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No. 98305-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
COURT OF APPEALS No. 35172-6-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

Mr. Brendan Reidy Taylor,

Defendant/Appellant

Respondent's Reply to Appellant's Petition for Review

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I. IDENTITY OF RESPONDENT

The State of Washington, appearing through the Kittitas County Prosecuting Attorney's Office, is the Respondent herein.

II. STATEMENT OF RELIEF SOUGHT

Respondent asks that this Court deny Petitioner's Motion for Discretionary Review as the Court of Appeals appropriately considered and correctly applied the test for erroneously admitted evidence under ER 404(b) as articulated in *State v. Gower*, 179 Wn.2d 851, 321 P.3d 1178 (2014), finding that the error did not materially affect the outcome of the trial. The Court of Appeals decision in Mr. Taylor's case is not in conflict with a published decision of the Court of Appeals, and thus raises no issue of substantial public interest.

III. FACTS RELEVANT TO MOTION

On Christmas day of 2016, the Appellant, Brendan Taylor, demanded that the victim, Anna¹, have sex with him.² Anna

¹ The Court of Appeals referred to Anna by her first name to avoid subjecting her to unwanted publicity. The State will continue that practice in this response. As did the Court of Appeals, the State also intends no disrespect.

² Mr. Taylor was charged by second amended information with the crimes of Assault in the Second Degree/Domestic Violence (predicated on strangulation), Felony Violation of a Protection Order/Domestic Violence (predicated on an

testified that she did not wish to because Mr. Taylor had been using methamphetamine the day before. RP 74-76. Anna told Mr. Taylor maybe later and asked him to let her sleep. RP 76. Mr. Taylor left the bedroom, but later returned to wake Anna up. RP 77. Anna was laying on her side as Mr. Taylor sat on the bed where her knees were. *Id.* According to Anna, “somehow his arm was like across my chest and he grabbed my arm, ... [a]nd – he leaned forward and – and as he did that his arm was on my throat.” RP 77. Anna turned her head in order to breathe as Mr. Taylor was pushing “pretty hard,” but testified that she didn’t believe that it had been Mr. Taylor’s intention to cut off her breathing. RP 77-79, 81. Anna did not recall saying anything during this incident, but believed that Mr. Taylor stopped when she pulled his glasses off his face and threw them toward the wall. RP 80, 94.

The parties then went into the living room/kitchen area where Mr. Taylor hit Anna, who then “went down on the floor.”

assault in violation of the order), Burglary in the First Degree/Domestic Violence, a Community Custody Violation, and two counts of Gross Misdemeanor Violation of a Protection Order/Domestic Violence. Mr. Taylor pled guilty to the latter three charges the day before trial, and the Burglary was dismissed by the State in the course of trial. The only counts before the jury for their consideration were the Assault in the Second Degree/Domestic Violence, and the Felony Violation of the Protection Order/Domestic Violence. CP 10-20, RP 188, 191, 263.

RP 81-82. Mr. Taylor kept hitting Anna as she attempted to get up. RP 82. Anna testified that she clearly remembered that there had been hitting in the kitchen, and that the hitting was “very hard.” RP 114-115, 130. Anna testified that her memory of the day was not very good because Mr. Taylor had hit her in the head many times. RP 72, 83. She testified that she sustained injuries to her right ear, and right knee, and that she had bruises and lumps all over her head. RP 96. It was her testimony that her face was swollen the next day and that she had experienced ear damage up to the day of trial. RP 97. According to Anna, she had lumps on the sides of her eyes, pain to her nose and jaw, a lump on the top of her head and behind both ears. *Id.* She had experienced massive headaches since the assault and was unable to wear her ski helmet without pain. *Id.* (Anna taught skiing to four to nine-year olds at Alpentel at the time of this incident). RP 68-69, 97, 135.

Anna identified State’s exhibit #7 as a picture of the bruising to her left eye, and a bruised lump to her eyebrow. RP 98-99. She identified State’s exhibit #3 as a black eye and bruising to her right eye near her eyelids. RP 100. She told

the jury that State's exhibit #4 did not really show the massive goose egg and bruising that she had had to her forehead for about a month. *Id.*

Anna identified State's exhibit #10 as showing bruising to her upper left arm, stating that she had been severely bruised. RP 101-102. Anna stated that she had bruises to her legs, as well as her arms, and that they just kept "popping up everywhere throughout the week." RP 98. Because of her injuries, Anna stayed home from work. *Id.*

Mr. Taylor and Anna both left the house, and taking the plastic snow shovel from the carport, Anna went out to try to break the windshield of Mr. Taylor's car. As she stated at trial, "I was trying to break his windshield, 'cause I'm like if he broke me I wanted to break something of his." RP 84-85, 127.

Mr. Blossom, who acted as "property manager" for his father, the landlord of the property, was driving by when his eye was caught by the flailing actions of Anna with the blue shovel. RP 139. When he got out of his car, he heard both Mr. Taylor and Anna yelling at each other, but made no observations of anything physical between the two. RP 143. Mr. Blossom couldn't specifically recall whether Anna told him

to call the police or if he decided to do so on his own. RP 128, 145. Anna stated that it was she who had asked Mr. Blossom to call. RP 86.

Anna returned to the house, and put the chain on the door, however Mr. Taylor broke the chain in re-entering the residence. RP 90, 118, 130, 132, 195. She identified State's exhibit #10 as showing the broken chain lock. RP 90. Anna armed herself with a ski and followed Mr. Taylor toward the bedroom. RP 84. Mr. Taylor slammed the door on the ski causing it to cut Anna's hand. RP 84, 116, 132-134.

When law enforcement arrived, Mr. Taylor had left, and Anna went to the hospital. RP 157. Kittitas County Sheriff's Office (KCSO) Deputy Mark Rickey testified that when he arrived at the house, Anna was noticeably upset, crying, shaking, and holding her face and head. RP 153. Deputy Rickey could see redness to Anna's temple, and the cut to her hand. RP 154. Anna spoke with KCSO Deputy Chris Whitsett at the hospital but testified that she had a hard time remembering what she had told him because her head hurt so bad. RP 106, 109. She did recall however that Deputy Whitsett had not put any words into her mouth. RP 108.

Deputy Chris Whitsett testified that he had seen bruising to the victim's face the afternoon after the assault. RP 170-171. He had observed a raised bump and yellowing to Anna's forehead and right eye. RP 172. He also saw dark bruising to her eyelid, significant swelling and darkening under her eye, as well as some bruising in the temple area around her brow. *Id.* Deputy Whitsett also testified about seeing bruising on the victim's right arm. RP 174.

The jury also heard a 911 call placed by Anna, in which the dispatcher repeatedly told her to "take a deep breath" as Anna relayed the incident. RP 192, 194, 195.

Anna did speak to Mr. Taylor's use of methamphetamine. RP 71-72, 74-75. However, her entire testimony consisted of over 60 pages. RP 67-118, 124-136. In closing, the prosecutor mentioned Mr. Taylor's use of methamphetamine to exemplify the complicated nature of domestic violence relationships, and to explain why Anna stayed with someone with a substance abuse issue that could make him behave in a mean manner. RP 237-238, 246, 252-253. The prosecutor used the Dr. Jekyll/Mr. Hyde analogy once in closing, and then once in rebuttal in response to defense counsel's argument

that it was Anna who was Mr. Hyde. RP 239, 247, 249, 253.

According to the prosecutor, Anna wanted “the Brendan Taylor who's sober.” RP 253.

Throughout the trial, Anna minimized the fact that she could not breathe when Mr. Taylor had his arm on her throat, stating that she thought he hadn't intentionally intended to cut off her breathing. RP 77, 79, 81, 115. And she did not remember telling law enforcement that her breathing had been cut off. RP 106, 108. She reiterated her concern and feelings for Mr. Taylor multiple times. RP 70, 72, 77, 86-87, 135.

Although she referenced Mr. Taylor's drug usage early in her testimony, *i.e.*, RP 71-72, and 74-75, there were no additional references during her testimony to either his drug usage or how it may have contributed to the assault. RP 67-118, 124-136. The State's closing with its references was brief. RP 237-247 for initial closing, RP 252-253 for rebuttal. Its references to Mr. Taylor's drug use were minimal with the thrust of the State's argument going to the prolonged assault itself.

Mr. Taylor was found not guilty of Assault in the Second Degree by Strangulation but was found guilty of Felony

Violation of a Protection Order/Domestic Violence necessarily implying that the jurors found an assault in the course of the protection order violation. RP 263.

IV. ARGUMENT

In *State of Washington v. Brendan Reidy Taylor*, No. 35172-6-III filed February 18, 2020, Division Three of the Court of Appeals found that evidence regarding the effect that methamphetamine usage had on Mr. Taylor did not satisfy the ER 404(b) exception for motive, but rather showed propensity as it was offered to show that drug usage made Mr. Taylor “mean.” Opinion, p. 9.

The Court then engaged in the analysis laid out in *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014), to “ask whether there is a reasonable probability that, without the error, ‘the outcome of the trial would have been materially affected.’” Opinion, p. 10. The Court found that the admitted testimony was harmless because the outcome of the trial would not have been different. Although using language that indicated that there was sufficient evidence to have convicted Mr. Taylor without the inadmissible testimony, *Gower*, in stating that there must be a finding that the error did not

materially affect the trial, is in effect asking would the fact-finder have come to the same decision without the error, or was the prejudice such that the decision of the jury must be questioned? *Gower* would seem to indicate that the test must focus on prejudice rather than sufficiency.

Division Three noted that the jury found Mr. Taylor not guilty of Assault in the Second Degree which they would have logically done if they were inappropriately “over persuaded” by the inadmissible evidence. In all likelihood, the victim’s reticence in describing the strangulation in the same manner as it may be inferred by the testimony as to how she had described it to law enforcement, led to the jury’s inability to find strangulation, whereas the victim’s testimony about the prolonged beating, and its effects including up to the day of trial; the observations of Mr. Blossom; the observations regarding Anna’s demeanor upon the arrival of law enforcement; the pictures and observations of the deputies of Anna’s various bruises; the picture of the ripped door chain; and the 911 call with the repeated requests of the dispatcher that Anna take a deep breath, convinced the jury beyond a reasonable doubt that at the very least, an assault in the fourth

degree had occurred. Being told that methamphetamine usage could make Mr. Taylor behave meanly was irrelevant, as the bruising to the victim's face, arms, and legs told that clearly.

State v. Gower differs remarkably from Mr. Taylor's matter. In that case, the judge as fact-finder allowed evidence which at that time was admissible under RCW 10.58.090 which has since been held to be unconstitutional. RCW 10.58.090 allowed the admission of prior instances of sexual misconduct, which played heavily in that Court's decision-making process when the evidence of the testimony of a prior victim was ruled necessary, and the issue before it was one of current victim credibility. As this Court noted in *Gower*, the potential for prejudice in admitting prior acts under RCW 10.58.090 is "at its highest" in sex offense cases. *State v. Gower*, 179 Wn.2d at 857. (internal cites omitted).

In this case, there was much more than just the credibility of the complaining witness, there was also a plethora of direct and circumstantial evidence, and the finding that Mr. Taylor was not guilty of the Assault in the Second Degree indicates that the jury took its responsibility seriously, and did not base

its decision to convict on prejudice towards Mr. Taylor, or for unsupported reasons. Likewise, the Court of Appeals cited *Gower* and utilized its test of whether the inadmissible evidence materially affected the verdict of the jury and found that it did not. The references to Mr. Taylor's use of methamphetamine were of little significance in light of the evidence as a whole, and Mr. Taylor cannot show prejudice by their admission.

V. CONCLUSION

Petitioner cannot show that the Court of Appeals' ruling in his matter conflicts with this Court's ruling in *State v. Gower*, and for that reason, cannot satisfy the requirements of RAP 13.4(b)(2) & (4). For that reason, the State respectfully requests that Petitioner's Motion for Discretionary Review be denied.

Dated this 16th day of April, 2020.

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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on Thursday, April 16, 2020, I caused to have mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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