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NO. 71128-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT REED,

Appellant.

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting unfairly prejudicial and irrelevant evidence of appellant's past involvement in prostitution. 12RP[1] 388-89.

2. The trial court erred by instructing the jury they could consider appellant's prior convictions in assessing his credibility when the convictions were not admitted for impeachment purposes. CP 62 (instruction 4).

3. Defense counsel was ineffective for failing to object to the credibility instruction when there was no basis for suggesting the jurors could consider the prior conviction as impeachment evidence.

4. Defense counsel was ineffective for failing to propose a 404(b)[2] evidence limiting instruction.

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – September 9, 2013; 2RP – September 10, 2013; 3RP – September 11, 2013; 4RP – September 12, 2013; 5RP – September 16, 2013; 6RP – September 17, 2013; 7RP – September 18, 2013; 8RP – September 19, 2013; 9RP – September 23, 2013; 10RP – September 24, 2013; 11RP – September 25, 2013; 12RP – September 26 & 27, 2013; 13RP – September 30, 2013; 14RP – November 1, 2013.

[2] The rule provides: 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.

Issues Pertaining to Assignments of Error

1. Appellant testified that he lived a destructive lifestyle during a prior "bad" relationship. 12RP 306. Over defense objection, the trial court found this testimony opened the door to further questioning by the prosecutor about appellant's involvement in prostitution during the relationship. Did the trial court err by admitting the unfairly prejudicial and irrelevant evidence where appellant's explanation was nothing more than a mere passing reference to a prior relationship?

2. Appellant was charged with first degree assault for an alleged incident with his girlfriend. Over defense objection, the trial court admitted evidence appellant had two prior assault convictions under several exceptions to ER 404(b). The prior assaults were not offered or admitted under ER 609(a)[3] as impeachment evidence. The trial court however, instructed the jury it could consider appellant's prior convictions for purposes of determining the credibility of his testimony. Was

[3] ER 609(a) states: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment."

appellant denied his constitutional right to effective representation when defense counsel failed to object to this erroneous instruction?

3. The trial court offered to give a limiting instruction after admitting appellant's two prior assault convictions under ER 404(b). Defense counsel failed to request a limiting instruction or clarify she did not want an instruction. Defense counsel instead stated she could not remember whether she wanted an instruction and explained appellant's intent to discuss the prior convictions during his testimony. Where proper limiting instructions could have sufficiently mitigated the harm from the 404(b) evidence while still permitting explanation of the circumstances of the prior convictions, was appellant denied his constitutional right to effective representation when defense counsel failed to propose the instructions?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Roosevelt Reed with one count of first degree assault with a family or household member, for an incident with Jane Gregory on September 5, 2012. CP 1-8. A jury found Reed guilty. CP 80. The jury also returned special verdicts finding the assault was an aggravated domestic violence offense and Reed committed the assault shortly after being released from prison. CP 81-82.

Based on the special verdicts, the trial court imposed an exceptional sentence of 360 months in prison. CP 93-103; 14RP 25. The trial court also imposed 36 months of community custody. Id. Reed timely appeals. CP 104.

2. Trial Testimony

Appellant Roosevelt Reed first met Jane Gregory in the nineteen-eighties. 6RP 63-64; 12RP 303-04. Gregory ended the relationship when she learned Reed was involved in another relationship. 12RP 304, 360. In 2008, Gregory and Reed reconnected after Reed learned he and Gregory had a daughter together. 6RP 64-65; 12RP 304-05, 360.

That daughter, Hope Darnell, along with Gregory, and Darnell's children regularly visited Reed in prison[4] over the next four years. 6RP 63, 65-68; 7RP 407. Reed was released from prison in April 2012 and moved into a Des Moines apartment with Gregory a short time later. 6RP 69-70; 12RP 307, 310, 313-14, 359. Reed complied with his community custody conditions after being released from prison. 9RP 109. He maintained stable employment and housing and checked in once monthly with his community corrections officer, Stacy Westberg. 9RP 88-89.

[4] Reed was in prison for a 1999 conviction for first degree assault. 12RP 307, 360, 366.

After moving in together, Gregory and Reed had "minor arguments over little things." 6RP 70. One time, Reed slapped Gregory on the chin. Gregory believed the incident was an accident. 6RP 76, 106; 7RP 72-73, 91, 95. There were no shoving or pushing incidents between Gregory and Reed. 6RP 106.

On September 4, 2012 Reed received permission from Westberg to travel to Spokane with Gregory to visit Darnell and her children. 7RP 7; 9RP 90. During the visit, Darnell believed Reed was controlling and would get angry about small things. 7RP 8. Darnell also noticed Reed spent time text messaging. 7RP 8. Darnell saw Reed giggle during one text message conversation and learned Reed was joking about a prior assault. 7RP 9-10. Darnell did not know the entire context of the text message conversation. 7RP 29. Darnell told Gregory about the text messaging but could not remember if she told her about the context of Reed's messaging. 6RP 73-74; 7RP 10.

On the way home, Gregory confronted Reed about the text messaging, telling him to be more involved in visiting Darnell. Gregory also told Reed it was not funny to joke about assaulting someone. 6RP 74; 7RP 77. Gregory said Reed's demeanor changed and he became angry. Gregory believed Reed might hit her. 6RP 75. When Reed stopped the

car, Gregory got out. Reed drove away without Gregory but returned after she threatened to call police. 6RP 75-76.

The next day, Reed called in sick to work. Gregory explained she and Reed went a cousin's apartment and then got lunch. 6RP 77, 99-102; 7RP 65. Gregory then took Reed to his meeting with Westberg. 6RP 77, 102; 7RP 65. Reed was calm, happy, and smiling when he met with Westberg. 9RP 92-93, 103. He did not mention any problems with Gregory. 9RP 99. Westberg told Reed that in the future he needed to be responsible for obtaining his own travel permits. Reed's body language changed and Westberg believed he was angry. Reed told Westberg all future communication would only be between the two of them. 9RP 93. Westberg believed Reed left the office by 4 p.m. 9RP 94, 111. Gregory said Reed's meeting with Westberg lasted about ten minutes. 6RP 103-04.

Gregory and Reed returned to the apartment after the meeting with Westberg. They began arguing about money and possibly Reed's text messaging from the day before. 6RP 77, 104-05; 7RP 65-66. Reed pushed Gregory and she pushed back. 6RP 78-79, 84, 105-06; 7RP 72. When Gregory told Reed they had agreed not fight, Reed pushed her more firmly. In response Gregory "snatched his [Reed] chain off his neck." 6RP 78-79, 84, 105-07; 7RP 72. Gregory could not remember what

happened next. 6RP 78-79, 83-84, 97, 107-08; 7RP 72, 75. She did not specifically remember Reed hitting her. 6RP 112-13.

Reed called 911. 6RP 23. When officers arrived at the apartment, Gregory had swollen cheeks, lips, and blood on her head and face. 6RP 14, 42-43. Officer Kevin Montgomery described Gregory's injuries as "severe" but not life threatening. 6RP 14, 23. Gregory had difficulty talking and was hard to understand. 6RP 15, 23, 44, 57. Gregory had six fractures to her cheekbone, eye socket, and nasal bone. 6RP 85, 93; 7RP 102-03.

Police saw no signs of forced entry into the apartment. 6RP 27, 49-50. Nothing was missing. 6RP 25-26, 50. There was blood on the apartment carpet, kitchen sink, and clothing items. 6RP 16, 20-22, 31, 33. Police seized a broken vase which may have been used defensively or as a weapon. 6RP 49, 57. No fingerprints or DNA were found on the vase. 6RP 56; 9RP 115.

Reed told Montgomery that he left the apartment between 12:30 and 1:00 p.m. to meet with a friend and attend his meeting with Westberg. Reed found Gregory when he returned home around 4:00 p.m. When Montgomery asked about the time between when Reed discovered Gregory and called police, Reed explained he had also picked up a car

from a friend. Reed was cooperative and answered all questions. 6RP 23-25, 29. He was not arrested. 6RP 29, 50, 53, 58.

Gregory voluntarily left the hospital the next day and returned to the apartment she shared with Reed. 6RP 80, 82, 112. Reed called Westberg on September 7 and told her Gregory had been assaulted. 9RP 95-96. Gregory declined Westberg's offer of assistance. 9RP 97-98. Shortly thereafter, Reed obtained permission to travel to Whidbey Island with Gregory. 9RP 96-97, 105-06.

Gregory told Darnell she received the injuries from a car accident. 6RP 84-85; 7RP 14, 32, 76. Darnell did not believe Gregory and suspected the injuries resulted from domestic violence. 6RP 85; 7RP 15, 32-33. Darnell traveled to Des Moines to help Gregory. 6RP 85-86; 7RP 17, 67. Gregory was able to drive Darnell to and from the train station. 7RP 36-37.

After Darnell arrived, Gregory told her she was injured by Reed and wanted to leave. 6RP 86; 7RP 19-20. After Gregory's car broke down however, Darnell called Reed to ask him to fix it. 7RP 21-22. Reed told Darnell he hit Gregory because he had nothing to loose and she jeopardized his freedom. 7RP 29, 39-40. Reed told Darnell he "messed up," and had anger issues. 7RP 23, 39. Darnell took Gregory back to the

hospital before leaving for Spokane. 7RP 24, 38, 74. Darnell did not call police or Westberg to report the alleged incident. 7RP 27-28, 38-41.

Over the next several weeks, Gregory had surgery to place crews and plates in her cheekbone, nose, and eye socket. Gregory's nose was shifted and held in place with a splint. Plastic was placed under Gregory's eye socket to prevent it from drooping. 7RP 99-107. Surgeon Craig Birgfeld believed Gregory's injuries were consistent with blunt force trauma. 7RP 112-13.

Reed moved out of the shared apartment on September 20. 6RP 87. Four days later, Gregory told advocate Angela Croker that Reed caused her injuries. 7RP 61; 9RP 33-41. Gregory did not provide Croker with any details of the incident and did not report the incident to police. 7RP 61; 9RP 40. Gregory continued to have headaches, double vision, facial numbness, and difficulty opening her right eye. 6RP 88-90; 9RP 110-12. She acknowledged lying to police about the incident. 7RP 69.

Reed was arrested on October 3. 12RP 381. Police seized Reed's phone and concluded it received signals from cell towers across the street from the apartments between 4:34 and 5:21 p.m. the day of the incident. 8RP 34-38. Reed made telephone calls to his brother, Precious Reed, from the apartment shortly after the incident. 11RP 153-54, 158, 166-68, 199-200; 12RP 339, 341, 378, 393, 399. Reed told Precious that

something had happened to Gregory and needed to come to the apartment. 11RP 158, 173, 176-77, 210. Precious' wife, Shantel Smith-Reed, reported Reed as telling Precious, "I think I killed the bitch." 9RP 6, 8, 17, 27. Gregory later told Smith-Reed that Reed had injured her. 9RP 13.

Precious denied Reed had told him he though he had killed Gregory. 11RP 180, 185. Precious explained any conflicting statements he gave to police were the result of his drug and alcohol use. 11RP 155, 159-61, 189-91, 206. Precious later collected Reed's belongings, including his cell phone, to prevent them from getting damaged. 11RP 162-63, 194-95, 217.

Reed denied assaulting Gregory. 12RP 356. Reed explained he requested the day off work and left the apartment to meet his friend Joe Kelley. 12RP 330-32, 334-35. Gregory was at the apartment when Reed left. 12RP 333. Reed met Kelley at a car wash and then they went to lunch. 11RP 276-77, 282-84; 12RP 334-35. After lunch, Reed left his car at Kelley's house. Kelley drove Reed to his meeting with Westberg. 11RP 278; 12RP 336, 363. Reed arrived at Westberg's office around 3:10 p.m. but did not meet with her until about 3:30 p.m. 12RP 336-37.

Kelley explained he waited in the car for over an hour while Reed met with Westberg. 11RP 278, 287. After the meeting with Westberg, Reed picked up his car and returned to his apartment. 11RP 280, 287-89;

12RP 339, 364. Reed found Gregory surrounded by blood on the floor of the apartment. Reed gave Gregory first aid and called Precious. 12RP 339, 370. Reed told Precious someone had almost killed the "bitch." 12RP 339, 341, 378, 393, 399. Reed explained "bitch" was a term of endearment. 12RP 341, 385.

Gregory told Reed she saw a flash of blue when she opened the apartment door. Someone then asked Gregory for money and car keys. 12RP 340. Reed believed the incident was connected to other crime in the area. He waited to call 911 so he could give Gregory first-aid and research prior crime incidents. 12RP 341-42, 371, 373.

Reed took care of Gregory over the next several weeks. 12RP 346. Gregory ended the relationship on September 20. 12RP 348. Reed acknowledged prior assault convictions from 1993 and 1999. He explained those incidents stemmed from bad relationships and his use of drugs and alcohol. 12RP 306-07, 364-69. He acknowledged text messaging about the 1993 incident during the visit with Darnell, but denied laughing about it. 12RP 326-29. Reed explained he had decided to change his life after his release from prison in April 2012. 12RP 307, 360, 366.

3. 404(b) Evidence

Before trial, the State sought to introduce evidence that Reed was convicted of third degree assault in 1993 and first degree assault in 1999. The State also sought to admit evidence that before Gregory's alleged assault, Reed had slapped, pushed, and covered Gregory's face with a pillow. The State explained the day before the alleged incident Reed had joked with another person via text message about the 1993 assault and Gregory was aware of that text message and Reed's prior assault convictions. 3RP 2-4, 8-12; Supp. CP ___ (sub no. 68A, State's Trial Memorandum at 19-20).

The State argued the prior incidents were admissible under ER 404(b) to explain: Gregory's delay in reporting the charged incident, Gregory's fear of Reed, and Gregory's credibility and why she initially lied about who assaulted her. The State also argued the prior incidents were admissible under ER 404(b) to explain Reed and Gregory's relationship and to show Reed's motive for committing the alleged assault through increasing hostility toward Gregory. 3RP 9-12; Supp. CP ___ (sub no. 68B, State's Supplemental Memorandum on ER 404(b)). The State noted it was seeking to admit the prior incidents, "strictly under a 404(b) analysis," and not for propensity purposes, or under ER 609. 2RP 27; 3RP 10, 12.

Defense counsel objected, arguing the prior assault convictions were too remote in time and "highly prejudicial," given the similarity of the prior assaults and the current charged assault. Defense counsel noted the jury would likely not be able to "erase" the prior assault convictions from their minds even with a limiting instruction. 3RP 13; CP 22-29. Defense counsel also objected to admission of the prior incident between Gregory and Reed, noting it was prejudicial and Gregory had never reported the incident to police. 3RP 14.

The trial court overruled defense objections, finding the offered 404 (b) evidence relevant to prove Reed's motive, Gregory's credibility and "why she might be afraid and initially lied," and res gestae given the alleged text message incident. 4RP 2-6. The trial court noted the prior incidents, "cannot come in for propensity." 4RP 2.

The court "assume[ed]" defense counsel would want a limiting instruction and offered to give an instruction both when the 404(b) evidence was admitted and when the jury was instructed at the end of the case. 4RP 3. Defense counsel did not request an instruction or explain she did not want one given.

Before Reed testified the State questioned whether defense counsel intended to ask for a limiting instruction. Defense counsel responded, "It's been so long ago, I can't remember." 1RP 297. The trial court noted

some attorney's did not want to reemphasis evidence with a limiting instruction, but reminded defense counsel the court would give a limiting instruction if requested. 11RP 297.

Defense counsel explained she understood Reed's prior convictions were not admissible for credibility purposes under ER 609 and that Reed would explain the 1993 and 1999 incidents during his testimony. 11RP 298. Defense counsel failed to request a limiting instruction, propose her own, or explain she did not want an instruction.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING UNFAIRLY PREJUDICIAL AND IRRELEVANT EVIDENCE.

Generally, evidence of other crimes is not admissible to show a defendant's conformity with those acts. ER 404(b). Otherwise inadmissible evidence may be admissible on cross-examination if the witness 'opens the door' to an issue on direct examination and the evidence is relevant to that issue. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). The court must also weigh the prejudicial effect of the evidence against its probative value. Stockton, 91 Wn. App. at 41.

In order to 'open the door,' the defendant must first introduce inadmissible evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995), rev. denied, 129 Wn.2d 1007 (1996). But a mere

passing reference during direct examination to a prohibited topic does not serve to 'open the door' to unrestricted questioning about prior misconduct. Stockton, 91 Wn. App. at 40 (citing Avendano-Lopez, 79 Wn. App. at 715).

This court reviews a decision to permit evidence under the open-door rule for abuse of discretion. State v. Bennett, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985), rev. denied, 105 Wn.2d 1004 (1986). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

a. Reed Did Not 'Open the Door.'

Application of these rules to Reed's case shows the trial court abused its discretion by finding Reed had opened the door to irrelevant and prejudicial evidence. Reed testified the 1993 assault conviction stemmed from "relationship that had went bad," and that he and the complaining witness were "living a destructive lifestyle." 12RP 306-07. On cross-examination, Reed explained the he and the complaining witness were a "couple" and the destructive lifestyle consisted of "illegal activities." 12RP 365. Reed initially declined to elaborate on the details of the illegal activities. 12RP 365, 390.

The prosecutor argued Reed's testimony about his "girlfriend" opened the door to questioning him further about that relationship. The prosecutor specifically sought to question Reed about a prostitution relationship he had with the complaining witness and how that relationship led to the 1993 assault. 12RP 388. Defense counsel objected, noting there had never been any charge related to the alleged prostitution and therefore it was highly prejudicial. 12RP 389. The trial court concluded the "door had been opened," and allowed the prosecutor to question Reed further. 12RP 389. Upon further cross-examination, Reed acknowledged involvement in prostitution as part of prior his prior lifestyle. 12RP 390-91.

The trial court erred in concluding Reed's testimony opened the door to irrelevant evidence. Stockton and Avendano-Lopez are instructive in this regard.

Avendano-Lopez was charged possession of cocaine with intent to deliver. Avendano-Lopez, 79 Wn. App. at 708. During direct examination, Avendano-Lopez explained he was living with a friend because he "just came out of jail." Avendano-Lopez, 79 Wn. App. at 714, n.18. In fact, Avendano-Lopez had been in jail for possession of heroin. Avendano-Lopez, 79 Wn. App. at 714.

On cross-examination the prosecutor asked Avendano-Lopez about his past use of heroin and prior drug selling activity. Avendano-Lopez acknowledged using heroin a few days before his arrest but denied ever selling heroin. The trial court concluded Avendano–Lopez 'opened the door' to the prosecutor's questions when he volunteered on direct examination that he had recently been released from jail. Avendano-Lopez, 79 Wn. App. at 712-13.

The Court of Appeals concluded Avendano–Lopez's passing reference to recently being released from jail, without mentioning any additional details, did not "open the floodgates to questions about prior heroin sales." Avendano-Lopez, 79 Wn. App. at 715. The Court of Appeals likewise concluded the prosecutor's question could not be justified on the basis the door was opened to exploration of Avendano-Lopez's general character since Avendano-Lopez never placed his character at issue. Avendano-Lopez, 79 Wn. App. at 716.

Similar testimony was deemed a passing reference in Stockton. Stockton was charged with unlawful possession of a firearm after he grabbed a gun from men. Stockton testified that he believed the men were attempting to rob and sell him drugs. Stockton, 91 Wn. App. at 37-38. On cross-examination, the prosecutor questioned Stockton about his knowledge of how to purchase street drugs. The trial court overruled

defense counsel's objection and Stockton acknowledged he had bought street drugs before. Stockton, 91 Wn. App. at 39.

This Court concluded Stockton's testimony that he thought the men were trying to sell him drugs was no more than a passing reference to any knowledge he may have had about drugs. Stockton, 91 Wn. App. at 40. The Court likewise rejected the State's assertion the prosecutor's cross-examination placed the attack in context because the question did not focus on the context of the altercation. Rather, the prosecutor's questions did not counter Stockton's testimony that the men were trying to sell him drugs or cast doubt on his claim that they tried to rob him when he walked away. The Court found the prosecutor's question only elicited testimony about Stockton's prior drug use, which was only marginally relevant to any issue at trial and was highly prejudicial. Stockton, 91 Wn. App. at 41.

Like Stockton and Avendano-Lopez, Reed's description of his relationship and "destructive lifestyle" was nothing more than a passing reference to a prior relationship with the 1993 complaining witness. Reed did not create a false impression that required correction or rebuttal. For example, Reed did not suggest he was a law-abiding citizen or that he and the complaining witness had a harmonious relationship. Indeed, Reed acknowledged he was previously involved in illegal activities. 12RP 306,

365. Cf., State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002) (trial court did not err by permitting State to elicit previously excluded evidence of syringes found in defendant's home during redirect examination after defendant took advantage of exclusion ruling to convey false impression that home lacked items indicating drug-related activities), rev. denied, 148 Wn.2d 1023 (2003); State v. Shaver, 116 Wn. App. 375, 384-85, 65 P.3d 688 (2003) (trial counsel was ineffective for opening door to admission of Oregon drug conviction by eliciting testimony that defendant had no convictions other than ones for two burglaries and one escape).

Evidence of Reed's prior prostitution was also not relevant. To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). As discussed above, the evidence was not relevant to impeach Reed because he did not lie or create a false impression about his prior relationship. Moreover, the fact that Reed had previously been involved with prostitution had no bearing on the question of whether he allegedly assaulted Gregory. Although the prosecutor theorized the 1993 assault stemmed from a prostitution relationship between Reed and the

complaining witness, there was no evidence of prostitution alleged in this case. 12RP 388. Reed's prior involvement in prostitution therefore did not make any material fact more or less likely in the current case.

For these reasons, the admission of Reed's prior alleged involvement in prostitution did not serve the purpose of the open-door rule and the rule did not justify the trial court's ruling. The court therefore abused its discretion.

b. The Trial Court's Error Prejudiced Reed.

The trial court's error prejudiced Reed. An evidentiary error is not harmless if it is reasonably probable the jury's verdict would have been materially affected had the error not occurred. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

The jury had already been told of Reed's prior two assault convictions. By allowing the jury to also consider evidence Reed had previously been involved in alleged prostitution, jurors were even more likely to conclude Reed lacked credibility, thereby undermining his defense. Jurors were also more likely to conclude Reed was predisposed to commit crimes.

For these reasons, it is reasonably probable the trial court's error in permitting admission of the prostitution evidence affected the jury's

verdict. The court's error was thus not harmless, and this Court should reverse Reed's conviction.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN ALLOWING THE COURT TO INSTRUCT JURORS THEY COULD CONSIDER REED'S PRIOR CONVICTIONS FOR CREDIBILITY PURPOSES

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

a. Counsel was Deficient.

The trial court has a duty to determine the purpose for which it admits evidence of a defendant's prior bad acts and "give the cautionary instruction that such evidence is to be considered for no other purpose or purposes." State v. Brubaker, 62 Wn.2d 964, 970, 385 P.2d 318 (1963).

The only jury instruction addressing Reed's prior assault convictions read as follows:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

CP 62 (instruction 4).

This instruction was improper because it failed to inform the jury of the proper purpose for which they could consider the prior assault convictions. Reed's prior convictions were neither offered, nor admitted, for credibility purposes under ER 609. Indeed, the State explained before trial it was "not proceeding under ER 609," with respect to Reed's assault convictions. 2RP 27.

There was no legitimate reason for defense counsel not to object to the trial court's erroneous instruction. By failing to object, defense counsel allowed the jury to consider Reed's prior convictions for improper purposes.

b. Counsel's Deficient Performance Prejudiced Reed.

Defense counsel's deficient performance also prejudiced Reed. Reed denied he assaulted Gregory. Reed's own testimony was crucial to this defense because he explained what happened at the time of the incident. By allowing the jury to consider Reed's prior assaults for credibility purposes, Reed's own theory of the case was also undermined.

Counsel's failure to object to the erroneous jury instruction therefore undermines confidence in the outcome of Reed's case. This Court should reverse his conviction.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION FOR 404(b) EVIDENCE

Reed's counsel was also ineffective for failing to propose a 404(b) limiting instruction. Reversal is required because there is a reasonable probability the lack of a limiting instruction materially affected the outcome at trial.

a. Counsel was Deficient.

The prosecution may not use evidence to demonstrate a defendant's criminal propensity:

> 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.

ER 404(b).

The rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's ER 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

"An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Gresham, 173 Wn.2d at 423-424. Consistent with the express language of ER 404(b), jurors in Reed's case needed to be told the one way in which they absolutely could not use the evidence. Cf. State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated "the jury could not use the testimony

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

Counsel must nevertheless request the instruction and the failure to do so generally waives the error. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). In Reed's case there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the character evidence. Had counsel requested an instruction, the court would have been required to give one and undoubtedly would have given its repeated offers to do so. Defense counsel's decision not to request that instruction, or to propose a limiting instruction of his own, is puzzling since she acknowledged the evidence demonstrated Reed's propensity for violence.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a

limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. Evidence that Reed had two prior convictions for assaults against women was not of a type the jury could be expected to forget or minimize. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed a central piece of the State's case.

In any event, no evidence suggests defense counsel was worried about reemphasizing the convictions. Rather, defense counsel failed to request an instruction because she could not remember whether she wanted a limiting instruction and because Reed intended to discuss the convictions during his testimony. But, there was nothing preventing Reed from explaining the circumstances of his prior convictions while still limiting the jury's use of that evidence. See e.g., City of Seattle v. Patu, 108 Wn. App. 364, 369, 30 P.3d 522 (2001) (Patu testified about the circumstances of his prior conviction and also requested a limiting instruction), 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. There was no

reasonable trial strategy for not requesting a limiting instruction. Counsel was aware of the risk of prejudice from the 404(b) evidenced by her objection to its admission. Counsel simply neglected to request a necessary limiting instruction. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel's Deficient Performance Prejudiced Reed.

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

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including as proof Reed was a violent person. Indeed, the jury is naturally inclined to treat evidence of other bad acts in this manner. See Patu, 108 Wn. App. at 377 (recognizing that absent an instruction the jury may assume the defendant has a "bad" general character and therefore a propensity to commit the charged crime);

see also Micro Enhancement Intern, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) ("Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.").

Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict simply because a bad person deserves punishment "creates a prejudicial effect that outweighs ordinary relevance." Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Absent a limiting instruction, a reasonable juror would probably conclude Reed's prior violent assaults against women made it more likely he would also violently assault Gregory. There is a reasonable probability the outcome would be different but for defense counsel's conduct. Reed's constitutional right to effective assistance counsel was violated. This Court should reverse his conviction.

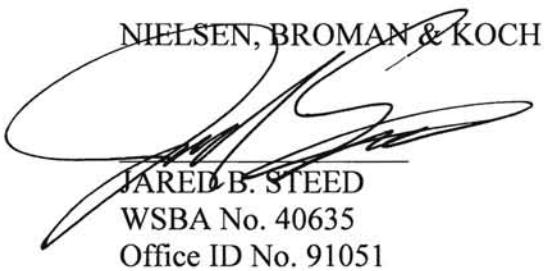
D. CONCLUSION

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

DATED this 22nd day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 71128-8-II
	)	
ROOSEVELT REED,	)	
	)	
Appellant.	)	

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 22ND DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROOSEVELT REED
DOC NO. 962757
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF SEPTEMBER 2014.

X Patrick Mayovsky