68429-9

68429-9

NO. 68429-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HAROLD DONALD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence Rule 404 prohibits the admission of character evidence to prove action in conformity therewith. Claiming that his constitutional right to present a defense trumps the rules of evidence, Donald sought to admit co-defendant Leon's prior convictions for crimes of violence to argue that Leon's violent nature made it likely that he alone committed the charged assault and attempted robbery. Washington courts have repeatedly rejected the idea that the constitutional right to present a defense requires the suspension of the rules of evidence. Further, the federal cases Donald cited neither approve the admissibility of pure propensity evidence nor hold that the right to present a defense trumps the rules of evidence. Moreover, the trial court concluded that evidence of Leon's criminal history would mislead the jury into believing that Donald did not have such a propensity, because ER 404(b) would preclude evidence of Donald's similar history of violent crimes. Did the trial court act within its discretion in excluding inadmissible evidence of Leon's propensity for violence?

2. A trial court may exclude relevant evidence if the probative value of the evidence is substantially outweighed by its risk of confusing the issues or wasting time. Here, the trial court granted Donald's motion to admit extensive evidence in support of his theory that the co-defendant,

Leon, acted alone, including evidence that Leon was malingering as relevant to consciousness of his guilt. However, the trial court excluded Leon's claim – made seven months after the crime and two months after his plea of guilty – that he heard voices telling him to hurt other people. Relying on ER 403, the court found those statements to be minimally relevant and likely to require extensive expert testimony as to whether Leon – who was not called as a witness at trial – was malingering when he made them. Did the trial court properly exercise its discretion when it excluded Leon's statements that he had experienced command hallucinations?

3. Fourteen years ago, in State v. Meggyesy,[1] this Court denied a challenge to a jury instruction that advised the jury that it had a "duty" to convict if it found that the State had proven each element of the crime beyond a reasonable doubt. The jury in this case was instructed in the same language as that challenged in Meggyesy. Donald has failed to prove that the holding of Meggyesy is "incorrect and harmful" as required by In re Stranger Creek[2] to overturn this precedent. Should his challenge to the jury instructions on the same basis urged in Meggyesy be rejected?

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[1] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

[2] 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On January 12, 2011, the State charged the defendant, Harold Clayton Donald, with one count of Assault in the First Degree, one count of Attempted Robbery in the First Degree, and one count of Possession of a Stolen Vehicle. CP 1-2. Six days later, the State amended the Information to add a co-defendant, Lorenzo Adrian Leon. CP 8-9.

Prior to trial, Leon pled guilty to one count of Attempted Robbery in the First Degree and agreed to testify against Donald. CP 47, 229-31, 243-44. However, Leon's counsel twice raised issues of his competency; at least one evaluator, Dr. Brian Judd, determined that there was no evidence to believe that Leon suffered from a mental illness. CP 47-48, 60-62, 243-45. Nonetheless, Leon continued to act mentally ill and refused to be interviewed by the State or Donald's lawyer to prepare for trial. CP 243-45. The State thus determined that it was unable to call Leon as a witness at trial against Donald. CP 243-45; 3RP 27.[3]

During pretrial hearings, the State amended the Information to add rapid recidivism aggravators to all three counts, and an aggravator on

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[3] This brief uses the following notation to refer to the thirteen-volume Verbatim Report of Proceedings: 1RP for January 23, 2012; 2RP for January 24, 2012; 3RP for January 25, 2012; 4RP for January 26, 2012; 5RP for January 30, 2012; 6RP for January 31, 2012 (one version of this volume is mislabeled January 23, 2012); 7RP for February 1, 2012; 8RP for February 2, 2012; 9RP for February 6, 2012; 10RP for February 7, 2012; 11RP for February 8, 2012; 12RP for February 9, 2012; and 13RP for February 24, 2012.

count II, Attempted Robbery in the First Degree, to the effect that the level of injuries substantially exceeded the level of bodily harm necessary to establish the elements of the crime. CP 69-71. The court later declined to instruct the jury on the latter aggravator. 10RP 155-57.

Pretrial, Donald sought to offer an "other suspect" defense, predicated on the theory that Leon – and Leon alone – committed the instant offenses. CP 186-210; 2RP 183-85. In support of this defense, Donald sought to offer evidence that Leon had been repeatedly convicted of crimes of assault, malicious mischief, harassment, attempted robbery, and burglary. CP 193-98. Donald argued that the evidence of these convictions should be admitted to show that Leon has a propensity to commit violent acts, and that ER 404(b) does not apply to evidence offered by a defendant regarding a third party. CP 187-98; 2RP 159-74.

The trial court rejected Donald's argument and excluded the evidence. The trial court recognized that in Washington, ER 404(b) applies to all parties. 2RP 171. The court noted that, when propensity evidence is admissible under the rules, it must be proved through reputation. 2RP 161-62. The court also observed that permitting Donald to offer evidence of Leon's criminal convictions to prove propensity was

unfair and misleading, because Donald had a strikingly similar criminal history, none of which was admissible.[4] 2RP 162-74.

Donald also sought to introduce evidence regarding Leon's mental health in support of his other suspect defense. Specifically, he offered evidence that Leon was faking any mental illness. CP 205-08. He also tried to admit evidence that Leon was experiencing "command hallucinations" telling him to hurt himself or others. CP 208-10. Donald's theory was that either Leon was malingering in order to escape responsibility for his role in the crime, or was genuinely mentally ill and was thus driven by his illness to commit the crime. CP 205-10. The trial court agreed to allow a limited presentation of evidence on this topic. Specifically, the court admitted evidence that Leon planned to malinger in order to avoid being held responsible for the crime, but excluded evidence that Leon claimed to hear voices telling him to hurt others. 3RP 11-19.

After a six-day trial, the jury found Donald guilty of Assault in the First Degree and Attempted Robbery in the First Degree, but acquitted him of Possession of a Stolen Vehicle. CP 120, 122, 124. The jury further found that he had committed the crimes of Assault and Attempted

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[4] Donald's criminal history includes convictions for Assault in the Second Degree in 2006 and 2008, and five convictions for Assault in the Fourth Degree, from 2006, 2007 (two), and 2010 (two). CP 49, 136. He had been released from custody for a probation violation for the later Assault in the Second Degree only two weeks prior to the assault and robbery that led to the instant charges. 2RP 167-68.

Robbery shortly after being released from incarceration. CP 121, 123. Based on these convictions and an offender score of nine, Donald faced a total standard range sentence of 240 to 318 months in prison. CP 131. On February 24, 2012, the trial court held a sentencing hearing and imposed an exceptional sentence of 397 months in prison. CP 130-39. This appeal timely followed. CP 168.

2. SUBSTANTIVE FACTS[5]

In the early morning hours of December 17, 2010, King County Sheriff's Deputy Stephanie Gerlitz and her partner Deputy Chris Meyers responded to a 911 call at the Autumn Ridge Apartments at 152nd and Aurora in Shoreline, Washington. 6RP 13-16, 19, 56-57; Ex. 2. It was very cold, near freezing. 6RP 13, 134. As she drove into the apartment complex, Gerlitz observed a man, naked except for one slipper, lying in the grass moaning. 6RP 20, 57-58. He was very bloody, could not speak, and did not open his eyes. 6RP 20, 57-58. She covered the man with a blanket and called for medics, who arrived within minutes. 6RP 21.

The man, later identified as Gordon McWhirter, was taken to Harborview Medical Center. 8RP 49. Dr. Steven Mitchell, a physician in

[5] Count III, Possession of a Stolen Vehicle, involved Donald's use of a stolen white Dodge Dynasty belonging to Mario Garcia Osoria around the time of the assault and attempted robbery of victim Gordon McWhirter. CP 1-6. Because Donald was acquitted of count III, and because the evidence pertaining to that count has little bearing on the two counts involving McWhirter, this statement of facts does not discuss the evidence relevant to the Possession of a Stolen Vehicle charge.

the emergency room, provided some of McWhirter's care. 8RP 47. Mitchell reported that when McWhirter arrived at the hospital around 4:45 a.m., he was intubated and significantly injured. 8RP 49. He was not interacting with his environment. 8RP 69. He had a significant head injury, and Mitchell thought it likely he would have internal injuries as well. 8RP 50.

Upon examination, doctors discovered an injury to McWhirter's spleen, a rib fracture, facial fractures, and a toe fracture. 8RP 50-58. He also had a traumatic brain injury, described as a shear injury, meaning that connections in the brain had been torn apart. 8RP 70-74. As a result, McWhirter could not move his extremities in a coordinated or purposeful way. 8RP 70-74. McWhirter also had abrasions and contusions all over his body – particularly on his back, arms, and face – as if he had been dragged. 8RP 50, 57. Mitchell opined that the injuries McWhirter suffered were consistent with blunt force trauma, like being hit by a car or being assaulted. 8RP 60, 89-90. He further said that the injuries were life-threatening. 8RP 60-61, 64-65. McWhirter was put on a ventilator in order to breathe, and was provided nutrition through tubes. 8RP 67. He was not discharged from the hospital until January 12, 2011, when he was moved to a rehabilitation facility. 8RP 76; 10RP 18.

In the meantime, after tending to McWhirter, Deputy Gerlitz began investigating the scene where McWhirter was found. She observed a trail of blood from McWhirter through the parking area to a parked Jeep Cherokee. 6RP 22, 63. Along the bloody trail, she noticed toenails and parts of toes on the ground. 6RP 23, 65; Ex. 3. Gerlitz also saw a second slipper, matching the one McWhirter had been wearing, and a pair of glasses. 6RP 30, 65. The Jeep itself had damage, including drill marks as if someone had tried to drill through the door, and a broken steering column and ignition. 6RP 37, 41-42, 65; Ex. 3. There was also blood on the Jeep. 6RP 37, 65. The Jeep belonged to McWhirter. 6RP 67-68; 10RP 10.

McWhirter's apartment, in the M building of the complex, was located directly across the parking lot from his Jeep. 6RP 80; 10RP 5. From the back porch of the apartment, one could look across and see the Jeep. 6RP 91; 10RP 16. McWhirter's wife, Sandra McWhirter, was sleeping when the police knocked on her door that morning. 6RP 83, 88-89. She testified that she had been ill, so she took some medication and went to sleep in the late afternoon of December 16, 2010. 10RP 12. When Sandra woke up, around 1:00 or 1:30 a.m. on December 17, 2010, she spoke with her husband and reminded him he needed to pay a dental bill. 10RP 13. She awakened again a short time later to movement in the

room. 10RP 14. She saw McWhirter was up, wearing only his robe; he told her he was going to turn on the computer, pay the bill, then go out onto the back porch to have a cigarette because he couldn't sleep. 10RP 14-15. She went back to sleep, and didn't know anything further until the police awakened her. 10RP 17. A later forensic check of the computer showed that McWhirter had in fact turned it on at about 2:04 a.m. on December 17, 2010. 9RP 159-60.

Detective Christina Bartlett responded to the scene and took responsibility for the investigation. 6RP 132. She observed the trail of blood, and collected the slipper, the eyeglasses, and blood samples and human tissue for later DNA testing. 6RP 167, 172-76. Bartlett also supervised the processing of the Jeep for latent fingerprint evidence. 7RP 12.

The latent print examiner, Boyd Baumgartner, located eleven prints of comparison value on the Jeep. 7RP 136-41. Two of the prints, from the outside of the rear passenger-side door, were matched to Donald. 7RP 144-48. A print on the interior of the front passenger-side window was matched to Leon. 7RP 149-51. Based on that information, Bartlett attempted to find Donald, Leon, and their associates. 7RP 59-60.

On January 3, 2011, the detective located and interviewed Donald at the jail. 7RP 60. Donald told her that he didn't know anything about a

Jeep in Shoreline or a man who got hurt there on December 17, 2010. Ex. 35. He claimed that he was at his Aunt Jackie's that evening, then went to the SeaTac Inn and stayed there with his sister Shakesha Donald until noon. Ex. 35. He denied knowing Leon, denied being present at the crime, and could not explain how his fingerprints came to be on the Jeep. Ex. 35.

That evening, after meeting with Bartlett, Donald twice called his mother, Cheryl Skillings, from the jail. 9RP 174-75. In the first call, he told his mother to throw away a blanket that he had given her. Ex. 46. An hour later, he called back and told his mother to get ahold of his sister Shakesha, and to tell her to say that he was at the motel with her. Ex. 47.

On January 4, 2011, the day after her interview with Donald, Bartlett interviewed Jade Jahmorris. 7RP 61. Jahmorris is the mother of Leon's child. 9RP 93. She knew Donald through Leon, and they had all hung out together ten to fifteen times between February 2010 and December 2010. 9RP 94.

On January 5, 2011, Bartlett interviewed Shirley Skillings, Donald's grandmother. 7RP 67-68. Shirley testified that on December 17, 2010, Donald had come to her apartment; her daughter – Donald's mother, Cheryl Skillings – was also present. 9RP 126-27. He had some pants that were stained and asked her for stain removal spray in order to

clean them. 9RP 132-33. Shirley commented on the pants to Donald, noting the mud on them. 9RP 133. Donald told her, "It's not mud. I stomped somebody." 9RP 133.

The next day, Bartlett met with Donald's mother, Cheryl Skillings. 7RP 89, 99. After their initial conversation, Cheryl provided Bartlett with a bathrobe. 7RP 100-02; Ex. 24. The robe was the same one that McWhirter had been wearing during the early morning hours of December 17, 2010. 10RP 14-15. Cheryl told the jury that Donald gave her the bathrobe as a Christmas gift when she saw him in December at her mother's house. 9RP 162-64. She acknowledged that Donald had called her from the jail and told her to throw it away, but she didn't do so. 9RP 175-76. During the December visit, Cheryl also noticed the apparent mud on Donald's pants. 9RP 164. She testified that she knew Leon as Donald's friend, and had known him for three or four years. 9RP 169.

On January 7, 2011, Bartlett interviewed Donald's sister, Shakesha Donald. 7RP 111. Shakesha testified that she met up with her brother on December 16, 2010, at the SeaTac Inn. 9RP 146-47. She was staying there with her friend, Donnie. 9RP 147-48. Donald's friend Leon then arrived at the motel. 9RP 152-53; Ex. 45. That evening, Donald drove the four of them – himself, Shakesha, Leon, and Donnie – up to a motel in Shoreline. 9RP 153-54. When they picked her up later, Donnie was no

longer with them. 9RP 155-56. At the time, Donnie lived in the M building of the apartment complex located at 152nd and Aurora, near Goldie's Casino. 9RP 148-49; Ex. 44.

Armed with all of this new information, Bartlett went to meet with Donald again; she took a second statement from him on January 10, 2011. 8RP 118-19; Ex. 36. Donald maintained that he did not know Leon. Ex. 36. He denied seeing his mother, Skillings, around the holidays, and denied giving her a blanket or robe as a gift; he claimed he gave her shoes for Christmas. Ex. 36. Donald denied giving Shakesha, his sister, a ride on the night of the crime. Ex. 36. He continued to insist that he had nothing to do with the assault on McWhirter, but could not explain how McWhirter's blood was on his shoes. Ex. 36. After that conversation, Donald again called his mother, and asked her why the detective was asking him what he gave her for Christmas. 9RP 174-75; Ex. 48.

Bartlett also obtained Donald's clothing from the King County Jail, including his shoes, jeans, and outerwear. 7RP 83; Ex. 21. Later DNA analysis of the clothing showed that McWhirter's blood was on both the front of the jeans and the toe area of the right shoe.[6] 10RP 47-53, 61-64.

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[6] The forensic scientist, Denise Rodier, opined that the chances of a random individual matching the DNA profile developed from the jeans was one in twelve quadrillion (12,000,000,000,000,000). 10RP 58. For the shoes, the chances were one in 20 quintillion (20,000,000,000,000,000,000). 10RP 63-64.

Blood recovered from the broken ignition switch from the Jeep matched Leon. 10RP 67-68.

During her investigation, Bartlett repeatedly visited McWhirter at the hospital. On the first visit, on December 17, 2010, he was intubated, unresponsive, and seriously injured. 6RP 179; Ex. 13. When she visited him four days later, on December 21, 2010, he was still unconscious. 7RP 29. On January 14, 2011, Bartlett went to see McWhirter at the Swedish Hospital Providence Rehabilitation Unit. 7RP 114. He was trying to feed himself applesauce, but he was spilling it all over himself. 7RP 114. Sandra McWhirter explained that, as a result of the assault, her husband was unable to shower by himself or feed himself. 10RP 19. He could not open jars or brush his teeth. 10RP 19-20. He has been going to therapy to learn how to regain control over his muscles, walk, and keep his balance. 10RP 18. They can no longer play games together because McWhirter's mind does not operate quickly enough. 10RP 22.

McWhirter was able to testify at trial. 10RP 4. He could not remember any of the events of December 16, 2010, in the hours leading up to the assault, nor did he remember the assault itself on December 17, 2010. 10RP 6. In describing his life after the assault, McWhirter explained that his whole left side is numb, his speech is slurred, he has difficulty moving and communicating, and his memory and thinking have

been affected. 10RP 7-10. He said he can no longer do many activities without supervision, and cannot even hold a book correctly. 10RP 9-10.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED DONALD'S PROFFERED EVIDENCE THAT LEON HAD A PROPENSITY TO COMMIT VIOLENT CRIMES.

Donald complains that the trial court violated his constitutional right to present a defense by excluding what he freely admits is propensity evidence. But ER 404 precludes any party from offering evidence to prove the character of a person, except under certain circumstances not relevant here. A defendant's right to present a defense does not overcome the strictures of ER 404. Moreover, the federal cases Donald relies on do not recognize a constitutional right to admit propensity evidence. Finally, the trial court's exclusion of Donald's evidence was also proper under ER 404(a), 405, and 403. There was no error.

a. The Trial Court Correctly Applied Evidence Rule 404 To Exclude Donald's Proffered Propensity Evidence.

A trial court's decision to admit or exclude evidence is given considerable deference. Thus, the trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In order to reverse a trial court's ruling, the challenging

party must show that the decision was manifestly unreasonable, or that discretion was exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence Rule 404 prohibits the admission of character evidence for the purpose of proving action in conformity therewith. The rule provides for three exceptions not relevant here.[7] ER 404(a). Evidence Rule 404(b) further provides that, although evidence of other acts is not admissible to prove propensity, such evidence may nonetheless be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

In assessing whether evidence of prior acts is admissible pursuant to ER 404(b), the Court must engage in a four-step analysis. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). First, the court must find by a preponderance of the evidence that the alleged misconduct occurred. Second, the court must identify the purpose for which the evidence is being offered. Third, the trial court must conclude that the

[7] These exceptions are: (1) evidence of a pertinent character trait of the defendant offered by the defendant (subject to rebuttal by the prosecution); (2) evidence of a pertinent character trait of a victim offered by the defendant (again subject to rebuttal by the prosecution), or offered by the State in a homicide case to rebut a claim that the victim was the first aggressor; and (3) evidence of the character of a witness as provided in rules 607 (any party may impeach a witness), 608 (reputation evidence), and 609 (impeachment through prior convictions). ER 404(a).

evidence proffered is relevant to the identified purpose. Fourth, the court must find that the probative value of the evidence outweighs its unfair prejudicial effect. Lough, 125 Wn.2d at 853; State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997). The last step is of special note. Although ER 403 operates to exclude relevant evidence only if its probative value is substantially outweighed by the danger of unfair prejudice, Washington cases have occasionally inverted that test in the context of ER 404(b), requiring its probative value to outweigh the danger of unfair prejudice. See, e.g., Baker, 89 Wn. App. at 732.

Here, Donald sought to introduce evidence that his co-defendant, Leon, had numerous previous convictions for assault and robbery. CP 193-98. He admitted below, and acknowledges on appeal, that this evidence was offered solely for propensity: to prove that Leon was violent, and thus was more likely to have committed the assault on and attempted robbery of McWhirter.[8] Such evidence is explicitly prohibited by ER 404. Donald has never argued that the proffered evidence fit into

[8] The State is not putting an adversarial gloss on Donald's argument; he was and is quite explicit that he should be entitled to offer propensity evidence to prove that Leon was the sole perpetrator. See, e.g., CP 198 ("The fact is that Lorenzo Leon's history shows that he is the type of person who would commit such a crime. He has repeatedly exhibited extremely violent behavior and shown an inability to control his violent temper."); 2RP 159-60 ("MR. NORMAN [defense counsel]: . . . I seek to admit Lorenzo Leon's violent history. THE COURT: Well, that goes to his propensity, his character to be a violent person? MR. NORMAN: Correct."); Brief of Appellant at 16 (arguing for a weighing of only relevancy and prejudice "even when propensity evidence is offered"), 24 ("Leon's history of assaults shows a pattern of criminal conduct and violence . . . .").

any exception in ER 404(a) or was offered for any of the other purposes delineated in ER 404(b). Accordingly, the trial court was required to exclude it. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) ("Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.").

b. Donald's Argument That Evidence Rule 404(b) Does Not Apply To Criminal Defendants Is Unpersuasive.

In recognition of the fact that ER 404 requires the exclusion of his proffered propensity evidence, Donald does not claim that the court incorrectly applied the rule, nor could he. Rather, he argues that ER 404(b) should not apply to him at all.[9] In making this argument, Donald relies on his constitutional right to present a defense and federal cases interpreting the parallel federal rule. Neither of these supports his position.

i. The constitutional right to present a defense does not encompass the right to ignore the rules of evidence.

A criminal defendant has a due process right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). This right has two constitutional components: the right to offer the testimony of witnesses, and compel their presence at trial if necessary,

[9] He does not make that argument with respect to ER 404(a) or any other rule of evidence.

and the right to confront and cross-examine the prosecution's witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). "It is well settled, however, that the right to present a defense is not absolute. . . . The right to present a defense does not extend to irrelevant or inadmissible evidence." State v. Strizheus, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011) (citations omitted) (emphasis added), rev. denied, 173 Wn. 2d 1030 (2012); see also State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) ("Although Aguirre does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence.").

Despite a long line of cases disclaiming a constitutional right to introduce evidence irrespective of the rules of evidence, Donald nonetheless contends that such a right exists. Specifically, relying on three cases,[10] he argues that the constitutional right to present a defense is restricted only by the requirements that the evidence be relevant and not so prejudicial as to disrupt the factfinding process. Brief of Appellant at 11. Yet, the three cases cited by Donald are inadequate to support his position.

In Washington v. Texas, 388 U.S. 14, the United States Supreme Court held that Texas statutes that arbitrarily prohibited "persons charged or convicted as coparticipants in the same crime [from] testify[ing] for one

[10] These three cases are Washington v. Texas, 388 U.S. 14; Hudlow, 99 Wn.2d 1; and State v. Gallegos, 65 Wn. App. 230, 828 P.2d 37 (1992).

another," although they could testify for the State, violated the defendant's right to compulsory process. Id. at 16-17. The court did not hold that the only rules governing the admissibility of the co-defendant's testimony were rules regarding relevance and prejudice; to the contrary, the court stated in a footnote that other statutes creating testimonial privileges and the like were unaffected by its ruling. Id. at 23 n.21. There is nothing in the court's opinion that suggests suspending the rules of evidence.

In Hudlow, the Washington Supreme Court upheld the application of our state's rape shield law[11] to preclude admission of a rape victim's prior sexual conduct for purposes of attacking her credibility or proving consent. 99 Wn.2d 1. The Hudlow court did discuss the balance between a defendant's right to present relevant evidence and the State's right to prevent a disruption of the factfinding process. Id. at 15. However, as the touchstones of admissibility under the rape shield statute are relevance and prejudice, the court naturally focused on those elements of admissibility. See RCW 9A.44.020. Moreover, the Hudlow court observed that some of the defendant's proposed evidence would be excluded anyway as it was hearsay; the opinion in no way suggested that the hearsay rules should give way to a relevance-and-prejudice standard of admissibility alone. Hudlow, 99 Wn.2d at 17. Further, State v. Gallegos, 65 Wn. App. 230,

[11] Former RCW 9.97.150, now recodified at RCW 9A.44.020.

828 P.2d 37 (1992), the other case cited by Donald, merely applied Hudlow without further discussion.

Moreover, as discussed above, the constitutional right to present a defense has not been read to routinely trump the rules of evidence. See, e.g., Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) ("[A]ny number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence."); State v. Rafay, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012) ("A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible."); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (same). Instead, examples abound of defendants being precluded from presenting relevant evidence because of routine applications of the rules of evidence.

For instance, in State v. Thomas, this Court held that the exclusion of a defense expert's testimony under ER 702 – on the grounds that the evidence was not helpful to the trier of fact – did not violate the constitutional right to present a defense. 123 Wn. App. 771, 781, 98 P.3d

1258 (2004); see also State v. Willis, 113 Wn. App. 389, 54 P.3d 184 (2002), aff'd in part, rev'd in part, 151 Wn.2d 255, 87 P.3d 1164 (2004) (same). In State v. Finch, the Washington Supreme Court held that the exclusion of the defendant's self-serving hearsay did not violate his right to present a defense. 137 Wn.2d 792, 825, 975 P.2d 967 (1999) ("A defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). In Rehak, Division II held that foundational requirements for admissibility of other-suspect evidence do not violate a defendant's right to present a defense. 67 Wn. App. at 162-63.

By contrast, Donald does not offer a single case in which the rules of evidence were suspended so that a defendant could present his defense. Indeed, recognition of such a constitutional right would result in a chaotic free-for-all. After all, as long as the evidence is relevant and not unduly prejudicial, defendants could give written statements professing their innocence to their lawyers, then offer them into evidence without being subject to cross-examination. Compare ER 801(d)(2). They could impeach witnesses with convictions that are older than ten years, or that are misdemeanors, or that are not crimes of dishonesty. Compare ER 609. They could offer evidence outside their, or their witnesses', personal

knowledge. Compare ER 602. In fact, there would be no principled reason to limit Donald's radical suggestion that ER 401, 402, and 403 are the only gatekeepers of admissibility when evidence is offered by a defendant.

The constitutional right to compel the attendance of witnesses on one's own behalf and the constitutional right to confront the witnesses against one does not entail a right to suspend the rules of evidence. Donald's claim that he had a constitutional right to ignore the strictures of ER 404(b) so that he could present propensity evidence relating to Leon must be rejected.

ii. Federal caselaw does not support suspending the operation of Evidence Rule 404(b) when evidence is offered by a defendant.

Donald points to numerous federal cases in support of his argument that ER 404(b) should not apply to evidence offered by criminal defendants. But federal cases interpreting federal rules of evidence are persuasive only if the language of the rule at issue is ambiguous and in need of interpretation. Moreover, the federal criminal cases cited do not support Donald's argument. While several federal circuits are inconsistent in their approach to ER 404(b) analysis, none has allowed the admission of pure propensity evidence, and none has suggested that the application

of Rule 404(b) to exclude evidence proffered by a defendant deprives that defendant of his constitutional right to present a defense.

To interpret a rule of evidence, a court employs the same principles used to construe statutes. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Although the court must discern the intent of the drafting body in construing any rule, the starting point is the rule's plain language. Id. If the rule is unambiguous, the court gives effect to its plain meaning. Id.

Here, the rules of evidence unambiguously apply to all parties to any litigation. Evidence Rule 101 provides: "These rules govern proceedings in the courts of the State of Washington to the extent and with exceptions stated in Rule 1101." There is no provision that in any way limits the application of the rules to the prosecution alone. Moreover, ER 404(b) has no language limiting its scope to evidence offered by the prosecution or to acts committed by a defendant. Instead, the rule prohibits evidence to prove the character "of a person," not any particular person. ER 404(b). Indeed, the only case cited by Donald for the proposition that "reverse 404(b) evidence" has been recognized in Washington stands exactly for the principle urged here: the strictures of ER 404(b) apply to both parties in a criminal case. State v. Young, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987) (reversing a conviction

because Young's proffered evidence should have been admitted pursuant to ER 404(b) as proof of identity, control, and absence of mistake).

Despite the unambiguous nature of the evidence rules, Donald turns to federal cases to support his argument that ER 404(b) does not apply to evidence offered by defendants. The State agrees that, when faced with interpreting an ambiguous Washington rule of evidence, federal cases may provide persuasive authority. In re Pouncy, 168 Wn.2d 382, 392 & n.9, 229 P.3d 678 (2010). But, as discussed above, Washington's rule is not ambiguous. Moreover, the federal cases Donald cites do not support his position that exclusion of sheer propensity evidence violates his constitutional right to present a defense.

As Donald recognizes, the seminal case on "reverse 404(b) evidence" is United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991). As explained in that case, "reverse 404(b) evidence" is merely evidence, admitted pursuant to Federal Rule of Evidence 404(b), that is offered by the defendant instead of (as is more commonly the case) the prosecution.[12] Id. at 1401-02. As such, the case primarily stands for the unremarkable proposition that the rules of evidence apply with equal force to both parties in a criminal case. Id. at 1404 (rejecting the government's

[12] Indeed, Judge Richard Posner has suggested a more apt name for the evidence would be "nondefendant Rule 404(b) evidence." United States v. Murray, 474 F.3d 938, 939 (7th Cir. 2007).

contention that defendants may offer evidence pursuant to FRE 404(b) only under limited circumstances). The Stevens court further observed that, once evidence meets the admissibility criteria of FRE 404(b), it would be subject to the balancing of probative value against prejudicial effect as required by FRE 403. Id. at 1404-05 (citing State v. Garfole, 76 N.J. 445, 388 A.2d 587 (1978), with approval).

The only notable holding of the Stevens court is that, in evaluating the admissibility of other crimes committed by other suspects in order to prove identity (i.e., to prove that the other individual who committed the other crime likely committed the crime at issue as well), the standard of similarity is lower than it would be if the State were offering the evidence, because the prejudicial effect is lower. Id. at 1403-05. This is effectively an observation about balancing under ER 403 – where prejudicial effect is lower, the probative value of the evidence may be lower without rendering the evidence inadmissible.

The Third Circuit later further addressed its Stevens holding in United States v. Williams, 458 F.3d 312 (3d Cir. 2006). There, the court explained that "the prohibition against propensity evidence applies regardless of by whom – and against whom – it is offered." Id. at 317.

Moreover, the court clarified that there is no need to engage in ER 403 balancing unless and until the court first determines that the evidence is admissible under ER 404(b). Id. Other circuits have agreed with this approach. See, e.g., United States v. McCourt, 925 F.2d 1229, 1234-35 (9th Cir. 1991) ("Evidence of 'other crimes, wrongs, or acts,' no matter by whom offered, is not admissible for the purpose of proving propensity or conforming conduct, although it may be admissible if offered for some other relevant purpose."); United States v. Lucas, 357 F.3d 599, 606 (6th Cir. 2004) ("We therefore hold that the standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime.").

Although Donald characterizes a number of federal cases as holding that FRE 404(b) does not apply when the evidence is offered by a defendant in support of his defense, many of those cases instead are simply a straightforward application of FRE 404(b). For instance, in United States v. Seals, 419 F.3d 600, 606-07 (7th Cir. 2005), the Seventh Circuit approved of the Third Circuit's reasoning in Stevens, yet excluded

evidence of other crimes committed by other suspects because the crimes were too dissimilar to constitute modus operandi to prove identity.[13] In United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005), the Tenth Circuit acknowledged Stevens, and admitted 404(b) evidence as relevant to the defendant's lack of knowledge. In other words, it admitted the evidence for one of the "other purposes" listed in FRE 404(b).

Other federal cases relied on by Donald imply a distinction between the use of FRE 404(b) to admit prior acts of the defendant and use of the rule to admit prior acts of third parties, but still appear to apply the rule in all cases. For instance, in United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983), the Eleventh Circuit held that, "Rule 404(b) does not specifically apply to exclude this evidence because it involves an extraneous offense committed by someone other than the defendant." However, the evidence at issue was not propensity evidence, but evidence relevant to identity and common plan, and thus admissible under the rule.

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[13] Donald claims that Seals overruled Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999), which applied a standard FRE 404(b) analysis of the admissibility of other acts evidence offered regarding a third party. This claim is belied not just by the Seals court's own use of FRE 404(b) to evaluate the admissibility of evidence, but by subsequent Seventh Circuit cases that both cite Seals and apply a traditional 404(b) analysis. See, e.g., United States v. Savage, 505 F.3d 754, 760-61 (7th Cir. 2007); United States v. Murray, 474 F.3d 938, 940 (7th Cir. 2007).

Further, the Morano court held that, although FRE 404(b) was not directly applicable, "the exceptions listed in the Rule should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403." Id.; see also Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311-12 (11th Cir. 1987) (citing Morano); United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (recognizing a difference between evidence of acts committed by a defendant and acts committed by a third party, but ultimately characterizing the proffered evidence as relevant to knowledge and plan); United States v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir. 1987) (suggesting that FRE 404(b) does not apply to acts committed by individuals other than the defendant, but approving the admission of the evidence as to intent and to rebut lack of knowledge).

The federal case that perhaps mostly strongly supports Donald's position is United States v. Krezdorn, 639 F.2d 1327, 1332-33 (5th Cir. 1981). There, the Fifth Circuit observed that a primary policy consideration underpinning FRE 404(b) – evidence that a defendant has a criminal disposition will be improperly used by a jury to conclude that he committed the instant offense – is not applicable when the evidence sought to be introduced pertains to a third person. Therefore, the Krezdorn court recognized that it was arguable that FRE 404(b) would not

apply to such evidence. However, despite Donald's claim to the contrary, the court ultimately declined to decide whether FRE 404(b) applied, holding instead that the challenged evidence was properly admitted either way.[14] Id.

Overall, the federal cases are inconsistent in their consideration of evidence offered pursuant to FRE 404(b) regarding acts done by a person other than the accused. They do have some common threads, however. The cases universally acknowledge the uncontroversial proposition that such evidence of other acts can be offered by any party to a case when offered for the "other purposes" enunciated in the rule. They do not

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[14] Donald's lengthy quotation of Krezdorn, Appellant's Brief at 15, leaves out some critical language. The entire relevant paragraph reads as follows, with emphasis added to show sentences, other than citations, not quoted by Donald:

> This evidence involves an extraneous offense committed by a person other than the defendant. Arguably, this is not the kind of evidence to which Rule 404(b) applies. "The extrinsic acts rule is based on the fear that the jury will use evidence that the defendant has, at other times, committed bad acts to convict him of the charged offense." United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979). Consequently, where the only purpose served by extrinsic offense evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded. When, however, the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable. It would seem, therefore, that when extrinsic offense evidence is sought to be introduced against a criminal defendant, in order to trigger the application of Rule 404(b) there must be an allegation that the extrinsic offense was committed by the defendant. We need not decide, however, whether Rule 404(b) applies to this situation since the evidence of the monetary payments is admissible whether or not Rule 404(b) applies.

United States v. Krezdorn, 639 F.2d 1327, 1332-33 (5th Cir. 1981) (footnote omitted).

sanction the use of propensity evidence by any party. And, they do not hold that the exclusion of the defendant's proffered propensity evidence constitutes a violation of his constitutional right to present a defense.

In short, none of the federal cases helps Donald. He did not offer evidence pursuant to ER 404(b). Rather, he offered evidence in spite of ER 404(b). No matter what standard of balancing pursuant to ER 403 a trial court employed, his evidence would still be inadmissible. Evidence offered to prove propensity is universally barred by ER 404(b).

iii. Even if Evidence Rule 404(b) does not apply to defendants, the trial court still properly excluded Donald's proffered evidence.

If this Court concludes – despite the plain language of ER 404(b) and the lack of case law supporting Donald's argument – that propensity evidence may be offered by a defendant, Donald's conviction should still be affirmed. His proffered character evidence was not admissible pursuant to ER 404(a) and 405. Moreover, the trial court excluded Donald's evidence not only because it was inadmissible pursuant to ER 404(b), but also because it would mislead the jury as prohibited by ER 403. This was not an abuse of discretion.

If a trial court errs in excluding evidence on one basis, reversal is not necessarily required. The exclusion of evidence may be upheld on any

proper basis, even if not on the rationale articulated by the lower court. See, e.g., State v. Jones, 71 Wn. App. 798, 824, 863 P.2d 85 (1993). Here, there were at least two alternate bases for excluding the evidence.

First, Donald proposed to prove Leon's character for violence through proof of his prior convictions. Specifically, it appears he intended to prove Leon's propensity for violence through his prior convictions for assault and similar offenses, as his brief refers to sworn probable cause statements and pleas of guilty. CP 195. His trial brief did not list any witnesses who could testify about the facts underlying the convictions from any personal knowledge. CP 47-68. Moreover, Donald did not endorse any witnesses to testify regarding Leon's reputation for violence in the relevant community. CP 47-68.

Accordingly, Donald was asking the trial court not just to ignore ER 404(b), but also ER 404(a) and 405. As noted above, ER 404(a) precludes the use of propensity evidence except to prove a pertinent character trait of a defendant offered by the defendant, a pertinent character trait of a victim offered by the defendant, or a pertinent character trait of a witness, subject to the restrictions of ER 607, 608, and 609. ER 404(a). Leon was none of those; instead, he was an accomplice whom neither party expected to call at trial. Donald makes no argument that ER 404(a) does not apply to him.

Moreover, "Rule 405 defines the acceptable methods of proving character, assuming the character of a party or victim is admissible under Rule 404(a)." 5A KARL B. TEGLAND, EVIDENCE LAW AND PRACTICE § 405.1, at 2 (4th ed. 1999). Thus, when character evidence is admissible, it must be proved through reputation evidence.[15] ER 405. Here, Donald never intended to prove Leon's character through reputation evidence, and he makes no argument that ER 405 does not apply to defendants. Donald's attempt to prove Leon's propensity for violence through his prior convictions was properly excluded, as Donald had no admissible evidence to prove Leon's character.

Second, the trial court excluded the evidence of Leon's prior convictions not just under ER 404(b), but also under ER 403. That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, the trial court recognized that Donald was offering Leon's prior criminal history in order to argue that Leon had a propensity for

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[15] If the person testifies at trial, additional avenues of proving character may be available, such as through cross-examination on specific instances of misconduct, or impeachment with prior convictions if relevant to credibility. See ER 608(b), 609. Again, Leon did not testify.

violence and thus was more likely to have committed the assault and attempted robbery of McWhirter than Donald was. 2RP 163-64. But the court also observed that Donald's criminal history showed him to be at least as violent as Leon. 2RP 163-64; CP 49. Due to ER 404(b), however, the jury would never hear about Donald's criminal history. Accordingly, the court held that arguing that the jury should compare Leon and Donald and conclude that Leon was the sole perpetrator because of his violent nature would be misleading. Because the jury would not hear evidence of Donald's convictions, it would be misled into believing no such evidence existed, and thus incorrectly infer that Donald was not violent, so Leon was more likely to have committed the offenses. 2RP 162-74. Balancing the misleading nature of Donald's evidence against the limited probative value of Leon's prior criminal convictions – especially in view of the fact that Leon's criminal history did not exculpate Donald or rationally lead to a conclusion that the crimes were committed by a single perpetrator – the evidence was properly excludable pursuant to ER 403.[16] The trial court did not abuse its discretion in so ruling.

[16] See United States v. Nobles, 422 U.S. 225, 241, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) ("The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.").

2. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT LEON SAID HE WAS HEARING VOICES THAT TOLD HIM TO HURT OTHER PEOPLE.

Donald complains that the trial court erred in excluding his proffered evidence that Leon had experienced command hallucinations to fight or kill other people. However, the trial court permitted Donald to offer significant other evidence in support of his other-suspect defense. In particular, the court allowed evidence that Leon was intentionally malingering in order to escape responsibility for his role in the crimes against McWhirter. The court then excluded evidence of marginal relevance – Leon's claimed hallucinations seven months after the crime – because of its low probative value and its likelihood of confusing the jury and prolonging the trial. This was not an abuse of discretion.

As discussed above, ER 403 permits a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues or by considerations of undue delay and waste of time. Further, a trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d at 308. And, the right to present a defense does not include a right to present evidence despite the rules of evidence. See section C.1.b.i, supra.

At trial, Donald sought to offer evidence that Leon was "faking" his mental illness (i.e., malingering) as evidence of his guilty conscience in support of his other-suspect defense. CP 205-08; 2RP 175-76. The defense proposed to prove that Leon was malingering through the testimony of Dr. Brian Judd, who evaluated Leon for court proceedings and determined he was malingering and competent, and through Leon's own statements, made primarily in recorded jail phone calls to his mother.[17] CP 205, 207; 2RP 175-76. At the same time, Donald sought to introduce evidence that Leon was hearing voices that told him to hurt himself and others (i.e., auditory command hallucinations). CP 208-09; 2RP 176-77. Donald intended to use such evidence – also offered through Dr. Judd and through Joann Johnson, another evaluator – again to show that Leon alone was responsible for the crimes against McWhirter. CP 208-09; 2RP 176-78, 191. Donald also acknowledged that Leon's mental health status was "unclear." CP 203, 205; 2RP 176-77. Either he was genuinely mentally ill (although there appears to be little evidence to support such a position), or he was malingering.

The trial court permitted Donald to offer the bulk of the evidence he sought to use. Specifically, the court admitted, as evidence of his

[17] Donald told the trial court that there were "hundreds of jail calls" from Leon that supported his theory that Leon was malingering. 2RP 190. He offered only four. Ex. 58.

consciousness of guilt, Leon's plea of guilty[18] and his jail phone calls prior to his guilty plea "where he references the amount of prison he's facing and suggest[s] he might want to feign symptoms or somehow manipulate the system in order to reduce that amount of time." 3RP 11-12. The court also permitted evidence that Leon in fact was ordered to undergo a competency evaluation. 3RP 19-23.

However, the court excluded any expert testimony regarding whether Leon was in fact mentally ill or was instead malingering, and excluded evidence that he was experiencing command hallucinations. 3RP 12-13. In reaching this decision, the court primarily relied on ER 403, concluding that such evidence had limited probative value, as the evaluations and statements at issue occurred after Leon pled guilty, and that the danger of confusion of the issues and waste of time substantially outweighed their minimal probative value.[19] 3RP 12-19.

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[18] As a tactical choice, Donald elected not to use Leon's guilty plea. 3RP 11.

[19] The court heard argument over two days, and made a lengthy and detailed ruling regarding which evidence he was admitting or excluding, and why. The heart of the court's ruling with respect to the evidence of Leon's command hallucinations can be found at 3RP 13:

> I don't want this case to devolve into trying Mr. Leon's current mental state. That's distracting and I think it gets the jury away from the point that they're supposed to address in this case, which is who committed the offense in this case. And I'm making that ruling under [Evidence Rule] 403 that it just goes too far afield.
>
> And I'm not going to allow the defense to get into Mr. Leon's delusions or lack of delusions because it's going to get into medical records and psychological records where the debate of the expert is to whether these statements were delusional or malingering or whatever.

On appeal, Donald challenges only the exclusion of Leon's claims that he was experiencing command hallucinations. The trial court's ruling should be upheld, because it was an appropriate exercise of judicial discretion.

First, the court admitted substantial evidence that enabled Donald to argue his theory of the case that Leon was the sole perpetrator of the crime.[20] The court allowed Donald to offer evidence of Leon's guilty conscience, in the form of phone calls to his mother in which Leon frets about the amount of time he thought he was facing for his crimes and schemed about faking a mental illness in order to get a reduced sentence or outright dismissal. Ex. 58. The court permitted Donald to show that Leon acted on his plan, by obtaining an order for a competency evaluation. 3RP 19-23. And, the trial court allowed him to offer evidence that Leon was in fact guilty of the crime, in that he pled guilty to attempting to rob McWhirter. 3RP 11-12. Excluding the additional fact that Leon claimed to have had command hallucinations to hurt others did not impact Donald's ability to argue his theory that Leon acted alone.

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[20] Other suspect evidence may properly be admitted when the proponent shows that the evidence connecting another person with the crime charged creates a chain of facts or circumstances that clearly point to someone other than the defendant as the guilty party, establishing a nexus between the other suspect and the crime. E.g., State v. Howard, 127 Wn. App. 862, 866, 113 P.3d 511 (2005). There is no question that standard was met in this case with respect to Leon, as the State charged Leon with the crime and he pled guilty to Attempted Robbery in the First Degree. The defense theory was that Leon acted alone; the State's theory was that Leon and Donald were accomplices.

Second, Leon's claim that he heard voices telling him to hurt people was of limited relevance. The statements were apparently made in July 2011, seven months after the offense. 3RP 13-15. There was no offer of proof that Leon was experiencing these hallucinations close in time to the crime. Indeed, there is scant evidence that Leon was experiencing these hallucinations at all; Dr. Judd concluded that he was faking his mental illness in order to avoid responsibility for the offenses. CP 226. Because there was no evidence that Leon was hearing voices telling him to hurt people at the time that he and Donald assaulted and tried to rob McWhirter, any testimony that Leon claimed to hear such voices seven months later was of limited relevance, at best.

Third, the court correctly concluded that admitting Leon's claim that he had experienced command hallucinations would have been confusing to the jury and a waste of time. As the court articulated, if Donald called Dr. Judd to testify that Leon had said he heard voices that told him to harm others, the State would have been permitted to cross-examine Dr. Judd as to the context in which those statements were made. 3RP 13-14. By the time he claimed to have heard voices, Leon had already pled guilty to the attempted robbery and had agreed to testify against Donald. CP 229-31, 243. The State would thus be entitled to establish that Leon was faking the auditory hallucinations not to avoid

responsibility for his crimes, but to avoid testifying against his friend Donald while still maintaining the benefit of his bargain with the State. This would entail offering evidence that Leon had pled guilty and agreed to testify against Donald (evidence that Donald wanted to avoid, 3RP 11), testimony from Dr. Judd about the purpose for and content of his evaluation of Leon, Judd's opinion that Leon was malingering, and other testimony about Leon's attempts to avoid fulfilling his end of the plea agreement, such as refusing interviews with the prosecution and Donald's defense team. CP 226, 229-31, 243-45. As other doctors also evaluated Leon, either party could conceivably admit evidence of their opinions as well.[21] Ultimately, the testimony Donald wanted to admit would result in confusing, contradictory, and lengthy expert testimony regarding the mental state of a person who was not only not on trial, but not even expected to testify.

In context, then, the trial court did not abuse its discretion in concluding that the risk of confusion of the issues and the waste of time outweighed Donald's need for evidence of minimal relevance. During pretrials, Donald indicated he wanted to argue both that Leon was

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[21] The State could also have chosen to take the opportunity to offer the evidence it had of Donald's own deceitfulness during his competency evaluation as evidence of his consciousness of guilt. See CP 35 (Donald told evaluators he did not know his own mother's name); CP 36 (Donald claimed he experienced command hallucinations himself, but was evasive about the details).

malingering and that he was not. 2RP 177. That alone is confusing. Further, if Leon was faking the command hallucinations, there was no need to admit them; there was already ample other evidence that Leon intended to malinger and attempted to carry out his plan.[22] To the extent that Donald wanted to show that Leon was in fact experiencing command hallucinations, these were remote in time from the crime, would provoke rebuttal evidence from the State and a mini-trial on the issue of whether Leon was malingering, and would improperly bring in through the back door propensity evidence forbidden by ER 404(b). The trial court's balancing of these competing interests, and decision to exclude the evidence, was reasonable and should not be disturbed on appeal.

3. DONALD HAS FAILED TO SHOW THAT THE PATTERN "TO CONVICT" JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

On appeal, Donald claims for the first time that the trial court's "to convict" instructions misstated the law and violated his right to a jury trial under the state and federal constitutions.[23] Specifically, Donald contends that the following language misstates the law:

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[22] See Old Chief v. United States, 519 U.S. 172, 182-84, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (holding that a trial court should evaluate whether to exclude evidence pursuant to FRE 403 in the context of the probative value and prejudicial effect of "evidentiary alternatives" available to prove the same point).

[23] The language challenged mirrors the pattern jury instructions. Compare CP 89, 96, 100 with WPICs 35.04, 35.13 and 37.02.

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 89, 96, 100.[24] Donald asserts that the court should instead have instructed the jury that it "may" convict upon a finding of proof beyond a reasonable doubt. U.S. CONST. AMEND. VII; Washington Const. art. I, § 21; Leonard v. Territory, 2 Wash. Terr. 381, 399, 7 P. 872 (1885).

This Court rejected this same argument over fourteen years ago. State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Since Meggyesy, every court to consider the issue has adhered to its reasoning, and the Washington Supreme Court has repeatedly denied review.[25] Donald acknowledges the precedent, but argues Meggyesy was wrongly decided. Yet, under the principles of stare decisis, a court will not overturn a prior holding unless

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[24] In his brief, Donald objects to the language in the "to-convict" instructions found at CP 89 (Assault in the First Degree), 96 (lesser included offense of Assault in the Second Degree), and 107 (Possession of a Stolen Vehicle). As Donald was acquitted of Possession of a Stolen Vehicle, but convicted of Attempted Robbery in the First Degree, the State assumes that Donald intended to challenge the jury instruction found at CP 100, not CP 107.

[25] See, e.g., State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

it is shown by clear evidence that it is incorrect and harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) ("The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned."). Donald makes no new arguments sufficient to meet this burden. Further, he failed to preserve any error for appellate review.

a. Rule Of Appellate Procedure 2.5(a) Precludes Appellate Review.

Donald failed to preserve the jury instruction issue for appellate review. "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An instructional error not objected to below may be raised for the first time on appeal only if it is "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). A reviewing court will not assume that an error is of constitutional magnitude. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). The court will look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. Id.

An error is manifest if it resulted in actual prejudice. To demonstrate actual prejudice, there must be a "plausible showing by the

[appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 135 (alteration in original).

Donald never objected to the instructions given here. 2/7/12RP 149-58. This bars review unless Donald can prove the error is manifest constitutional error with identifiable consequences. See State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Here, there can be nothing more than pure speculation that the alleged error – the inclusion of the disputed language in the jury instructions – had identifiable consequences. This is insufficient to allow for appellate review.

b. Donald Fails To Demonstrate That Meggyesy Was Wrongly Decided.

Donald makes the same argument that Meggyesy did: the language that the jury had a duty to convict if it found beyond a reasonable doubt each element of the crime had been proven violated the defendant's "right to trial" under the state and federal constitutions. Specifically, Donald argues – as Meggyesy did – that under the state constitution, a different result is required. In short, Donald claims that this Court got it wrong. The Court should reject this argument because Donald has failed to demonstrate that the decision in Meggyesy is incorrect and harmful. See In re Stranger Creek, 77 Wn.2d at 653.

In Meggyesy, the Court held that the "to convict" instruction did not implicate the federal constitutional right to a jury trial or misstate the law, and that neither the state nor the federal constitutions invalidated the instruction. Meggyesy, 90 Wn. App. at 701-04 (applying the six-step analysis set forth in State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986)).[26] The Court stated that because the judge did not instruct the jury to render a guilty verdict, but only to convict if all elements of the charge were met beyond a reasonable doubt, the instruction did not invade the province of the jury. Id. at 699-701.

Moreover, the Court recognized that instructing the jury that it "may" convict is tantamount to notifying the jury of its power to acquit against the evidence, and that a defendant is not entitled to a jury nullification instruction. Meggyesy, 90 Wn. App. at 700. The Court acknowledged that with general verdicts, juries do have the power to acquit against the evidence. Id. (citing United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972)). But the Court noted that under the federal constitution, while the circuit courts have clearly held that jury nullification is always possible, no case has held that an accused is entitled

[26] Pursuant to Gunwall, the factors a court should consider in determining whether the state constitution offers broader protection to a defendant than its federal counterpart are: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) state constitutional history, (4) preexisting state law, (5) structural differences in the constitutions, and (6) whether the subject matter of the provision is of particular state or local concern.

to a jury nullification instruction. Donald has not cited contrary authority here.[27]

Donald argues, as did Meggyesy, that under the state constitution, the result must be different. This Court (followed by Fleming, supra; Brown, supra; and Bonisisio, supra) rejected this argument. This Court concluded, after it applied a Gunwall analysis, that there was no state constitutional basis to invalidate the challenged instruction. Meggyesy, 90 Wn. App. at 701-04.

The language in the instructions at issue is identical to the language used in Meggyesy's "to convict" instructions. Because Donald has failed to demonstrate that the decision in Meggyesy is incorrect and harmful, the Court should hold that the "to convict" instructions in this case were not erroneous.

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[27] Donald does not address State v. Wilson, 9 Wash. 16, 36 P. 967 (1894), discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, the jury "must" find the defendant guilty. Id. at 21. The Supreme Court stated that taking all the language in context, "it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law made it their duty to find him guilty." Id. (emphasis added). The court held that there was no instructional error. Id.

D. CONCLUSION

For all of the foregoing reasons, Donald's convictions should be affirmed.

DATED this 11th day of December, 2012.

Respectfully submitted,

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Office WSBA #91002

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer L. Dobson and Dana M. Nelson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HAROLD DONALD, Cause No. 68429-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

12/12/12
Date

Done in Seattle, Washington