

NO. 70813-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JERELL DAVIS,

Appellant.

REC'D

APR 15 2014

King County Prosecutor  
Appellate Unit

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

The Honorable Patrick Oishi, Judge  
The Honorable Mary Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective for proposing incomplete and insufficient limiting instructions.

Issue Pertaining to Assignment of Error

Appellant was charged with first degree robbery for his alleged involvement in taking marijuana from the complaining witness. Over defense objection, the trial court admitted evidence appellant was involved in a marijuana robbery several weeks earlier under the res gestae, modus operandi, and identity exceptions to ER 404(b).<sup>1</sup> Defense counsel proposed an instruction informing jurors of the limited purpose for which the evidence had been permitted. The instruction failed, however, to state that jurors could not use the evidence to show appellant had a propensity or particular disposition to commit robbery. Defense counsel also objected to instructions defining res gestae and modus operandi. Where proper limiting instructions could have sufficiently mitigated the harm from the 404(b) evidence, was appellant denied his constitutional right to effective

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<sup>1</sup> ER 404(b) states: “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.”

representation when defense counsel failed to propose the proper instructions?

B. STATEMENT OF THE CASE

1. Trial Testimony

Appellant Jerrell Davis called Sean Ramalho to purchase medical marijuana. Davis identified himself as Daniel Stednick and provided Ramalho with Stednick's marijuana identification. 7RP 137; 8RP<sup>2</sup> 39, 43-44. After verifying Stednick's information, Ramalho agreed to meet Davis at the Royal Firs apartments to sell him one quarter pound of marijuana for about \$1,100. 8RP 39-43, 46.

Several weeks earlier, Stednick's marijuana, cell phone, and medical marijuana license were taken from him when he met someone at the Royal Firs apartments to sell them marijuana. 8RP 26-28, 35-36; 9RP 32. Stednick identified the person as a slightly heavysset African American male with tattoos on his neck and arms. Stednick could not identify anyone in a photo montage. 8RP 35.

Ramalho drove to the apartments with friend Sean Miller. Ramalho asked Miller to act as security. 8RP 45-47, 106-08. Outside the

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – August 1, 2012; 2RP – October 25, 2012; 3RP – May 2, 2013; 4RP – May 6, 2013; 5RP – May 8, 2013; 6RP – May 14, 2013; 7RP – May 15, 2013; 8RP – May 16, 2013; 9RP – May 22, 2013; 10RP – May 23, 2013; 11RP – May 24, 2013; 12RP – August 23, 2013.

apartments Davis showed Ramalho Stednick's marijuana identification and said he would give Ramalho photographic identification inside the apartments. 8RP 49-52. Davis asked Miller to stay in the car while he and Ramalho went upstairs, explaining his baby and grandmother were sick. 8RP 55, 112.

Once upstairs, two other men appeared. 8RP 51, 59, 61. One pointed a gun at Ramalho's face and told him "get out your shit." 8RP 51, 60-61. Ramalho's marijuana and identification papers were taken. 8RP 67-68, 72. Davis took Ramalho's cell phone. 8RP 61-62, 69. Ramalho followed the men and watched them get into a silver car. 8RP 68, 72. Ramalho told Miller to call police and reported the car's license plate number. 7RP 130-31; 8RP 75-77, 114-15. Ramalho identified appellant Davis in a photo montage and told police he had a neck tattoo. 8RP 53-54, 59-60, 86, 99; 9RP 30, 48. Ramalho identified David Valentine as the person holding the gun. 7RP 169, 173-74; 8RP 84-85; 9RP 29. Miller could not identify anyone in the photo montage. 7RP 169; 8RP 116; 9RP 31.

The day after the incident, police searched Valentine's house and found medical marijuana business papers in Ramalho's name. 7RP 145; 8RP 82; 9RP 24-25. Valentine pled guilty before Davis' trial. 3RP 10, 26.

A short time later, in an unrelated incident, police stopped Davis in a car with a license plate matching the one reported by Ramalho. 7RP 179-81. The car was not registered in Davis' name. 7RP 150.

When interviewed by police, Davis acknowledged he owned the car associated with the Ramalho incident. 9RP 51-53. Davis also gave police his phone number which matched the phone number given to Ramalho. 9RP 52-53. Davis told police he arranged a marijuana purchase online before meeting the seller at the Royal Firs apartment. Davis denied robbing Ramalho. CP 20.

Based on this evidence, Davis was charged with one count of first degree robbery for the Ramalho incident. CP 1-7. After hearing the above, a King County jury found Davis guilty. CP 120. The trial court sentenced Davis to a standard range prison sentence of 38 months. CP 130-40; 12RP 20. Davis timely appeals. CP 141-58.

## 2. Limiting Instruction

Before trial, the State sought to introduce evidence of the Stednick robbery and Davis's telephone number and car. 4RP 79-86; 5RP 50-57, 67; Supp. CP \_\_\_\_ (sub no. 109, State's Trial Memorandum, at 7-11). The State argued Davis' cell phone to set up the marijuana purchases and use of a prior stolen marijuana identification card showed completeness of the crime charged and modus operandi. Id. The trial court overruled defense

objections, finding the specific 404(b) evidence relevant to prove *res gestae*, identification and *modus operandi*. 5RP 75-89; CP 21-33, 45-50.

Defense counsel proposed instructions for each applicable witness to limit use of the ER 404(b) evidence to the purposes identified by the trial court. 7RP 9, 107, 185; 8RP 16; CP 53-54, 55-56, 58-59. Just before Stednick's testimony, the trial court instructed jurors:

Certain evidence has been admitted in this case for only a limited purpose. This evidence you are about to hear consists of witness testimony and may be considered by you only for the purposes of determining whether it tends to prove circumstantial evidence of the crime charged, *res gestae*, identity, or *modus operandi*. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 56; 8RP 23-24.

Before officers David Ghaderi and Ryan Rutledge testified, the court gave a similar instruction, limiting consideration of the evidence to "circumstantial evidence of the crime charged, *res gestae*, identity, or *modus operandi*," and "determining whether or not the defendant was associated with a certain phone number, and whether [Davis] owned a certain vehicle." 7RP 114, 177-78; 8RP 19, 23-24; 9RP 32; CP 53-54, 55-56, 58-59.

The prosecutor proposed definitional instructions for the terms "*res gestae*," and "*modus operandi*." 10RP 9; Supp. CP \_\_\_\_ (sub no. 120,

Proposed Supplemental State's Jury Instruction at 2). Defense counsel objected to the instructions. 10RP 19. The trial court declined to give the instructions, reasoning they could be construed as a comment on the evidence. 10RP 15-17, 19.

At the end of trial, defense counsel proposed, and the court gave, the following written limiting instruction:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consisted of certain witness testimony and may be considered by you only for the purpose of res gestae, identity, and/or modus operandi. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 61, 105 (instruction 6).

C. ARGUMENT

1. DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY PROPOSED INCOMPLETE AND INSUFFICIENT LIMITING INSTRUCTIONS

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Davis' counsel was ineffective for proposing an insufficient ER 404(b) evidence limiting instructions and for objecting to an instruction defining the ER 404(b) basis for which the evidence was admitted. Reversal is required because there is a reasonable probability the inadequate instructions materially affected the outcome at trial.

a. Counsel was Deficient.

The prosecution may not use evidence to demonstrate a defendant's criminal propensity. ER 404(b). The rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's ER 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d

at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

Where an instruction is requested, however, it must be correct. Gresham, 173 Wn.2d at 424. And, critically, “An adequate ER 404 (b) limiting instruction *must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.*” Gresham, 173 Wn.2d at 423-424 (emphasis added).

Here, defense counsel proposed, and the court gave, an instruction that did not include the propensity language. CP 61, 105 (instruction 6). The trial court’s other limiting instructions were consistent. CP 53-56, 58-59.

While the instructions identified several purposes for which jurors could use the ER 404(b) evidence, they failed to include language setting for the prohibition mandated under Gresham. Consistent with the express language of ER 404(b), jurors had to be told the one way in which they absolutely could not use the evidence. Cf. State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated “the jury could not use the testimony to judge Kennealy’s character or propensity to commit such acts, but that it could only consider the

testimony in determining whether it showed that Kennealy had a common scheme or plan.”), rev. denied, 168 Wn.2d 1012 (2010); State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (noting court properly instructed jurors that evidence could only be considered for whether there was a common scheme or plan and not to prove defendant’s character).

The State may argue the limiting instruction is adequate because it mirrors the language of WPIC 5.30.<sup>3</sup> By the time of Davis’ trial however, Gresham made clear the language of WPIC 5.30 was insufficient. See Nessman v. Sumpter, 27 Wn. App. 18, 23, n.5, 615 P.2d 522 (1980), rev. denied, 94 Wn.2d 1021 (1980) (recognizing the pattern jury instructions are not intended to present a complete statement of the law). Moreover, “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.” Gresham, 173 Wn.2d at 424.

Counsel’s failure to propose an adequate limiting instruction fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting an adequate instruction.

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<sup>3</sup> WPIC 5.30 provides, “Certain evidence has been admitted in this case for only a limited purpose. This [*evidence consists of \_\_\_\_\_ and*] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

Counsel was aware of the risk of prejudice from the 404(b) evidence as demonstrated by his request for a limiting instruction. Counsel simply neglected to request the adequate limiting instruction required. See State v. Killo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel's Deficient Performance Prejudiced Davis.

Counsel's failure to request an adequate limiting instruction was prejudicial. The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome of trial. Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Without a proper limiting instruction the jury was free to use any portion of the ER 404(b) evidence for propensity purposes. This prejudicial effect was further compounded by defense counsel's objection to the prosecutor's proposed instruction defining the legal terms "res gestae," and "modus operandi," 10RP 19.

The trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-explanatory. In re Detention of Pouncey, 168 Wn.2d 382, 390, 229 P.3d 678 (2010); State v. O'Donnell, 142 Wn. App. 314, 325, 174 P.3d 1205 (2007). The purpose of the rule is “to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law.” O'Donnell, 142 Wn. App. at 325. A term is considered technical when its legal definition differs from the common understanding of the word. Id.

The trial court declined to give definitional instructions, not because it believed the terms had a common understanding and were self-explanatory, but because it reasoned the prosecutor could sufficiently define the terms during closing argument. 10RP 14-16, 19. But the jury was also instructed that the “lawyers’ statement are not evidence,” and “the law is contained in my instructions to you.” CP 99 (instruction 1).

Without an adequate limiting instruction or proper understanding as to the legal terms defined therein, the jury was free to construe “res gestae” and “modus operandi” as a basis for concluding Davis acted in conformity with the Stednick robbery in the current incident. There is a reasonable probability the outcome would be different but for defense

counsel's conduct. Davis' constitutional right to effective assistance counsel was violated.

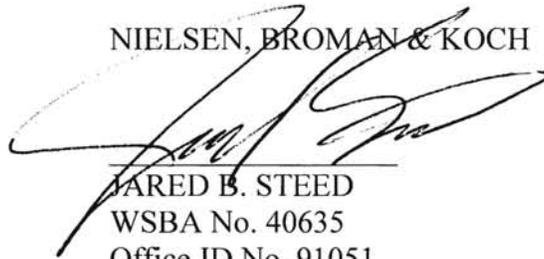
D. CONCLUSION

For the reasons discussed above, this Court should reverse Davis' conviction and remand for a new trial.

DATED this 15<sup>th</sup> day of April, 2014.

Respectfully submitted,

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COA NO. 70813-9-1

**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 15<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JERRELL DAVIS  
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SIGNED IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF APRIL 2014.

x Patrick Mayovsky

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