

FILED  
Jan 20, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73340-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MARTIN BURTON,

Appellant.

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

The Honorable Jim Rogers, Judge  
The Honorable Dean S. Lum, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL DENIED BURTON A FAIR TRIAL WHEN HE PROPOSED AN INSTRUCTION WHICH PERMITTED JURORS TO HEAR OTHERWISE OMITTED EVIDENCE

Evidence of Burton's prior alleged assault of "Virginia" was never introduced at trial. Nonetheless, defense counsel proposed, and the trial court gave, a limiting instruction which introduced this evidence to the jury. Defense counsel then further elaborated on this omitted evidence during closing argument. As set forth in the opening brief, Burton argues defense counsel was ineffective for proposing an ER 404(b) instruction and then further elaborating on this omitted evidence during closing argument. Brief of Appellant (BOA) at 5-17.

The State does not dispute that evidence of the alleged assault was omitted at trial. Brief of Respondent (BOR) at 10, 12. Rather, the State suggests the prosecutor's unanswered question to R.W., "Did she tell you about anything that the Defendant had done to her recently that would cause her injury," allowed the jury to speculate and infer that Burton had assaulted another women. BOR at 10, 12. This argument fails for several reasons.

First, as the State recognizes, the question about Burton's alleged assault of Virginia was not answered by R.W. BOR at 10, 12. Evidence of the alleged incident was also not introduced elsewhere during R.W.'s

testimony, and was not discussed during the prosecutor's closing argument. The only evidence of the alleged assault came from defense counsel's proposed instruction and discussion of the incident during his closing argument. Whatever inferences the prosecutor's question to R.W. may have conveyed to the jury, the full extent of Burton's alleged assault, injury, and threats to "Virginia" was not communicated to the jury until defense counsel's proposed instruction and discussion of the incident.

Second, the prosecutor's unanswered question, and decision not to press R.W. for further information, left open the possibility that "Virginia's" accusations against Burton were just that. In contrast, the language of defense counsel's proposed instruction conveyed to the jury that the accusations were in fact true: "I am allowing evidence that *[R.W.] knew of Defendant's prior assault against a person named Virginia.*" CP 51 (instruction 8) (emphasis added).

Finally, even assuming the prosecutor's unanswered question permitted the jury to speculate, jurors were specifically instructed the prosecutor's remarks were not evidence. CP 43 (instruction 1). Thus, only through defense counsel's proposed instruction and discussion of Burton's prior alleged assault was the jury permitted to hear, and consider, this otherwise omitted evidence.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION LIMITING JURORS USE OF OTHER UNCHARGED ACTS BETWEEN BURTON AND R.W.

Burton also argues defense counsel was ineffective for failing to propose an instruction limiting the jury's use of other uncharged acts between Burton and R.W. BOA at 17-20. The State suggests defense counsel's decision not to request a limiting was strategic because "the record suggests Burton and counsel strategically used R.W.'s testimony to assist in their defense[.]" BOR at 18. As discussed in the opening brief however, nothing prevented defense counsel from using R.W.'s testimony to assist in the defense while still limiting the proper purposes for which the jury could consider that evidence. BOA at 19 (citing City of Seattle v. Patu, 108 Wn. App. 364, 369, 30 P.3d 522 (2001), aff'd 147 Wn.2d 717, 58 P.3d 273 (2002)). Counsel's failure to propose an adequate limiting instruction fell below the standard expected for effective representation.

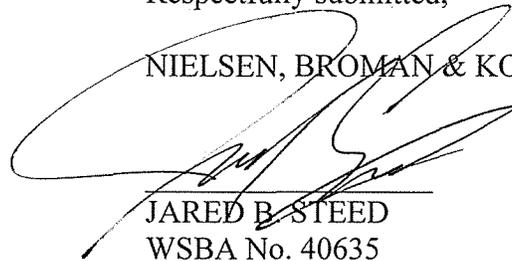
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Burton's convictions and remand for a new trial.

DATED this 20<sup>th</sup> day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and extends upwards into the 'Respectfully submitted' line.

JARED B. STEED

WSBA No. 40635

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Attorney for Appellant

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STATE OF WASHINGTON	)	
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Respondent,	)	
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vs.	)	COA NO. 73340-1-I
	)	
MARTIN BURTON,	)	
	)	
Appellant.	)	

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**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 20<sup>TH</sup> DAY OF JANUARY, 2016, 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] MARTIN BURTON  
DOC NO. 998076  
MONORE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF JANUARY, 2016.

X Patrick Mayovsky