

COA No.45173-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

BARON DELL ASHLEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF CLARK COUNTY

The Honorable David Gregerson

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**REPLY BRIEF**

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**TABLE OF CONTENTS**

A. REPLY ARGUMENT ..... 1

    1.    THE ER 404(B) EVIDENCE WAS INADMISSIBLE .. 1

        a. The trial court was wrong to admit the evidence, because it was unfair to Mr. Ashley where he was not on trial for these decade-old incidents. ..... 1

        b. Not harmless. ..... 3

    2.    THE SENTENCING COURT MISCALCULATED  
          MR. ASHLEY'S OFFENDER SCORE. .... 5

    3.    THE SENTENCING COURT ERRED IN  
          ORDERING MR. ASHLEY TO PAY LFO'S. .... 6

B. CONCLUSION .....

## TABLE OF CONTENTS

### WASHINGTON CASES

<u>State v. Baker</u> , 162 Wn. App. 468, 259 P.3d 270, <u>review denied</u> , 173 Wn.2d 1004 (2011). . . . .	6
<u>State v. Becker</u> , 59 Wn. App. 848, 801 P.2d 1015 (1990) . . . . .	5
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011) . . . . .	6
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987). . . . .	2
<u>State v. Foxhoven</u> , 161 Wn. 2d 168, 163 P.3d 786, 790 (2007). . . . .	1
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003) . . . . .	5
<u>State v. Knight</u> , 134 Wn. App. 103, 138 P.3d 1114 (2006). . . . .	5
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995). . . . .	2
<u>State v. Scherner</u> , 153 Wn. App. 621, 653, 225 P.3d 248 (2009) . . . . .	2
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1996) . . . . .	3,4
<u>State v. Taylor</u> , 30 Wn. App. 89, 95, 632 P.2d 892, <u>review denied</u> , 96 Wn.2d 1012 (1981). . . . .	5

### UNITED STATES COURT OF APPEALS CASES

<u>United States v. LeMay</u> , 260 F.3d 1018 (9th Cir.2001) . . . . .	3
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### STATUTES AND COURT RULES

RCW 9.94A.525 . . . . .	5,6
RCW 9.94A.030 . . . . .	5,6

## A. REPLY ARGUMENT

### 1. THE ER 404(b) EVIDENCE WAS INADMISSIBLE

(a) The trial court was wrong to admit the evidence, because it was unfair to Mr. Ashley where he was not on trial for these decade-old incidents. Based on the pre-trial ER 404(b) hearing, Ms. Gamble, who was allegedly imprisoned in her bathroom by intimidation, was permitted to testify that Mr. Ashley had abused her physically in the past, and because of this, she felt that she would be harmed if she did not stay in the bathroom. RP 1B at 194-99.

This was unfair, because Mr. Ashley was not on trial for old matters, including incidents over a decade old. The important evidentiary rule of ER 404(b) prevents Mr. Ashley from being made to look like a bad or violent person in the eyes of his jury simply because he may have engaged in socially “unpopular behavior” toward his girlfriend a long time ago. State v. Foxhoven, 161 Wn. 2d 168, 174-75, 163 P.3d 786, 790 (2007).

And specifically, the remoteness in time of these claimed incidents strongly weighed in favor of excluding them – as the State correctly relies on in its own brief, the last of these claimed significant incidents that were testified to occurred in the year 2004.

Brief of Respondent, at pp. 2-3. The 2004 incident was over a decade ago. Remoteness in time is very important because it makes the incidents largely irrelevant to the matter at hand. These incidents were too remote to be probative, in contrast to their prejudicial propensity effect on the jury and the risk that the jury in this case convicted Baron Ashley for a series of claimed physical abuses that happened in the distant past. RP 1A at 71-83; RP 1B at 195-97; see State v. Bowen, 48 Wn. App. 187, 195-96, 738 P.2d 316 (1987).

With these considerations in mind, the ER 404(b) evidence simply fails the multi-factor test for admitting this kind of evidence, because it was not materially relevant to any proper purpose of showing that Ms. Gamble was restrained by intimidation, and even if relevant under ER 401, the probative value of this evidence about occurrences from years and years ago was heavily outweighed by the unfair prejudicial effect of the evidence. See State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995) (setting forth criteria).

In addition, although an evidence rule is at issue, the Court should consider the degree to which the State's reliance on Mr. Ashley's past behavior portrayed him as an already-guilty person in the jury's eyes. See generally State v. Scherner, 153 Wn. App.

621, 653, 225 P.3d 248 (2009) (recognizing argument that ER 404(b) evidence may strip the defendant of his right to be presumed as an innocent person); cf. United States v. LeMay, 260 F.3d 1018, 1025–26 (9th Cir.2001). Baron Ashley argues in this appeal that the scale should have tipped in favor of *excluding* evidence of prior conduct. Washington cases such as State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1996) provide that where it is minimally relevant, prejudicial ER 404(b) evidence should be kept out of a defendant’s trial.

**(b) Not harmless.** Notably, the State, given the context of the case in which the prosecutor essentially relied on Mr. Ashley’s alleged past behavior to prove the present charge, does not make any contention that the error was “harmless.”

At trial below, Ms. Gamble admitted that Mr. Ashley never threatened her to make her stay in the bathroom. RP 1B at 202. The prosecutor therefore relied on past conduct by Mr. Ashley to prove a crime it could not prove otherwise. The evidence was not strong in any other aspect. Indeed, there was a great concern at trial that Ms. Gamble offered her claimed account of being kept in the bathroom, only when police officers, who were questioning her, indicated their suspicion that she had been part of Ashley’s effort to

hide his presence in the home. She admitted to believing the police were angry at her for not opening the apartment door, and she admitted to being worried that she would be arrested for Obstructing. RP 1B at 209-11. In particular, Detective Hamlin was questioning her and asking, "Why are you trying to save him?" RP 1B at 217. It was at *this juncture* that Ms. Gamble told the officers her account of being prevented from leaving the bathroom. RP 1B at 214-15.

There were other weaknesses in the State's case, which render the ER 404(b) error reversible. Ms. Gamble's claim at trial that she was "only" allowed to exit the bathroom when officers entered into the apartment. RP 1B at 199-200. However, C. Ashley, the 7-year old daughter of Mr. Ashley and Ms. Gamble, stated that she and her mother were standing around downstairs when the police came in the door. RP 1A at 181-82; RP 1B at 199-200.

When the trial court errs in admitting ER 404(b) evidence, the Court of Appeals must reverse the person's conviction if, within reasonable probabilities, the error materially affected the jury's verdict. State v. Smith, 106 Wn.2d at 780. In this case, the error

was not harmless, and it wrongly affected the outcome of Baron Ashley's trial.

**2. THE SENTENCING COURT MISCALCULATED MR. ASHLEY'S OFFENDER SCORE.**

Mr. Ashley argues that the trial court erred in its scoring of the 1999 juvenile disposition for Attempted assault in the second degree. RP 1B at 304; CP 93, 101-02. The State responds that RCW 9.94A.525 indicates that prior convictions for attempted and other inchoate crimes should be treated as the completed crime for purposes of offender scoring. See RCW 9.94A.525. The State relies on State v. Becker, 59 Wn. App. 848, 801 P.2d 1015 (1990), and State v. Knight, 134 Wn. App. 103, 138 P.3d 1114 (2006). Brief of Respondent, at pp. 11-14.

However, Becker and Wright were erroneously decided. The Courts in those cases did not adequately take into account the fact that, where the definitional section of the SRA, .030, provides that certain offenses are violent offenses, non-listed offenses are definitionally not violent offenses. See RCW 9.94A.030(33), (54). Definitions are integral to the statutory scheme and must be given effect, because they are effectively embedded in later statutes that use the term. State v. J.P., 149 Wn.2d 444, 453, 69 P.3d 318 (2003); State v. Taylor, 30 Wn. App. 89, 95, 632 P.2d 892, review



denied, 96 Wn.2d 1012 (1981). Further, any conflict in the statutory scheme – which was recognized by the Becker and Knight Courts - - must be resolved in favor of the person being sentenced, under the Rule of Lenity that those Courts should have correctly applied.

**3. THE SENTENCING COURT ERRED IN ORDERING MR. ASHLEY TO PAY LFO'S.**

At sentencing, defense counsel argued that Mr. Ashley was unable to pay Legal Financial Obligations. RP 1B at 319-20. The trial court responded by stating that Mr. Ashley might later need a showing of inability to work and “future inability to pay” but stated that “[t]hat showing has not been made at this point.” RP 1B at 321. As a result, the court therefore imposed costs and fees in the judgment and sentence of several thousand dollars. CP 91-100; RP 1B at 318-20.

The trial court therefore ordered Mr. Ashley to pay costs. That order was premised on an affirmative finding which was entered in error, and must be stricken, requiring remand of the case to the sentencing court. State v. Bertrand, 165 Wn. App. 393, 404 and n. 13, 267 P.3d 511 (2011) . The portion of Mr. Ashley’s judgment and sentence ordering payment of Legal Financial Obligations should also be vacated, because it is premised on a

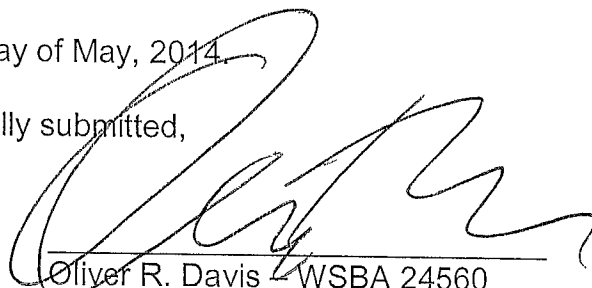
finding that the State contends is erroneous under *any* analysis of the sentencing court's actions. Brief of Respondent, at pp. 14-16.

**B. CONCLUSION**

Based on the foregoing and on his Opening Brief, Baron Ashley asks that this Court of Appeals reverse his judgment of guilt, and reverse his sentence and his costs order.

Dated this 27 day of May, 2014.

Respectfully submitted,



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Washington Appellate Project  
Attorneys for Appellant

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DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
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v.	)	NO. 45173-5-II
	)	
BARON DELL ASHLEY,	)	
	)	
Appellant.	)	


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# WASHINGTON APPELLATE PROJECT

**May 27, 2014 - 4:03 PM**

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