NO. 46318-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHERYL A. STRONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COURT
The Honorable Richard Brosey, Judge
Cause No. 14-1-00149-0

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 638-2106

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03. Whether the trial court erred in admitting three of Strong's prior convictions where more than 10 years had elapsed from the date of her release from confinement for each offense? [Assignment of Error No. 3].

04. Whether Strong was prejudiced as a result of her counsel's failure to request a limiting instruction for evidence of prior convictions? [Assignment of Error No. 4].

05. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Strong's convictions? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Cheryl A. Strong was charged by second amended information filed in Lewis County Superior Court April 29, 2014, with two counts of felony harassment (threat to kill), contrary to RCWs 9A.46.020(1)(a)(i) and (2)(b), with each count further alleging that the respective offense involved the aggravating factor of a destructive and foreseeable impact on persons other than the victim, in violation of RCW 9.94A.535(3). [CP 11-12].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 11-12].[1] Trial to a jury commenced May 5, the Honorable Richard Brosey presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 157]

Strong was found guilty as charged, sentenced within her standard range, and timely notice of this appeal followed. [CP 67-70, 77-89].

02. Substantive Facts

On March 5, 2014, Cheryl Strong was living with her seven-year-old son Chris, who attended White Pass Elementary School in Lewis County. [RP 68-70, 132-34]. According to Christie Collette, a secretary at the school [RP 69], Strong called the school that afternoon[2] to say she was changing her address and that "Chris would be riding home that day to 105 Shady Lane and he would be riding the bus there the next day and from there on forward." [RP 71]. Based on this, the school changed Chris's bus route informati on and notified the transportation department. [RP 71]. The note given the bus driver listed only "Shady Lane" and did not include the corresponding numerical reference because it was Collette's understanding that "the parent (Strong) was suppose to be

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[1] All references to the Report of Proceedings are to the transcript entitled VERBATIM TRANSCRIPT OF PROCEEDINGS.

[2] The record is confusing as to whether this call was made March 4, as claimed by Strong [RP 132], or March 5, as stated by Collette. [RP 70]. Accordingly, the facts are presented using the date asserted by the respective witness, although, in context, it appears March 4 is the correct date.

out at the intersection to meet him (Chris) off the bus." [RP 79; State's Exhibit 2]. On March 5, Chris took the school bus to school but did not return that afternoon at the normal time, around 3:20. [RP 133-34]. Collette testified that when Strong called her, she explained that because of the change of address,

> we took (Chris) to where she changed her address, 105 Shady Lane, exactly where she wanted us to, and she said that she told Chris that morning to tell his bus driver he was going to his new address that day.

[RP 73].

Frantically, Strong began searching for her son before again calling the school at approximately 3:41. When nobody answered, she made the following comment, which was recorded by the answering system [RP 137]: "Sorry, Chris, but I'm gonna fucking shoot everybody that goes to your fucking school, works there." [State's Exhibit 1]. Chris was eventually found on the next block from their cul-de-sac, "sooping (sic) wet, crying, had been knocking on doors trying to find somebody that he recognized so he could find out how to get home." [RP 138]. Strong asserted she has never lived on Shady Lane and didn't even know "were it is at(,)" further noting the new address she had provided the school "was Sheerwood Court." [RP 139].

The following morning, Chris went back to school on the same bus. [RP 133]. Around 8:15, Collette and Rebecca Miner, the school district superintendent, listen to the above-referenced voice message and took the threat seriously, and the school was placed on lockdown. [55, 74-76, 84, 86-87]. Learning of this, Strong drove to the school to get her son but was arrested in route. [RP 58, 139-40].

When initially questioned, Strong denied making any calls or leaving any threats or knowing there was an answering machine [RP 58-59, 66], before saying "she didn't mean what she had said and that she was just talking to herself(,)" adding that "she needed to be more careful in the future what she said." [RP 59].

At trial, Strong explained that she informed the school on March 4 that she was in the process of moving but gave no firm date. [RP 132]. When she sent Chris to school the next day, she told him to "make sure he told his bus driver that he would be getting off at his normal bus stop." [RP 133]. After learning her son had been taken to a new location and then discovering he wasn't there [RP 135-36], she called the school: "they have a code, so I dial the school number. I know the elementary school code is which (sic) 4, so I immediately dialed 4, and it takes me directly to the elementary school office." [RP 143]. She talked with Collette, wanting "to know where they took my son and nobody could tell me." [RP 136].

> I told her I was going to continue to look for him and she said to call them if I found him and that she was sorry and that was about it.

[RP 136].

After she called the school a second time and nobody answered

[RP 137-38], thinking she had

> hung up my phone and closed it, put it in my lap, then, started to have a conversation with myself about my son being lost, because I was angry, upset and scared and I knew he was scared or out there somewhere not by his house or his old house, so I vented to myself and I made a statement.
>
> Q. Was that the statement, "Chris, I'm going to kill everyone there"? (sic).
>
> A. Yes, it was.

[RP 136-37].

D. ARGUMENT

01. STRONG WAS DENIED A FAIR AND IMPARTIAL TRIAL AS A RESULT OF DEPUTY SHERIFF ROBERT NELSON'S TESTIMONY THAT HE BELIEVED SHE COMMITTED THE CRIME.

A witness may not testify to his or her opinion as to the guilt of a criminal defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1997). Such testimony is error of constitutional magnitude, State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), for it violates the defendant's constitutional right to

have the jury make an independent evaluation of the facts. State v. Wilber, 55 Wn. App. 294, 297, 777 P.2d 36 (1989). A law enforcement officer's opinion testimony may be especially prejudicial since it often carries a special aura of reliability, State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001), and "may influence the fact finder and thereby deny the defendant a fair and impartial trial." State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (citing State v. Haga, 8 Wn. 481, 492, 507 P.2d 159 (1973).

At trial, when asked why he had instructed the school to contact Strong and to inform her she could pick up her son while the school was on lockdown and to find out what she was driving and whom she was with [RP 56-57], Deputy Sheriff Robert Nelsons responded as follows:

> So I would know what she was driving, who might be with her as I contacted her. At this point in time, I believed she committed the crime. (emphasis added).

[RP 57].

This was a direct comment on Strong's guilt and denied her a fair and impartial trial. This court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996), which requires proof that the untainted

evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The prejudice here is self-evident. Strong's only defense was her explanation of the events and why she did not knowingly threaten anyone. Without it she was defenseless, and the jury was the sole judge of her credibility, which, as argued by the State, was the critical issue in the case: "Well, this is all about credibility really, isn't it." [RP 191]. And it is on this point that the police officer's direct comment on Strong's guilt cuts the deepest, acting to pervert the process by triggering interference with the jury's duty to make relevant credibility determinations, and thereby precluding it from rendering a fair determination of Strong's guilt or innocence. In the end, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the admission of the police officer's opinion as to Strong's guilt having a practical and identifiable consequence on the jury's determination of this issue is substantial, with the result that her convictions must be reversed and the case remanded for a new trial, given that the untainted evidence was not so overwhelming that it necessarily leads to a finding of guilt.

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02. STRONG WAS PREJUDICED AS A RESULT OF HER COUNSEL'S FAILURE TO OBJECT TO DEPUTY SHERIFF ROBERT NELSON'S TESTIMONY THAT HE BELIEVED SHE COMMITTED THE CRIME.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court determine that counsel waived the issue by failing to object to Deputy Sheriff Robert Nelson's testimony that he

believed Strong committed the crime, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to object for the reasons previously argued herein. Had counsel done so, the trial court would have granted the objection under the law set forth in the preceding section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is palpable for the reasons argued in the preceding section.

Counsel's performance was deficient for failing to object to the police officer's testimony, with the result that Strong was deprived of her constitutional right to effective assistance of counsel, and is entitled to reversal of her convictions.

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03. THE TRIAL COURT ERRED IN ADMITTING THREE OF STRONG'S PRIOR CONVICTIONS WHERE MORE THAN 10 YEARS HAD ELAPSED FROM THE DATE OF HER RELEASE FROM CONFINEMENT FOR EACH OFFENSE.

Over objection [RP 14-15], the trial court ruled that Strong's prior convictions for theft in the first and second degree and burglary in the second degree were admissible if she testified, even though more than 10 years had lapsed from the date of her release from confinement for each offense. [CP 14; RP 14-15, 17]. Strong conceded that her prior forgery conviction, for which she was sentenced May 28, 2004, was admissible. [CP 14; RP 16-17].

The court found that the three prior convictions all dealt "with the issue of taking a (sic) property and/or other crimes of dishonesty." [RP 17]. In admitting the evidence, the trial reasoned:

> With respect to the theft 2, which was done - - she was sentenced May 17 of '02. The Theft 1 she was sentenced to in 11-22-01, and the Burglary 2 she was sentenced 5-4-01, so we're talking not a great deal of time for the commission of those, prior to the time she committed the forgery, which is within the 10 year period of time.
> ....
> Assuming she takes the stand - - plus she was 35, she wasn't a young adult at the time that these were committed, the issue of credibility here weighs heavily. If she denies making the call which she apparently did, when she talked to law enforcement, denied making a threat, said she didn't mean anything, the jury needs to have the opportunity to

> balance those claims, with what her criminal history shows in the past.
>
> Balancing - - looking at the elements that I'm supposed to look at, as far as balancing them, my decision is all of them are available for use by the State under rule 609 for impeachment should the defendant choose to testify.

[RP 17-18].

In light of the court's ruling, Strong admitted during direct examination that the had several prior convictions, one of which was the conceded forgery. [RP 144-45]. During cross-examination, the prosecutor went further, pointing out that although the case was about credibility, Strong hadn't specifically mentioned her prior convictions for theft in the first and second degree and burglary in the second degree. [RP 146].

Evidence of a prior a conviction for a crime of dishonesty is usually inadmissible to impeach a witness' credibility if more than 10 years has elapsed since the date of conviction or the date of release from confinement of the witness, whichever is later. ER 609(b). Additionally, such evidence "is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes." (citation omitted). State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). Such evidence is thus admissible only where the court determines that the probative value of admission substantially outweighs its prejudicial effect.

ER 609(b). This court reviews a trial court's decision to admit evidence for abuse of discretion, State v. Lough, 125 Wn.2d 847, 861, 889 P.2d 487 (1995), which occurs when the trial court incorrectly interprets the rule of evidence. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Given that 10 years had elapsed for purposes of ER 609(b) for each of the three convictions at issue, they were presumptively inadmissible under the rule. State v. Jones, 117 Wn. App. 221, 233, 70 P.3d 171 (2003). And only "'very rarely and only in exceptional circumstances'" should courts "depart from the prohibition against the use for impeachment purposes of convictions more than ten years old …" State v. Russell, 104 Wn. App. 422, 437, 16 P.3d 664 (2001) (quoting United States v. Beahm, 664 F.2d 414, 417-18, (4th Cir. 1981)).

As quoted above, the trial court conducted no meaningful balancing test as required by ER 609(b), instead relying on observations that Strong was not a young adult at the time of the commission of the prior offenses and that "not a great deal of time" separated these offenses "from the time she committed the forgery, which is within the 10 year period of time." [RP 17]. But this is not the test and demonstrates the trial court's misinterpretation of the applicable rules of evidence. "Reason dictates that the older such a conviction becomes, the less probative value it likely will have." State v. Jones, 117 Wn. App. at 233. And whether

Strong was 35 years old when she committed the prior offenses or whether they were committed near the 10-year limitation in ER 609(b) is of no consequence vis-à-vis the probative value of the admission of the evidence for impeachment purposes. It was error to admit the evidence.

As argued earlier, this case turned on whether the jury believed Strong's testimony. "It is obvious that evidence of former convictions is so prejudicial in it's nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged." State v. Nass, 76 Wn.2d 368, 371, 456 P.2d 347 (1969). "The same prejudicial effect exists when the admission of evidence of a conviction is for the purported purpose of helping the jury assess defendant's credibility." State v. Alexis, 95 Wn.2d 15, 18, 621 P.2d 1269 (1980).

Without the evidence of the three prior convictions, all beyond the 10-year limitation of ER 609(b), reversal is required where there is a reasonable probability that the ER 609 error affected the verdict, State v. Russell, 104 Wn. App. at 438, which happened in this case, since it may have been different had the jury heard only evidence of Strong's single prior conviction for forgery, and thus been able to treat it as an isolated instance of prior misjudgment. But, as credibility was the key, the

evidence of her three other prior convictions for dishonesty provided the jury with the opportunity to view Strong as a person lacking all credibility, with a propensity to commit crime and one not to be believed, leaving no chance she would be found not guilty.

04. STRONG WAS PREJUDICED BY HER COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION FOR EVIDENCE OF HER PRIOR CONVICTIONS.[3]

An accused is entitled to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose for the admission of the evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). A limiting instruction must be provided where the party against whom the evidence is admitted requests the instruction be given. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). Generally, in the context of prior convictions admitted under ER 609, the instruction reads:

> 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 reason.

WPIC 5.05.

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[3] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier is hereby incorporated by reference.

No such instruction was proposed or given in this case, and no legitimate reason can be advanced for failing to do so, and the prejudice is self-evident, for absent a limiting instruction prohibiting the jurors from considering the evidence of Strong's prior convictions for any purpose other than proscribed by the instruction, the jury was free to consider the evidence for any purpose, including the propensity to commit crime, see State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001), with the result that the error cannot be deemed harmless. Counsel's failure to request a limiting instruction undermines confidence in the outcome of Strong's convictions.

05. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF STRONG'S TRIAL AND REQUIRES REVERSAL OF HER CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant

reversal of Strong's convictions, the cumulative effect of these errors materially affected the outcome of her trial and her convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Strong respectfully requests this court to reverse her convictions and remand for a new trial.

DATED this 30th day of November 2014.

Respectfully submitted,

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Sara L. Beigh
appeals@lewiscountywa.gov

Cheryl A. Strong #824902
M.C.C.C.W.
3420 NE Sand Hill Road
Belfair, WA 98528

DATED this 1st day of December 2014.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

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