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JUN 25 2009

King County Prosecutor  
Appellate Unit

NO. 62214-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

HENRY MAYNARD,

Appellant.

FILED  
COURT OF APPEALS OF THE  
STATE OF WASHINGTON  
2009 JUN 25 PM 4:05

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

The Honorable Catherine Shaffer, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF  
MAYNARD'S PRIOR ASSAULT CONVICTION

1. The State Incorrectly Identifies The Statement That  
Allegedly "Opened The Door"

The State incorrectly asserts that Maynard's statement that he "was not the kind of person who goes around trying to hide from bad things" was the statement that "opened the door" to Maynard's prior conviction. Brief of Respondent 6. The record demonstrates that both the court and the State relied on Maynard's statement that "Rodney is not type of person who would cause those injuries" in allowing evidence of Maynard's prior assault.

When overruling defense counsel's objection to use of Maynard's prior assault conviction, the trial court reasoned that "by indicating and saying he [Maynard] was not the kind of person who would do this, *referring to this particular assault*, he had opened the door to the fact that he had a prior for assault." 5RP 33 (emphasis added). The trial court's emphasis on Maynard's reference to the particular assault in question demonstrates that the court believed it was Maynard's supposed statement about his own propensity for causing the injuries in question that opened the door. Had the court believed that Maynard opened the door when he generalized

his tendency not to hide from bad things, it would undoubtedly have emphasized that statement rather than his other statement in its ruling. Furthermore, the fact that the court called a side bar to discuss the introduction of Maynard's prior assault conviction almost immediately after Maynard made his statement about Rodney is further evidence that the court believed this statement, and not Maynard's prior general reference about not hiding from bad things, had opened the door. See 5RP 29.

Likewise, though the State contends that it relied on Maynard's statements about his tendency not to hide from bad things in arguing that Maynard had opened the door, the record reflects otherwise. In concluding that Maynard's statement in the context of the particular assault at issue had opened the door, the court noted that it was agreeing with the State's argument. 5RP 33. Furthermore, when presented with the opportunity to add to the court's synopsis of the reasoning behind its ruling, the state made no attempt to clarify or correct the court's ruling. 5RP 34. Accordingly, the record demonstrates that the State (like the court) relied on Maynard's statement that "Rodney is not type of person who would cause those injuries," rather than his general reference

about not hiding from bad things, when it argued that evidence of Maynard's prior assault should be admitted.

2. Maynard Did Not Open the Door

Even if the court had relied on Maynard's statement that he "was not the kind of person who goes around trying to hide from bad things," this would have been insufficient to open the door to his past conviction.

Inadmissible evidence is admissible on cross-examination if the witness "opens the door" during direct examination and the evidence is relevant to some issue at trial. State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006), aff'd 165 Wn.2d 17 (2008), cert. denied, 129 S. Ct. 2007 (2009); State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). A criminal defendant who places his character in issue by testifying as to his own past good behavior may be cross-examined as to specific acts of misconduct unrelated to the crime charged. Warren, 134 Wn. App. at 64-65 (citing State v. Brush, 32 Wn. App. 445, 448, 648 P.2d 897 (1982)). But, "a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct." Stockton, 91 Wn. App. at 40.

While Maynard testified that he did not try and hide from bad things, he did not testify that he was a good person or otherwise refrained from bad acts. Accordingly, Maynard's testimony about his tendency not to hide from bad things was but a mere passing reference that did not open the door to questions about his involvement in prior bad acts or crimes.

In Stockton, evidence of the defendant's previous drug use and conviction for possession of a controlled substance was ruled inadmissible prior to the start of trial. 91 Wn. App. at 39. Concluding that Stockton had not opened the door to testimony about his prior drug use and conviction when he testified that he thought men were trying to sell him drugs at the time of the incident in question, the court stated that Stockton's remark was no more than a passing reference to any knowledge he may have had about drugs. Id. at 40. Rejecting the State's assertion that inquiring into whether Stockton had bought drugs before was necessary to place the altercation in context, the court noted that the prosecutor's question did not even counter Stockton's testimony that men were trying to sell him drugs or cast doubt on his claim that they tried to rob him when he walked away. Id. at 40-41. As such, the Court

concluded that Stockton never put his familiarity with drugs at issue. Id. at 41.

Like Stockton, Maynard's testimony that he was "not the kind of person that goes around trying to hide from bad things" did not open the door to testimony about his prior assault conviction. Maynard made no assertions as to his prior involvement with crimes or his propensity for assault. As with Stockton, the prosecutor's inquiry into Maynard's prior assault conviction neither focused on, nor refuted, Maynard's assertion that he did not hide from bad things. Indeed, the State offered no evidence that refuted Maynard's testimony. Because Maynard never placed his character for assault at issue, the prosecutor's question regarding his prior assault cannot be justified on the ground that Maynard opened the door.

Similarly, in State v. Avendano-Lopez, 79 Wn. App. 706, 714-15, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996), the Court concluded that the defendant did not open the door to questions on cross-examination about prior drug transactions when he volunteered on direct examination that he had recently been released from jail, or when he testified that he had not sold drugs with an alleged accomplice. Id. at 714-15. As

the court noted, the prosecutor's question, "aside from being improper, was also irrelevant; whether or not Avendano-Lopez had previously sold narcotics had no legitimate bearing on whether, on the date in question, he possessed with intent to deliver." Id. at 713. "The State fails to explain how prior drug sales could be admissible under ER 404(b), and it appears that the only purpose of offering such evidence would be to prove that Avendano-Lopez acted in conformity with prior drug transactions, which ER 404(b) prohibits." Id. at 715.

As with Avendano-Lopez, the prosecutor's question about Maynard's prior assault had no legitimate bearing on the assault at issue. Maynard never testified as to his own good character or made any assertions that he had no prior criminal record. As the prosecutor's comments focused solely on Maynard's prior assault conviction rather than refuting his testimony that he didn't hide from bad things, it cannot be said that the prosecutor was offering the evidence to impeach Maynard. The only purpose behind evidence of Maynard's prior assault conviction, therefore, was to prove that he acted in conformity with the past conviction during the incident in

question. This evidence was prohibited by both ER 404(b)<sup>1</sup> and the trial court's ruling prior to the start of Maynard's trial. See 1RP 37.

The court's ruling deprived Maynard of his right to a fair trial. It likely influenced the jury's decision to find the aggravating factor given that Dr. Harruff's testimony indicated that Whisenant's bruising and fractured larynx were not conclusive evidence of the level of bodily harm resulting from the strangulation. The evidence portrayed Maynard as particularly violent (having committed multiple assaults) and therefore more likely to have caused the victim's injuries through strangulation.

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<sup>1</sup> ER 404(b) states:

**Other Crimes, Wrongs, or Acts.** 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.

B. CONCLUSION

For all of the above reasons and those discussed in the opening brief, this Court should vacate Maynard's exceptional sentence.

DATED this 25<sup>th</sup> day of June, 2009.

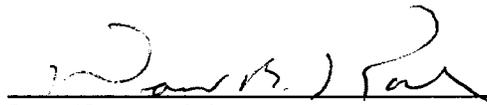
Respectfully submitted,

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  )  
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**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 25<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HENRY MAYNARD  
DOC NO. 321934  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JUNE, 2009.

x *Patrick Mayovsky*