , 133 Wn.2d 1019 (1997)	8
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	7
<u>State v. Trickler</u> 106 Wn. App. 727, 25 P.3d 445 (2001).....	9

State v. Wade
98 Wn. App. 326, 989 P.2d 576 (1999)..... 7

RULES, STATUTES AND OTHER AUTHORITIES

ER 403 8
ER 404 3, 7, 8
ER 803 4
RCW 9.94A.535 2
RCW 9A.36.021 1
RCW 9A.36.031 2
RCW 9A.36.150 2

A. ASSIGNMENT OF ERROR

The trial court erred when it denied the appellant's motion for mistrial based on the improper admission of evidence appellant served time in prison.

Issue Pertaining to Assignment of Error

The appellant was accused of assaulting his former girlfriend. The trial court ruled that the girlfriend was prohibited from testifying that the appellant lived with her until he was sent to prison, and ordered the prosecutor to instruct the witness not to reveal this information. When the witness later violated the order, defense counsel moved for a mistrial, which the court denied.

Where the girlfriend's testimony denied the appellant a fair trial, did the trial court err in denying his motion for a mistrial?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charged appellant Rogelle Harris with second degree assault (intentional assault, recklessly inflicting substantial bodily harm),¹ felony violation of no contact order (elevated to a felony based on assault), interfering with domestic violence reporting, and witness tampering. The

¹ RCW 9A.36.021(1)(a)

complainant as to each count was Harris's former girlfriend and cohabitant, Glennis Harps. CP 1-12.

The State alleged the first three counts involved domestic violence. As an aggravating factor on counts 1 and 2, the State also alleged that Harps's minor child was present.² CP 9-10; RCW 9.94A.535(3)(h)(ii).

Before trial, Harris pled guilty to count 4, witness tampering. CP 73-98; RP 11-22. The court later dismissed count 3, interfering, after denying the State's motion to amend the information. CP 112; RP 550-56, 580, 683-84. As to count 1, the court instructed the jury as charged and also on third degree assault based on a negligent act.³

The jury found Harris guilty as charged on counts 1 and 2 and found the aggravator applied to each count. CP 69-72.

The sentencing court dismissed count 2 because it merged with the assault charge and sentenced Harris to a high-end standard range sentence on the remaining counts. RP 683-84; CP 84. This timely appeal follows.

² The State originally charged the aggravator on count 3 but later acknowledged it was inapplicable as the crime was a gross misdemeanor. CP 10-11; RP 22; RCW 9A.36.150(3).

³ CP 55 (instruction 17); RCW 9A.36.031(1)(f).

2. Pertinent pretrial rulings

Harris moved under ER 404(b) to exclude previous instances of domestic violence between Harris and Harps⁴ as well as related evidence regarding a probation violation on Harris's prior federal charge. CP 16-17; RP 100-03.⁵ The court ruled such information should be excluded:

Based on my review of [the State's interview with Harps]. . . she is going to need to be informed about these rulings because she makes reference . . . to when she was cohabitating with Mr. Harris based on when he was released from prison . . . , so if I could just ask that you reinforce with her that [] that information has been excluded.

RP 103-04.

The court also instructed the State to tell Harps that if she became confused on the stand, she could signal to the judge, and the judge would then remove the jury while matters were clarified for her. RP 104-05. The prosecutor agreed to the proposed plan. Defense counsel also stated he would not object to leading questions by the State to help avoid the introduction of improper testimony. RP 105.

⁴ The parties agreed the no-contact order was itself admissible as to count 2. RP 100-02; see also CP 28-29 (court's rulings in limine).

⁵ It should be noted that the transcripts often misidentify the speaker. For example, the speaker at the bottom of RP 101 and top of RP 102 is clearly defense counsel, not the court.

Similarly, the court ordered that the report of a Harborview social worker, admissible under the medical diagnosis or treatment hearsay exception,⁶ be redacted to exclude Harps's report that Harris was previously incarcerated for assaulting her. RP 142-44; see also CP 24-34 (court's rulings in limine).

After scheduling difficulties, the case was removed from Judge Beth Andrus and assigned to Judge Laura Gene Middaugh. The State informed Judge Middaugh of the above rulings, and the parties agreed Judge Andrus's rulings remained in force. RP 216.

3. Trial testimony and violation of in limine order

Harps is the mother of 11-year-old C.W. RP 334. Beginning in 2009, Harps and Harris, a friend of C.W.'s father, had a romantic relationship lasting about a year, and they lived together for about six months of that time. RP 335-36. In November of 2010, however, a court issued a two-year order prohibiting Harris from contacting Harps. RP 338, 472-74.

On December 30, 2010, Harps was injured when a glass thrown by Harris hit her back and shattered. RP 293-94, 302, 305, 328. The resulting wound was painful and required many stitches to close. RP 291, 303, 364-68, 529-41. C.W. was present during the incident. RP 398, 431.

⁶ ER 803(a)(4).

According to Harps, Harris surprised her by showing up at her apartment. The two began arguing immediately. RP 349-52, 385, 514-15. Harps first threw the glass at Harris, who then hurled the glass at Harps. RP 354-61, 377, 414, 478. According to C.W., Harris and Harps were calmly watching television when the argument began. RP 427-32, 443.

After the glass hit Harps, Harris appeared shocked and surprised, and he ran out of the house with C.W.'s phone. RP 361-62, 378-79, 408, 443, 445, 497.

In violation of the court's order, Harps testified that she and Harris lived together until Harris was sent to prison. RP 338. The testimony occurred as follows:

Q: Okay. Now I want to direct your attention to after that period of time when the no contact order was issued, so I want to direct your attention to, uh, December 30th of 2010.

A: Okay.

Q: Were you living with Mr. Harris at this time?

A: No.

Q: Okay. How long had Mr. Harris moved out by the time it gets to December 30th?

A: He never lived with me. He had, uh, um, he, we weren't living together. He, he had mo--, moved out, I don't know if I can talk about it. We --

Q: Well. just, you can just tell me when he moved out.

A: Um, well, he, when he went to prison he moved out.

[DEFENSE COUNSEL]: Objection, your Honor.

A: Yeah.

THE COURT: Sustained. Um, can I have the jury step out, please.

[JURY PANEL EXCUSED]

RP 338.

Harris immediately moved for a mistrial. RP 340-41. The court denied the motion, commenting that the testimony was not unduly prejudicial because jurors already knew about the no-contact order and therefore knew there was some “activity” between Harris and Harps. RP 342. The court also noted that a curative instruction would be adequate because jurors were, in general, presumed to follow instructions. RP 341-42. The court rejected counsel’s arguments that a no-contact order did not necessarily equate with incarceration and in any event that jurors would understand “prison” was more serious than jail time. RP 341-43.

Following an additional 15 minute recess, the court instructed the jury “there is no evidence that the Defendant has been to prison, and the jury is to disregard the statement of the witness and not to consider that for any purpose whatsoever in this case.” RP 347.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION FOR A MISTRIAL.

A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his

right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

This Court reviews the denial of a motion for mistrial for an abuse of discretion. Id. at 76. An examination of the above criteria reveals the trial court abused its discretion.

First, this error was very serious and therefore weighs in favor of reversal. Under ER 404(b), 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.” State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). No matter how relevant such evidence may be, ER 404(b) mandates its exclusion absent other permissible purposes. State v. Gresham, ___ Wn.2d. ___, ___ P.3d ___, 2012 WL 19664 at *5 (Jan. 5, 2012); Wade, 98 Wn. App. at 337.

ER 404(b) must also be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially

outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes."). It is well accepted by scholars and courts that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. Id. at 710-11.

Recognizing that Harris would be prejudiced if jurors learned he was sent to prison while living with Harps – and absent any showing that such evidence was admissible under one of the purposes listed in ER 404(b) – the trial court correctly precluded the State from introducing such testimony. RP 103-04. The court ordered the State to carefully prepare Harps in order to avoid such testimony. It even devised a failsafe plan to avoid the introduction of such testimony if Harps became confused. RP 104-05. The court's plan failed, perhaps because a different judge

ultimately presided over the trial. However, the court's devisal of such a plan indicates it was seriously concerned regarding the prejudice that would result from such testimony. Because the irregularity was serious, this Court should find that this factor weighs in favor of reversal.

As for the second factor, the evidence was not cumulative of any properly admitted evidence, and the factor likewise weighs in favor of reversal. While the trial court rationalized that jurors could infer from the no-contact order that there had been some "activity"⁷ between Harps and Harris, that is far different than informing jurors Harris spent time in prison, which implies conviction of a serious crime. Given the timing of Harris's incarceration, moreover, jurors were likely to infer that the previous crime involved Harps. Evidence establishing that an accused previously committed acts similar to the current charge is especially prejudicial because it allows the jury to shift focus from the merits of the current charge and instead focus on past behavior. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). Not only was the evidence not cumulative, it also suggested prior criminal acts against Harps. The second factor also weighs in favor of reversal.

Finally, Harris acknowledges the court told jurors to disregard the evidence. But some errors simply cannot be fixed with an instruction.

⁷ RP 342

State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); Escalona, 49 Wn. App. at 255-56.

Given the relatively lengthy recess that occurred immediately after Harps let the cat out of the bag, jurors would have been unable to put the evidence out of their minds. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Without Harps testimony regarding Harris's prior criminality, and possible prior violence toward Harps, Harris had a viable claim his actions were spontaneous and unintentional, and that therefore third degree assault based on negligence was the appropriate charge. There was no dispute Harris appeared shocked and surprised immediately after the glass hit Harps. RP 361-62, 378-79, 408; see also RP 649, 668-69 (defense closing argument urging conviction of third degree assault rather than second degree assault).

Because the erroneous introduction of the evidence was not harmless, this Court should reverse Harris's assault conviction and remand for a new trial. Gresham, 2012 WL 19664 at *12.

D. CONCLUSION

Harp's testimony created a serious irregularity that denied Harris a fair trial. This court should reverse his second degree assault conviction and remand for a retrial.

DATED this 10th day of January, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67506-1-1
)	
ROGELLE HARRIS,)	
)	
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 10TH DAY OF JANUARY 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] ROGELLE HARRIS
DOC NO. 927271
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 988326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JANUARY 2012.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 10 PM 4:27