

714108-60

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NO. 71468-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARTIN ADAMS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 5

 1. The court impermissibly denied Mr. Adams the peremptory challenges to which he was entitled 5

 a. The court may not interfere in or unreasonably denied peremptory challenges to prospective jurors..... 5

 b. The court denied Mr. Adams the peremptory challenges to which he was entitled 7

 c. Denying Mr. Adams his right to exercise peremptory challenges is a structural error when Mr. Adams was not permitted to participate in the selection of jurors who deliberated in the case 10

 2. Mr. Adams was denied a fair trial by the State’s use of propensity evidence and his silence when arrested to paint him as a nasty person who lacked sympathy for his wife..... 12

 a. The right to a fair trial includes the right to be tried for only the charged offense..... 12

 b. The court admitted irrelevant evidence of Mr. Adams’ behavior on other occasions to show his propensity for being dislikeable toward his wife 15

 c. The prosecutor impermissibly elicited an allegation of Mr. Adams’ drug use unrelated to the charged incident 18

d. The prosecution improperly bolstered the complainant’s allegations with prior consistent statements	21
e. The prosecution improperly used Mr. Adams’ silence when being arrested as evidence of his guilt.....	23
f. These errors affected the jury’s deliberations and require reversal	27
F. CONCLUSION	29

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583, 587 (2010) 27

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 23, 24, 26, 27

State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002)... 13,
17, 18

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 14

State v. Gresham, 173 Wash.2d 405, 269 P.3d 207 (2012) 13

State v. Gunderson, _ Wn.2d _, __ P.3d _, 2014 WL 6601061 (2014) 14,
15, 17, 18, 27

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 5

State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) 7

State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971) 12

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001) 10

State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974) 18

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) 13

State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986) 13

State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001) 10, 11, 12

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) 6

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983) 27

Washington Court of Appeals Decisions

<i>State v. Bargas</i> , 52 Wn.App. 700, 273 P.2d 470 (1988)	21
<i>State v. Evans</i> , 100 Wn.App. 757, 998 P.2d 373 (2000)	10, 11, 12
<i>State v. Fleming</i> , 83 Wn.App. 209, 921 P.2d 1076 (1996).....	28
<i>State v. Makela</i> , 66 Wn. App. 164, 831 P.2d 1109 (1992).....	21
<i>State v. Tigano</i> , 63 Wn.App. 336, 818 P.2d 1369 (1991), <i>rev. denied</i> , 118 Wn.2d 1021 (1992).....	18, 21

United States Supreme Court Decisions

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)	5, 6
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	27
<i>Dowling v. United States</i> , 493 U.S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990).....	12
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).....	12
<i>Miranda v. Arizona</i> , 384 U.S. 436, 458, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	23, 25
<i>Pointer v. United States</i> , 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894).....	6
<i>Swain v. Alabama</i> , 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)	6
<i>United States v. Salerno</i> , 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).....	12

Federal Court Decisions

United States v. Velarde-Gomez, 269 F.3d 102(9th Cir. 2001)..... 23, 24

United States Constitution

Fifth Amendment..... 2, 23, 26
Fourteenth Amendment 5, 12
Sixth Amendment 5, 23

Washington Constitution

Article I, section 22 5, 12, 23
Article I, section 3 12
Article I, section 9 2, 23, 26

Court Rules

CrR 6.4..... 7
CrR 6.5..... 6, 7, 10, 11
ER 404 15, 16, 19, 20
ER 801 2, 21, 22

A. INTRODUCTION

Kim Adams accused her husband Martin of assaulting her on a single occasion and did not recant this allegation. As “background,” the prosecution offered evidence that he was routinely controlling toward her, used drugs on other occasions, gambled their limited money, and failed to express concern for her when arrested. Because this evidence of prior wrongful conduct is far more prejudicial than probative and inadmissible as general background evidence, this objected-to evidence violated Mr. Adams’ right to a fair trial. His silence at the time of his arrest is likewise impermissibly prejudicial and was used against him. In addition, the court refused to provide him the peremptory challenges to which he was entitled under CrR 6.5, which constitutes structural error.

B. ASSIGNMENTS OF ERROR.

1. Mr. Adams was denied his right to exercise peremptory challenges of prospective jurors, which undermines his right to a fair trial by impartial jury under the Sixth and Fourteenth Amendments and article I, sections 21 and 22.

2. The court’s admission of highly prejudicial evidence of uncharged wrongful conduct denied him a fair trial.

3. The State used Mr. Adams' silence at the time of arrest against him, contrary to the Fifth Amendment and article I, section 9.

4. The court improperly admitted numerous out-of-court consistent statements even though there was no claim of recent fabrication to rebut, as required by ER 801(d)(1)(ii).

5. Cumulative error denied Mr. Adams a fair trial under the Fourteenth Amendment and article I, section 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. During jury selection, the court may not deny an accused person his right to exercise the peremptory challenges to which he is entitled under law. The court refused to let Mr. Adams exercise the peremptory challenges for alternate jurors to which he was entitled by giving him fewer potential challenges than required and barring him from using his strike against a prospective juror. Did the court impermissibly deny Mr. Adams his right to exercise peremptory challenges?

2. Evidence that an accused person has behaved disgracefully or illegally in the past is prohibited to show the accused's propensity for acting in a certain manner. Over Mr. Adams' objection, the prosecution introduced evidence of Ms. Adams' prior behavior toward the

complainant, calling him a very controlling person who gambled away their money and used drugs on other occasions. The court did not weigh this evidence's admissibility under ER 404(b). Did the court let the prosecution color the jury's perception of Mr. Adams based on past uncharged behavior that was unrelated to the charged incident?

3. The right to remain silent at the time of arrest is a bedrock constitutional protection. The State introduced evidence that Mr. Adams was silent when he was arrested and failed to express surprise or concern for the complainant even though police officers told him of her injuries. Did the evidence of Mr. Adams' lack of statements when arrested for assaulting his wife violate his right to remain silent?

D. STATEMENT OF THE CASE.

Martin and Kim Adams met in 1990 and married. 3RP 349-50 They faced difficult economic circumstances. 3RP 357.¹ Mr. Adams suffers from a disabling back injury that causes sharp pains and spasms that make it hard for him to move. 2RP 105, 238; 3RP 353. They lived

¹ The verbatim report of proceedings consists of six volumes of transcripts. Five volumes are consecutively paginated trial proceedings, referred to herein by the volume on the cover page. Because the court reporter designated two volumes as "Volume V," references to the volume containing jury selection are listed by the date of proceeding rather than the volume number, i.e., 12/10/13.

in a cramped motor home that lacked drinkable water. 3RP 356, 364.

They kept the lights off to save electricity. 3RP 356-57.

On September 19, 2014, Ms. Adams told her co-workers that Mr. Adams had hit her in her side after he tripped over some water bottles. 2RP 87-88, 128, 136. She went to the hospital and x-rays showed two “very small” fractures on two lower ribs. 3RP 303. She did not have bruises or swelling. 2RP 211. Mr. Adams was charged with second degree assault. CP 8.²

At Mr. Adams’ jury trial, arresting police officer Kathryn Dearborn said Mr. Adams did not express surprise when two officers came to arrest him. 3RP 268-69. Ms. Adams and two of her friends described Mr. Adams as “very controlling” of Ms. Adams and said he would spend her paycheck gambling, leaving her with no money. 2RP 8-86, 136, 184, 191-92. The court overruled Mr. Adams’ objections to this evidence. 2RP 85-86, 135-36, 186-90.

In violation of a court ruling, the prosecution offered testimony that Ms. Adams told the police that Mr. Adams used drugs in the past, although he had not used drugs at the time of the incident. 2RP 147-57.

² The State declined to prosecute the originally charged offense of felony harassment. 12/10/13RP 514; CP 8-9.

Mr. Adams testified that he had taken Benadryl because he had hives from allergies and was sleepy. 3RP 354-55. He did not intentionally hit Ms. Adams or recall anything out of the ordinary occurring that night. 3RP 354-55, 361-65.

Mr. Adams was convicted of the charged incident. CP 49. He received a standard range sentence. CP 60-61. Pertinent facts are further explained in the relevant argument sections below.

E. ARGUMENT.

1. The court impermissibly denied Mr. Adams the peremptory challenges to which he was entitled

a. The court may not interfere in or unreasonably deny peremptory challenges to prospective jurors.

An accused person has a right to participate in selecting an empaneled jury by fair and impartial means. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Article I, section 22 contains stronger protections guaranteeing the right to trial by jury than the federal constitution. *Irby*, 170 at 884 (right to “appear and defend” mandates defendant’s personal participation in all stages of jury selection); *see State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913

(2010) (“greater protection” for jury trial rights under article I, sections 21 and 22 than federal constitution).

The peremptory challenge is a “means of assuring the selection of a qualified and unbiased jury.” *Batson*, 476 U.S. at 91. Peremptory challenges have “deep historical roots” and the Supreme Court has found that “peremptory challenge is a necessary part of trial by jury.” *Id.*; *Swain v. Alabama*, 380 U.S. 202, 212, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Even though the right to peremptory challenges is not explicitly guaranteed in the constitution, the peremptory challenge is “one of the most important rights secured to the accused.” *Swain*, 380 U.S. at 219 (quoting *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 38 L.Ed. 208 (1894)). “The denial or impairment of the right is reversible error without a showing of prejudice.” *Swain*, 380 U.S. at 219.

Any time the court selects alternate jurors, “[e]ach party *shall* be entitled to one peremptory challenge *for each* alternate juror to be selected.” CrR 6.5 (emphasis added). CrR 6.5 provides the court with discretion whether to select alternate jurors. The court may select 12 jurors and hope no juror becomes unable to serve over the course of the case. Without alternate jurors, the minimum number the court may

provide in most felony trials is six peremptory challenges for each the prosecution and defense. CrR 6.4(e)(2). When alternates are included on the jury panel, the parties are entitled to the additional peremptory challenges allowed for each alternate. CrR 6.5.

By mandating that “each party shall be entitled” to specified additional peremptory challenges when the court seats alternate jurors, the court rule is construed as “presumptively imperative and operates to create a duty.” *See State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The trial court refused to give two peremptory challenges to Mr. Adams even though it was seating two alternate jurors, despite the mandatory language of CrR 6.5. The court permitted one additional peremptory challenge for any alternate selected and added two alternate jurors to the panel.

b. *The court denied Mr. Adams the peremptory challenges to which he was entitled.*

Before commencing jury selection, the court announced that after the parties used six peremptory challenges, they would be able to exercise an additional peremptory for the 13th or 14th juror. 1RP 55. Those jurors would not be informed that they were selected as

alternates. *Id.* The court offered to simply select 13 or 14 jurors and draw names out of a hat at the end of the case, but when both parties said that either procedure was acceptable, the court opted to use its regular procedure of selecting additional jurors and telling those final jurors they were alternates at the close of the case. 1RP 55-56.

The court also explained its procedure for jury selection, which was that all jurors could voice their hardship excuses or other reasons why they should not serve and the court would decide which jurors to dismiss for cause at the end of voir dire. 1RP 49-51.

At the end of voir dire, the court excused several jurors due to scheduling difficulties or other cause related reasons. 12/10/13RP 595, 598. Then the prosecutor and defense attorney alternated as they announced their peremptory challenges. *Id.* at 597-98. The court did not require the parties to challenge jurors sequentially by the number assigned. *Id.* Instead, the attorneys selected from those seated at their discretion. For example, the prosecutor's order for striking jurors was 13, 10, 17, 26, 28; while defense counsel struck in order: 3, 20, 11, 25, 22, 8. *Id.*³

³ The prosecutor opted to not use his fifth peremptory. 12/10/13RP 597-98.

After the defense announced its sixth peremptory, the court said that “the alternative peremptories would begin with [Juror] No. 27.” 12/10/13RP 599. It also said each attorney would get only one peremptory but two alternates would be selected. *Id.*

The prosecutor struck Juror 29 and defense counsel asked to strike Juror 19. 12/10/13RP 599-600. The prosecutor objected to the defense strike. *Id.* at 600. The court agreed and barred this strike, ruling that defense counsel was not permitted to “go back into the panel” to exercise strikes. *Id.* Defense counsel complained that this rule had not been announced before jury selection and she was unaware of that the court would prohibit it. *Id.* During the initial peremptory strikes, both attorneys had not been required to strike jurors sequentially. *Id.* at 597-98. But the court refused to allow the defense peremptory strike of Juror 19 even though it had not previously discussed this part of the process, claiming it was the procedure the court “always” used. *Id.*⁴ After the court denied the defense request to strike Juror 19, and having been given only a single peremptory challenge for the two alternate

⁴ Judge Garrett became a superior court judge in 2013. *See* <http://www.carmichaelclark.com/bellingham-attorney-news/deborra-garrett-is-elected-to-whatcom-county-superior-court/> (last viewed Dec. 11, 2014).

jurors, the defense agreed not to exercise further strikes against the remaining potential alternates. *Id.* at 601.

- c. *Denying Mr. Adams his right to exercise peremptory challenges is a structural error when Mr. Adams was not permitted to participate in the selection of jurors who deliberated in the case.*

The trial court allowed only a single peremptory challenge despite selecting two alternate jurors. 12/10/13RP 599. Under CrR 6.5, the defense was “entitled” to at least one peremptory challenge for each alternate selected. A court abuses its discretion when it misunderstands and misapplies mandatory requirements of a court rule. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court misunderstood the requirements of CrR 6.5 when it denied Mr. Adams a peremptory challenge for a seated alternate juror.

“Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.” *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000). The Supreme Court explicitly adopted the reasoning of *Evans* in *State v. Vreen*, 143 Wn.2d 923, 931-32, 26 P.3d 236 (2001). In *Vreen*, the court held that if jurors deliberate and render a verdict after the court has improperly denied the defendant

the opportunity to exercise a peremptory strike to which he was entitled, the error is structural and reversal is required. *Id.* at 932.

The holdings and logic of *Evans* and *Vreen* control Mr. Adams' case. The court denied Mr. Adams his right to exercise peremptory challenges to which he was "entitled" under CrR 6.5. The premise of a peremptory challenge is that the accused need not identify a specific basis on which to challenge a particular juror, and therefore, the accused person is not required to show that a particular juror sat on the case that should have been excused. *Vreen*, 143 Wn.2d at 931. Instead, denying the accused the right to exercise a peremptory challenge to which he was entitled is a fundamental error undermining the integrity of the trial process. *Vreen*, 143 Wn.2d at 931.

The court also denied Mr. Adams' request to use a peremptory challenge for Juror 19 even though jury selection was not complete and Mr. Adams believed he was permitted to exercise such a strike. Failing to allow Mr. Adams the two peremptory strikes to which he was entitled, and barring him from exercising one challenge to a potential juror when the court had not explained that it would not permit any further strikes to the first 12 selected jurors, violated Mr. Adams' right to exercise the challenges to which he was entitled. Its denial of Mr.

Adams' right to exercise peremptory challenges to which he was entitled requires a new trial. *Vreen*, 143 Wn.2d at 932; *Evans*, 100 Wn.App. at 774.

2. Mr. Adams was denied a fair trial by the State's use of propensity evidence and his silence when arrested to paint him as a nasty person who lacked sympathy for his wife

- a. *The right to a fair trial includes the right to be tried for only the charged offense.*

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice").

“ER 404(b) is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wash.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wash.2d 358, 362, 655 P.2d 697 (1982)). Allegations that an accused person committed an uncharged misconduct, or is a mean person, are presumed inadmissible. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465–68, 39 P.3d 294 (2002).

Uncharged misconduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *Saltarelli*, 98 Wn.2d at 362); ER 404(b).⁵ Doubtful cases should be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776.

⁵ 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. 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.

“This analysis must be conducted on the record.” *State v. Gunderson*, __ Wn.2d __, __ P.3d __, 2014 WL 6601061, at *3 (2014) (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). In addition, the “trial court must also give a limiting instruction to the jury if the evidence is admitted.” *Id.*

In *Gunderson*, the Supreme Court reversed an assault conviction because the trial court admitted evidence of prior domestic violence between the defendant and his former wife that was more prejudicial than probative. 2014 WL 6601061 at *3. The evidence was insufficiently probative because the complainant had not given conflicting statements about the incident, even if other evidence contradicted her testimony. *Id.* at *3-4. The prosecution was not free to make a blanket claim the allegations were credible because the accused had engaged in domestic violence in the past. “[T]he mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness’s testimony is unreliable” before offering accounts of uncharged misconduct. *Id.* at *4.

The *Gunderson* Court also explained the essential analysis in which the trial court must engage before admitting uncharged allegations of misconduct. “[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high.” *Id.* at *4. There is a “heightened prejudicial effect” from the jury hearing about uncharged domestic violence.” *Id.* Therefore, prior acts of domestic violence are admissible only if the prosecution “has established their overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events.” *Id.* If the State does not prove the overriding need for such testimony, “the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.” *Id.*

b. *The court admitted irrelevant evidence of Mr. Adams’ behavior on other occasions to show his propensity for being dislikeable toward his wife.*

Ms. Adams accused Mr. Adams of hitting her in the side, causing pain. 2RP 88. She did not recant or contradict her allegations to police. But over Mr. Adams’s objection, the prosecution elicited evidence that Mr. Adams routinely engaged in abusive behavior toward his wife.

In his motions in limine, Mr. Adams objected to the State's introduction of uncharged misconduct, including prior domestic violence or statements of Ms. Adams's fear. CP 12-13. The prosecution insisted it would not introduce any prior domestic violence behavior unless the defense opened the door. 1RP 14. The court denied Mr. Adams's motion in limine, finding his prior acts were relevant to assessing the complainant's credibility. 12/10/13RP 503-04.

Despite its pretrial agreement that it would not elicit ER 404(b) evidence in its case-in-chief, the prosecution's first questions to its first witness, Ms. Adams, asked her to describe Mr. Adams' behavior in general terms over the course of their lengthy relationship. 2RP 85-86. The prosecutor requested Ms. Adams give examples of Mr. Adams' "controlling" behavior on occasions unrelated to the incident, which she described as not letting her call friends and gambling away her paychecks so she was left without money. 2RP 86.

The prosecutor similarly asked two of Mr. Adams's friends to generally describe the relationship between Mr. and Ms. Adams. 2RP 135-36, 185-86. The prosecutor insisted that the "relationship is an issue in this case." 2RP 135; *see* 2RP 186. The court overruled the defense objections, calling Mr. Adams's behavior during his 18 years of

marriage to Ms. Adams “background” and “preliminary” information that could be elicited. 2RP 135, 186.

Friend Tina Esqueda said Mr. Adams was a regular gambler who was “very controlling” with Ms. Adams and would not let her out of his sight. 2RP 184, 186, 191-92. Once at the casino, months before this incident, Ms. Adams told her friend that she was “afraid that he would hurt her.” 2RP 192; *see* 2RP 188-90 (witness describes Ms. Adams saying she was afraid months earlier). Susan Gurlock said Mr. Adams was generally “very impatient” with Ms. Adams. 2RP 136. Mr. Adams objected to this testimony about his Mr. Adams’ behavior on other occasions, but the court overruled the objections. 2RP 85-86, 135-36, 185-86.

The court never engaged in the necessary ER 404(b) analysis required to admit misconduct alleged to occur on other occasions. *See Gunderson*, 2014 WL 6601061 at *4. ER 404(b) prohibits “any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion,” and is not limited to “unpopular or disgraceful” conduct. *Everybodytalksabout*, 145 Wn.2d at 466. Prohibited evidence includes claims that Mr. Adams gambled away their money and was “very controlling” of Ms. Adams.

Contrary to *Gunderson*, the court did not find an overriding State interest or acknowledge the heightened prejudicial effect of prior abusive or controlling behavior. 2014 WL 6601061, at *3-4; *see* 2RP 85-86, 135, 186-91. It did not limit the jury's consideration of this evidence but instead told the jury it was relevant background information when overruling defense objections. 2RP 135, 186. The court's rulings permitted and encouraged the jury to use against Mr. Adams the claims that he was a mean, controlling gambler who treated Ms. Adams disrespectfully on other occasions, even though this evidence should not have been admitted. *See Everybodytalksabout*, 145 Wn.2d at 468.

c. *The prosecutor impermissibly elicited an allegation of Mr. Adams' drug use unrelated to the charged incident.*

An accused person's drug use on an unrelated occasion is generally irrelevant and presumptively prejudicial. *State v. Tigano*, 63 Wn.App. 336, 344-45, 818 P.2d 1369 (1991), *rev. denied*, 118 Wn.2d 1021 (1992). It is not probative of truthfulness as it has little to do with a witness's credibility. *State v. Stockton*, 91 Wn.App. 35, 42, 955 P.2d 805 (1998). Drug use is condemned "by many if not most" in society. *State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974).

When questioning the complaining witness, defense counsel pointed out an inconsistency in her statements to police: she initially told the responding police officer that Mr. Adams used “meth” during the incident, but later told the investigating detective that he had not used any drugs. 2RP 98. She did not recall making either statement at trial. 2RP 98. The prosecutor responded by asking Ms. Adams whether she talked to the police about Mr. Adams’ drug use generally. 2RP 114. Ms. Adams said she told them “he did some drugs.” *Id.* At the State’s prompting, Ms. Adams also explained how she had described the drugs Mr. Adams used, smoking something white out of a pipe. 2RP 115.

Then, over Mr. Adams’ objection, the prosecutor asked a police detective whether the complainant talked about “any” of Mr. Adams’ “prior drug use.” 2RP 147-48. Outside the jury’s presence, the court found that defense counsel had opened the door to whether Mr. Adams had used drugs, but told the prosecutor to limit his questions to the incident. 2RP 150-51. However, in the jury’s presence the prosecutor asked the detective, “what drugs did she say Mr. Adams used *in the past?*” 2RP 154 (emphasis added). The court sustained the defense objection, but the prosecutor was undeterred and asked if the detective if she talked about Mr. Adams’ use of “meth?” *Id.* The detective

answered, “Yes.” *Id.* Mr. Adams objected and the court told the prosecutor to “move on,” without ruling on the objection. *Id.* Still in front of the jury, the prosecutor said he wanted to elicit that Ms. Adams “described the drug as white and he smoked it.” *Id.* The court told the prosecutor he was violating the rules of evidence by inquiring into prior bad acts. *Id.* The prosecutor again said he “wanted to identify” the drug Ms. Adams described Mr. Adams as having used in the past but the court said it was too far afield. *Id.*

Mr. Adams’ use of drugs on other occasions had no probative value, as the court recognized. He did not open the door to his use of drugs when asking the complainant about whether she told different stories to two police officers about whether Mr. Adams used drugs on the night in question. 2RP 98. The defense was trying to show she exaggerated the incident in her initial report, not trying to establish Mr. Adams never used drugs. But the prosecutor repeatedly injected general claims Mr. Adams used drugs “in the past,” showing by his questions and while arguing with the judge that it had evidence that Mr. Adams was a drug user on other occasions. This evidence was plainly inadmissible, as the court had ruled, and the prosecution should not

have tried to prejudice the jury against Mr. Adams based on prior drug use. *Tigano*, 63 Wn.App. at 344-45.

d. *The prosecution improperly bolstered the complainant's allegations with prior consistent statements.*

A witness's prior consistent statements are inadmissible hearsay unless offered to rebut an accusation that the witness's testimony is a recent fabrication. ER 801(d)(1)(ii). The requirement of recent fabrication means that the witness is challenged based on the claim that she had a reason to fabricate her story later. *State v. Bargas*, 52 Wn.App. 700, 702, 273 P.2d 470 (1988). "The alleged fabrication must be recent because if the statement was made after the events giving rise to the inference of fabrication, it would have no probative value in counteracting the charge of fabrication." *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992). A claim of recent fabrication "can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements." *Id.* at 168-69.

Here, Mr. Adams questioned the veracity of the complaining witness by pointing out some inconsistencies and reasons to doubt her

story. 2RP 100-01, 104, 109. His theory was that she fabricated the incident, or Mr. Adams's intentional conduct, from the beginning. But the prosecution responded by eliciting her allegations to a number of witnesses as prior consistent statements. 2RP 119-20, 126-27. The court permitted the prosecution to elicit these statements to rebut an implication of recent fabrication. 2RP 127. As a result, Richard Loewen repeated Ms. Adams' allegations about the incident as he drove her to work on the day of the incident; Susan Gullock testified that on the day of the incident, Ms. Adams said Mr. Adams had kicked her; Detective Pauline Renick testified about Ms. Adams' detailed accusations on the day after the incident; Tina Esqueda described the details of Ms. Adams' allegations when she took her to the hospital on the day of the incident; and Officer Kathryn Dearborn repeated Ms. Adams's specific allegations when reporting the incident to her. 2RP 119, 128, 136, 146, 192-94, 266.

Because Mr. Adams' theory was that Ms. Adams' claims of the incident were never true, not that something happened after the incident to cause her to fabricate the claim, her prior consistent statements were inadmissible under ER 801(d)(1)(ii). The prosecution impermissibly

bolstered the complainant's credibility by asserting that she told many people that Mr. Adams assaulted her on the day of the incident.

e. *The prosecution improperly used Mr. Adams' silence when being arrested as evidence of his guilt.*

The right to remain silent when accused of criminal activity is a bedrock protection guaranteed by the Fifth Amendment as well as article I, section 9 of the Washington Constitution. *Miranda v. Arizona*, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Custodial interrogation must be preceded by advice that the defendant has the right to remain silent and the right to the presence of an attorney during interrogation. *Miranda*, 384 U.S. at 479; U.S. Const. amend. 6; Wash. Const. art. I, § 22. "The prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (*quoting Miranda*, 384 U.S. at 468 n. 37).

An accused person's failure to react when officers confront him with incriminating evidence is the same as describing him as remaining silent when interrogated by police. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1030-31 (9th Cir. 2001). In *Velarde-Gomez*, prosecution offered evidence that the defendant was non-responsive

when confronted with incriminating evidence: “Agent Salazar testified that Velarde ‘didn’t look surprised or upset;’ that ‘[t]here was no response;’ that he did not ‘say anything;’ and that he did not ‘deny knowledge.’” *Id.* at 1031. The Ninth Circuit held, “Each of these comments described the same thing - that Velarde did not react at all, but remained silent in the face of confrontation.” *Id.* “The non-reaction the government seeks to introduce as ‘demeanor’ evidence is not an action or a physical response, but a failure to speak.” *Id.* This evidence commented on Mr. Velarde-Gomez’s silence. *Id.* Legitimate demeanor evidence might have been that “Velarde was sweating or vomiting,” but not his failure to respond or look upset. *Id.*

Similarly, in *Easter*, the defendant’s “right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him.” 130 Wn.2d at 241. “It was also violated by testimony and argument he was evasive.” *Id.*

In the State’s case-in-chief, the prosecutor repeatedly elicited Mr. Adams’ silence and failure to express surprise or concern about his wife at the time he was being arrested for assaulting her. 3RP 239, 279-80. Two police officers went to Mr. Adams’ home to arrest him after

speaking to Ms. Adams at the hospital. 3RP 267. They confronted him with her allegations. 3RP 268-69. They did not give *Miranda* warnings or tell him he was not required to answer their questions. *Id.*

When Officer Dearborn told Mr. Adams that his wife was in the hospital and said he injured her, Mr. Adams did not say anything. 3RP 267-69. His response “was not one I would expect from a spouse that had just learned their wife . . . was in the emergency room.” 3RP 268. “He was not shocked, he was not surprised.” *Id.* Mr. Adams objected to the officer’s comments about “what wasn’t said,” but the court overruled his objection. *Id.*

The prosecutor asked the officer to explain Mr. Adams’ “physical demeanor,” which the officer described as “indifference” and “[l]ack of surprise.” *Id.* Mr. Adams again objected, explaining that indifference is not demeanor. 3RP 268-69. The court sustained this objection and told the prosecutor he could ask about “physical signs.” 3RP 269. The prosecutor asked, “Did he have any physical reaction?” and the officer replied, “No, nope. There was a lack of surprise, let me say that.” *Id.* She said she questioned Mr. Adams if he knew why Ms. Adams was in the emergency room. *Id.* The prosecutor told her not to discuss his “lack of statements.” *Id.*

When cross-examining Officer Dearborn, defense counsel clarified that when the police asked, Mr. Adams “said that he had not hit Kim Adams.” 3RP 272, 273. The court overruled the prosecutor’s objection to eliciting what Mr. Adams’ “self-serving hearsay” when arrested because the State had opened the door by offering Mr. Adams’s “demeanor.” 3RP 273. In response, the prosecutor pressed Officer Dearborn for further information about what Mr. Adams *did not say* at the time of his arrest. The prosecutor asked, “did he tell you anything else?”; “Did he tell you anything about the hospital?”; “[W]hat did he say” when told that his wife was in the hospital; and “Did he tell you anything else” about his wife being at the hospital. 3RP 279-80. The officer’s answers to these questions were, “no,” Mr. Adams had not said anything else. *Id.*

The prosecution impermissibly presented evidence of Mr. Adams’ absence of his statements at the time of his arrest in violation of his right not to be compelled to give evidence against himself, in violation of the Fifth Amendment and article I, section 9. *Easter*, 130 Wn.2d at 241. His failure to be “surprised” by Ms. Adams’ injuries or to ask the police questions about her well-being were inadmissible in the State’s case-in-chief. *Id.*

f. *These errors affected the jury's deliberations and require reversal.*

Because the prosecutor violated Mr. Adam's constitutional rights, the constitutional harmless error standard applies. *Easter*, 130 Wn.2d at 241. The State must prove beyond a reasonable doubt the misconduct did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Alternatively, when reviewing evidentiary errors, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

The violation of Mr. Adams' right to remain silent is presumptively prejudicial. *Easter*, 130 Wn.2d at 241. Highlighting his failure to express sufficient concern and remorse to the arresting officers encouraged the jury to convict him due to his lack of sympathy and callousness. The prosecution further appealed to the biases of the jury by repeatedly eliciting evidence that Mr. Adams was "very controlling" toward his wife and wasted her money gambling; and this evidence has a "heightened prejudicial effect." *Gunderson*, 2014 WL

2014 WL 6601061, at *4. These characterizations of Mr. Adams had no bearing on whether he intentionally hit and injured Ms. Adams on the evening of September 19, 2014, but gave the jury reasons to want to see Mr. Adams punished for his general propensity to callously toward her. Likewise, claims about whether he used drugs on other occasions and gambled away their money were not probative of the claimed assault but gave the jury another reason to dislike and distrust Mr. Adams.

As this Court has explained, trained and experienced prosecutors “do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996). While there was clear evidence Ms. Adams had two small rib fractures, there was not clear evidence of what caused them or why. Mr. Adams denied intentionally harming Ms. Adams and did not recall using force against her. Yet the prosecution improperly bolstered the complainant’s credibility and discredited Mr. Adams by violating the rules of evidence and infringing on his right to remain silent. *See Fleming*, 83 Wn.App. at 216. This Court should reverse and remand for a fair trial.

F. CONCLUSION.

Mr. Adams' conviction should be reversed and a new trial ordered.

DATED this 16th day of December 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy Collins", written over a horizontal line.

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 71468-6-I
)	
MARTIN ADAMS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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