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JUL 10 2009

King County Prosecutor
Appellate Unit

62746-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER FUALAAU,

Appellant.

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FILED
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Mary E. Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 404(b) when it admitted evidence of appellant's prior crimes to prove his identity, motive, and intent.

2. The trial court erred when it entered the following findings of fact and conclusions of law under ER 404(b):¹

- a. under section 1 "undisputed facts": "Defendant Fualaa described how he had brutally beaten Knobby much in the same way Mr. Hough describes that Defendant Fualaa had beaten him."
- b. under section 3: "The Court finds that this evidence is admissible under ER 404(b) as proof of the defendant's identity, motive and intent in committing the crimes he is charged with in this case."
- c. under section 3(c): "The court has determined that the evidence is relevant to prove an element of the crime charged and to rebut a defense," intent is at issue, and "the similarities between these two incidents are striking."
- d. section 3(d), *except* that portion stating the "evidence will likely have serious prejudicial impact because of the violent nature of the beating the defendant admitted to inflicting on Mr. Phadnis."

¹ The court's ER 404(b) findings and conclusions are attached to this brief as appendix A.

3. The trial court erred when it denied defense counsel's motion to withdraw as appellant's attorney.

4. The trial court erred when it entered the following findings of fact and conclusions of law on defense counsel's motion to withdraw under the subheading "Defense Motion to Withdraw as Attorney for the Defendant":²

- a. based on defense counsel's experience and the fact the defendant created the situation "it is the court's belief that defense will be able to continue as counsel for the defendant."
- b. "To do otherwise would have the effect of endorsing and encouraging disruptive behavior by the defendant."

Issues Pertaining to Assignments of Error

1. Over defense objection, the trial court permitted the State to elicit testimony that appellant had previously kidnapped and assaulted an individual years before the conduct for which he was charged in the present case. Was this a violation of ER 404(b) where there was no proper purpose for the evidence and it resulted in significant unfair prejudice?

2. During trial, appellant assaulted defense counsel and counsel moved to withdraw from the case. Where the incident

² The court's findings and conclusions on the motion to withdraw are attached to this brief as appendix B.

created a conflict of interest for counsel and resulted in a complete breakdown in communication between attorney and client, did the trial court err when it refused to allow counsel to withdraw?

3. Where several of the trial court's findings and conclusions on the ER 404(b) ruling and defense counsel's motion to withdraw are not supported by the evidence or the law, are they erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Roger Fualaau with Assault in the First Degree (with a firearm sentencing enhancement) and two counts of Kidnapping in the First Degree. CP 46-48. A jury found him guilty, the court imposed a composite standard range sentence of 412 months, and Fualaau timely filed his Notice of Appeal. CP 68-71, 111, 113, 147-149.

2. Substantive Facts

a. *The alleged crimes*

The State based its case against Fualaau on the testimony of two witnesses: John Hough and Joanna Palm. Hough, who is originally from New Jersey and goes by the nickname "Jersey," is a

longtime methamphetamine addict and uses daily. 7RP³ 4-7, 25. Hough moved to Washington in 2005 and lived with a methamphetamine dealer. That individual introduced him to Stu Fualaau (Roger's Fualaau's brother)⁴ and the two became friends. 7RP 5-6.

According to Hough, dealers often asked Stu to collect money for them on outstanding drug debts and Hough often drove Stu on these jobs because he had a car. 7RP 6-7. In 2006, Hough met Roger Fualaau, who is paralyzed from the waist down and confined to a wheelchair. 7RP 8-9; 8RP 61. Hough testified that the entire Fualaau family is involved with the sale and use of methamphetamine. 7RP 9.

Sometime in 2006, Stu told Hough that he feared for his safety and needed a firearm. Hough provided him with a "Mac 11 automatic," a small "machine pistol" capable of firing up to 32 rounds without reloading. 7RP 10-12. Thereafter, Stu was pulled

³ This brief refers to the verbatim report of proceedings as follows: 1RP – 9/10/08; 2RP – 9/18/08; 3RP – 10/10/08; 4RP – 10/17/08; 5RP – 10/29/08; 6RP – 10/30/08; 7RP – 11/3/08 (a.m.); 8RP – 11/3/08 (p.m.); 9RP – 11/4/08 (a.m.); 10RP – 11/4/08 (p.m.); 11RP – 11/5/08; 12RP – 11/6/08; 13RP – 11/12/08; 14RP – 12/12/08.

⁴ To avoid confusion, this brief refers to each Fualaau brother by first name.

over for driving a stolen car. Police found the firearm and Stu was charged with unlawfully possessing it. 7RP 13.

Stu was looking at a significant prison term if convicted. Hough offered to take blame for the gun. The two devised a plan for Hough to tell police the gun was his and that he mistakenly left it in the car without Stu's knowledge. 7RP 14-16. According to Hough, Roger repeatedly threatened that if the plan did not work, he would kill Hough. 7RP 16-17.

Stu was released from jail on the charge but had court appearances in Pierce County. 7RP 18-19. On one occasion, Hough accompanied Stu to the courthouse and spoke with Stu's attorney, telling him the agreed-upon story about the firearm. 7RP 17-18.

Later, on February 27, 2007, Hough once again accompanied Stu to the courthouse, intending to speak with Stu's lawyer again. Stu's girlfriend, Joanna Palm, drove the men to the courthouse. 7RP 10, 18-20; 8RP 97. Unbeknownst to Stu, five days earlier federal prosecutors had obtained an indictment charging him with a federal crime for his possession of the automatic weapon. He was arrested on the warrant inside the courthouse. 7RP 20; 8RP 92-101.

Palm and Hough left the courthouse in Palm's car. 7RP 22. According to Hough, Palm called Roger from the car and then indicated they were going to meet Roger and discuss what to do next. 7RP 22-23. They arrived at a house in the South Park neighborhood of Seattle and went inside the garage. 7RP 23. Roger was there, as was an individual who goes by the nickname "House," and others arrived shortly thereafter. 7RP 24-25.

Someone shut the garage door and Hough sat down on a box. 7RP 25-26. According to Hough, Roger pulled out a .25 caliber handgun and asked him if he wanted to get shot in the head or the leg. 7RP 26. After putting the gun in Hough's mouth, Roger shot the box Hough was sitting on and punched him in the face. 7RP 27-28. Roger then shot Hough in the leg, causing him to fall to the floor, and hit him with something, possibly the gun. 7RP 29-30. According to Hough, he was beaten with a metal bar, made to strip naked, stabbed in the back with a small pocket knife, and burned with a plumber's torch. 7RP 30-32.

Roger, Hough, House, and Palm drove to a house in Federal Way. 7RP 34-35. Hough rested on a couch. House was concerned about him and, according to Hough, likely talked Fualaau into taking him to a hospital. 7RP 35-36. After Hough

agreed to tell everyone he had been jumped and shot by a Mexican gang, he was dropped off at an emergency room. 7RP 37-38. When police questioned Hough, he told them the planned story, which officers found implausible. 7RP 39; 9RP 97-102. The emergency room physician noted a strong smell of alcohol on Hough. 10RP 17.

Upon his release from the hospital, Hough stayed in a motel. 7RP 40. A Kent Police Officer visited Hough there. For the first time, Hough claimed he had been shot by "Wheelchair Roger," a reference to Roger Fualaau. 7RP 40-41; 9RP 76.

Not wanting to be found, Hough moved to another motel in the area. 7RP 42. On March 17, 2008, as Hough walked down the street, a Dodge Pickup truck pulled in next to him. 7RP 45, 88-89; 9RP 17. The driver of the truck was Layne Keliiliki and the passenger was Henry Fidow. Hough did not know either man. 7RP 43-45. Fidow got out, grabbed Hough's wrist, said he was from the prosecutor's office, and told Hough they wanted to speak to him about the shooting. Hough refused to identify himself and said he did not know what they were talking about, but Fidow forced him inside the truck. 4RP 46-47.

After stopping briefly at a warehouse parking lot, Fidow told Keliiliki they had to take Hough to "the house" and they continued to drive. 4RP 49-50. According to Hough, Fidow called Roger, who was on speakerphone. Fidow provided a physical description of Hough and eventually Hough was told to audibly identify himself, which he did using his nickname "Jersey." 7RP 51-53.

About this time, a Kent Police Officer happened to see the Dodge truck and ran its license plate. 9RP 17-20. The plate came back clear, but the registered owner (Keliiliki) had a felony arrest warrant. 9RP 20-21. When the officer attempted to stop the truck, Keliiliki attempted to get away. 9RP 22-23. After a ten-minute pursuit, officers successfully stopped the vehicle and discovered Hough in the back seat. 7RP 53-56; 9RP 31-32, 37. Hough told police he had been kidnapped. 7RP 57. Inside the truck, police found a baseball bat, brass knuckles, pepper spray, illegal narcotics, and various other items indicating "probable criminal activity." 9RP 37, 54-56.

With Hough's assistance, a police officer made contact with Roger by cell phone. The two had a brief conversation and the officer indicated that if Roger did not turn himself in, the police department was going to "get him." Roger said "fuck you" and the

call was terminated. 9RP 83-84. Roger was arrested shortly thereafter. 9RP 90.

The assault charge and one kidnapping charge were based on the events inside the garage on February 7, 2007. The second kidnapping charge was based on events in the Dodge truck on March 17, 2007. CP 46-48.

In an attempt to bolster its case against Roger, the State called Joanna Palm as a witness. 8RP 7. She testified that on February 7, everyone in the garage was under the influence of methamphetamine, and Roger also smelled and appeared intoxicated. 8RP 21-22, 28. Palm testified that Roger shot Hough, burned him, and cut him with a knife. 8RP 23-26. Hough was eventually taken to the emergency room for treatment, but Palm could not remember whose idea it was to take him there. 8RP 34-36. According to Palm, after the shooting, Roger felt that someone was looking for him and did not want to go home. Instead, he stayed with Palm, who had a motel room. 8RP 38-40, 43-44.

Palm testified that she knew Layne Keliiliki and Henry Fidow. 8RP 41-42. On two occasions, Keliiliki stopped by Palm's motel room to visit Roger. 8RP 42. Palm testified that on the first occasion, Keliiliki told Roger he was sorry about what Hough had

put him through and offered to help. 8RP 45. Roger subsequently learned where Hough was staying. 8RP 46. Thereafter, Keliiliki visited Palm's motel room a second time and brought Fidow with him. According to Palm, Roger asked the two men to go get Hough and bring him back to the motel room. They agreed and left. 8RP 46-47.

Palm testified that Roger received a phone call from the men about an hour later indicating that they had Hough. 8RP 49. She then left for the store to buy cigarettes. 8RP 49. When she returned, Roger said he had received a call from a police officer, who said "I got your two boys, I'm going to come for you." 8RP 48-49.

Roger presented an alibi defense. His nephew, Eric Saunoa, testified that in February 2007, he lived with Roger in Graham, Washington, along with several other family members. 11RP 11-12. Saunoa vividly recalled February 27, 2007 – the day Fualaau supposedly kidnapped Hough in the garage and shot him – because it was the day after his mother's birthday. 11RP 13. According to Saunoa, Roger was in Graham and the family spent the entire day cleaning the house and yard. Saunoa remembered

that his uncle was bossing everyone around and never left Graham.
11RP 13-14.

b. ER 404(b) ruling

Prior to trial, the State indicated its intent to introduce evidence that in 2002, Roger had assaulted another individual under circumstances the State believed were similar to the assault involving Hough. The State argued the prior assault was relevant to show motive, intent, and identification of Fualaau as the guilty party. Supp. CP ____ (sub no. 128, State's Trial Memorandum, at 10-15). The defense opposed the motion. CP 53-56.

At a hearing on the matter, the State indicated its desire to use a transcript from a trial several years earlier in which Roger had testified for the State against an individual charged with murder and discussed the events in 2002. 5RP 7-8. The State argued that Roger's testimony revealed that he had kidnapped and tortured the defendant in that case "in much the same manner" that he had kidnapped and tortured Hough. 5RP 8. The State's primary purpose for this evidence was to prove identity – that Roger kidnapped and assaulted Hough. 5RP 11-16.

The defense argued that use of the prior crimes was not necessary because the State had two live witnesses to testify that

Roger was involved in the current case. 5RP 17. Moreover, the two incidents were not sufficiently similar to warrant admission of the prior conduct. 5RP 17-18. Finally, evidence of the prior crimes was extremely inflammatory and unfairly prejudicial. 5RP 18-19.

The court agreed that the prejudicial effect was “extremely high.” 5RP 22. But the court found the evidence relevant to demonstrate identify, motive, and intent and believed the probative value outweighed this prejudice. 5RP 22. The court entered written findings and conclusions in support of its decision. CP 64-67.

At trial, and over another defense objection, an employee of the prosecutor’s office read Roger’s testimony from the prior trial. 10RP 3, 22-24. Jurors learned that in 2002, Neelesh “Knobby” Phadnis had twice set fire to a house in which Roger was staying in retaliation for Roger taking a gun that belonged to Phadnis. Exhibit 23, at 140-154. Roger is married and the house belonged to his wife’s parents. Exhibit 23, at 137-38, 148-150.

Phadnis sought out Roger to speak with him and found him. Exhibit 23, at 156. Roger decided to “sasa” Phadnis; in Samoan, this means to discipline someone through physical force. Exhibit 23, at 155-156. Roger testified that he repeatedly struck Phadnis

on the legs and shoulder with a small metal stick and punched him in the mouth. This continued for about an hour while Roger verbally berated him. Exhibit 23, at 156-160. When the owner of the house told Roger to take Phadnis somewhere else, Phadnis was taken to the home Phadnis had set on fire. Exhibit 23, at 158, 160-161.

Although Roger made it clear that no one else was to touch Phadnis, he discovered that two individuals helping him had caused Phadnis to bleed from his chest from what looked like puncture marks. Exhibit 23, at 162. Roger continued with the sasa. He had Phadnis lay down on the ground and he repeatedly hit him in the back with the flat side of a machete. Exhibit 23, at 163-164. The sasa ended after Phadnis apologized to Roger's mother-in-law and father-in-law. Exhibit 23, at 164-165. Roger then treated Phadnis' wounds himself. Exhibit 23, at 165-166.

During closing argument, the State relied heavily on this evidence to convince jurors that Roger committed the assault and kidnapping offenses against Hough. See 13RP 8-10, 33-41, 65-66.

c. Counsel's motion to withdraw

After the charges were filed in this case, Roger's attorney – Nicholas Marchi – questioned his competency to stand trial. CP

10-13, 15-36. Following examinations by two psychologists, the court ultimately found Roger competent to proceed. CP 14, 37-40.

The jail had been giving Roger large doses of antidepressants, and initially he functioned better once this ceased. 2RP 23. As the trial progressed, however, the jail staff decided to start his medication again. Marchi indicated to the court he would try to prevent that from happening given the prior adverse effects. 2RP 12-13.

The following day, while Roger's nephew (Saunoa) was on the stand, Roger asked the court to tell corrections officers to get his medication. 11RP 24. The court called a recess so that Marchi could speak to Roger about the matter. 11RP 24. Before jurors could leave the courtroom, however, Roger lunged at Marchi, grabbed hold of him with both arms, and said something to the effect of "I need my fucking medication now." 11RP 24; 12RP 6-7. A corrections officer intervened and forced Roger to release Marchi. 12RP 17. After being removed from the courtroom, Roger indicated he was hearing voices. 11RP 24.

Marchi moved for a mistrial and to withdraw as Roger's attorney. The court recessed for the day to allow time to consider the next step. 11RP 25. Marchi indicated he would contact the

Office of Public Defense and arrange to have another attorney available to take over the representation. 11RP 27-28.

The next day, Marchi renewed his motions for mistrial and to withdraw. Marchi indicated that in light of the assault, he and Roger had a conflict of interest. 12RP 3. He was now a witness in a potential assault case, was to give a report to law enforcement on the incident, and had concerns about his personal safety. 12RP 4-5. Marchi also indicated he had concerns about Roger's mental status. He had spoken to Roger that morning. He was hearing voices and extremely agitated about not getting his medications. 12RP 3-4.

The prosecutor opposed the motions for mistrial and recusal. He argued that defendants should not be able cause mistrials in this manner. Otherwise, they could do so whenever the trial was not going favorably for the defense. 12RP 5-12, 14-15. The only legal authority cited by the prosecutor was State v. Bilal, 77 Wn. App. 720, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995), which indicates that when a defendant assaults a judge, recusal is not automatic and lies in the judge's discretion. 12RP 5-7. The State proposed a curative instruction telling jurors to ignore the fact

Roger attacked his lawyer. 12RP 11-12. As to Roger's mental condition, the State suggested he was malingering. 12RP 12-13.

Marchi challenged the notion an instruction would suffice. 12RP 17. He repeated his concerns for his own safety and that he might now be called as a witness against his client in a criminal prosecution. 12RP 16-18. He was still shaken from what had happened and now distracted from the task of representing his client. 12RP 18-19.

The court found that although the outburst was a serious matter, based on Roger's demeanor up until the attack, it had been calculated to create a conflict and mistrial because he was likely unhappy with the prosecutor's cross-examination of his nephew. 12RP 20, 31-33. The court found no reason to reassess Roger's competency. 12RP 19-20. The court denied the motion for mistrial, finding that to grant a mistrial would "endorse and encourage disruptive behavior." 12RP 21, 33. The court also denied Marchi's motion to withdraw, once again expressing concern that to grant the motion would encourage this type of behavior. 12RP 21.

Jail staff took additional, undisclosed measures in an attempt to ensure that Roger would not attack anyone again. 12RP 27-28.

The court brought the jurors back in the courtroom and instructed them that “[b]ehavior of the defendant in court yesterday is not evidence. You must not consider the defendant’s behavior in performing your duties as jurors.” 12RP 39. At Marchi’s request, the court then recessed trial until the following week. 12RP 36-40. Marchi hoped to use the time to “rebuild some trust” and convince himself that his safety was not at risk. 12RP 36.

When the parties reconvened the following week, Marchi indicated the defense would not be presenting any additional witnesses and would not be conducting any redirect of Eric Saunoa. 13RP 2. Marchi renewed his motions for mistrial and motion to withdraw from the case. 13RP 3. Forced to continue as counsel, Marchi gave a closing argument. 13RP 43-59.

Fualaa now appeals.

C. ARGUMENT

1. THE TRIAL COURT ERRED UNDER ER 404(b) WHEN IT PERMITTED EVIDENCE OF FUALAAU’S PRIOR CRIMES.

It is well established that a defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other bad acts must be excluded unless shown to be relevant to a material issue and to be more probative than

prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled on other grounds, State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The prosecution's attempts to use evidence of bad acts must be evaluated under ER 404(b), which reads:

(b) 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, absence of mistake or accident.

Because the evidence of Fualaau's prior crimes fell under ER 404(b), it was subject to the traditional four-part analysis. First, the trial court must find by a preponderance of the evidence that the prior misconduct occurred. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Second, the court must identify the purpose for which the evidence is being admitted. Thang, 145 Wn.2d at 642.

Third, the court must determine that the proffered evidence is logically relevant to an issue. Thang, 145 Wn.2d at 642. The test is "whether the evidence as to other offenses is relevant and

necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. (quoting Goebel, 40 Wn.2d at 21). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Fourth, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice.⁵ Thang, 145 Wn.2d at 642.

In a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). Admission of evidence under ER 404(b) is reviewed for an abuse of discretion. Thang, 145 Wn.2d at 642.

In this case, the prior crimes clearly occurred based on Fualaau's sworn testimony at the prior trial. Moreover, the trial court identified the purpose for introducing the evidence -- to establish identity, intent, and motive. But evidence of the prior

⁵ Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury"

crimes fails the third and fourth prongs of the test. Under ER 404(b), it was not, in fact, relevant to establish identity because the two crimes did not feature sufficiently unique characteristics. Nor was it relevant to show intent or motive. Moreover, the prejudice from this evidence far outweighed any probative value.

a. The Evidence Was Not Relevant To Show Identity, Intent, or Motive.

When evidence of other bad acts is introduced to prove identity, the evidence is relevant “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.” Thang, 145 Wn.2d at 642 (quoting State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994)). Stated another way, “[t]he device used must be so unusual and distinctive as to be like a signature.” Thang, 145 Wn.2d at 643 (quoting State v. Coe, 101 Wn.2d at 777).

In Thang, a prior robbery was found not admissible to prove identity on the charged murder despite the fact that “both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator allegedly remarked that ‘the bitch

is dead' and (4) both victims were kicked." Thang, 145 Wn.2d at 645. However, there were several dissimilarities sufficient to make the crimes unlike a signature: "(1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) in one case entry occurred through a door, and in the other, through a window; (5) in one case, the perpetrators fled in the victim's car, and in the other case, on foot." Thang, 145 Wn.2d at 645.

The same is true in Fualaa's case. While there are similarities between the two offenses, the dissimilarities remove the earlier offense from the realm of "signature crime": (1) the crimes occurred five years apart; (2) one victim sought and found Fualaa before the assault, while the other was allegedly brought to Fualaa (almost twice) (3) one victim was assaulted for endangering Fualaa and his extended family, while the other victim was allegedly assaulted for failing to come through as a scapegoat for Fualaa's brother; (4) one victim was only beaten by Fualaa, while the other victim was beaten, shot, stabbed, and burned; (5) one victim was made to strip naked, while the other was not; (6) Fualaa treated one victim's injuries himself, while it appears he

had to be convinced (by House) the second victim should be treated at all.

The trial court's findings that Fualaau described how he beat "Knobby" much in the same way Hough was beaten and that similarities between the two incidents were "striking" are contrary to the evidence and therefore erroneous. CP 65; Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (findings of fact not supported by substantial evidence are erroneous), cert. dismissed, 479 U.S. 1050 (1987). In light of the many differences between the two cases and the five-year period between them, their similarities fail to establish a method "so unusual and distinctive as to be like a signature." Thang, 145 Wn.2d at 643 (quoting Coe, 101 Wn.2d at 777). Therefore, the prior crimes were not relevant to show that Fualaau committed the current offenses.

Nor was the evidence relevant to prove motive or intent. "Motive" means "[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." Saltarelli, 98 Wn.2d at 365 (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). In Saltarelli, the Supreme Court held that even where a prior rape was similar in nature to the currently charged offense, it was not logically relevant to motive where the current offense involved a

different victim and occurred five years later. It showed no more than a propensity to commit the charged crime. Saltarelli, 98 Wn.2d at 363-365. Likewise, neither the State nor the court explained how Fualaau's crimes five years earlier served as the inducement to commit crimes against Hough. This was no more than propensity evidence.

The same is true for intent. There are situations where "the prior doing of other similar acts, whether clearly part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." Saltarelli, 98 Wn.2d at 365 (quoting 2 J. Wigmore, *Evidence* § 302 at 245 (Chadbourn rev. ed. 1979)). "But where the acts, if committed, indisputably show an evil intent and the defendant does not specifically raise the issue of intent," the prior crimes are not admissible for this purpose. Saltarelli, 98 Wn.2d at 366 (quoting People v. Kelley, 66 Cal.2d 232, 242, 424 P.2d 947 (1967)).

If Fualaau committed the charged acts of assault and kidnapping against Hough, there is no dispute he had the requisite intent for the crimes. He did not admit the conduct but argue some innocent intent. Rather, he simply denied committing the crimes. Short of specifically disputing intent, a not guilty plea does not place

intent at issue. Saltarelli, 98 Wn.2d at 366 (quoting Kelley, 66 Cal.2d at 242); see also State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995) (defense of general denial; prior misconduct improperly admitted to prove intent where intent implicit in the act of manual strangulation of the victim).

Had Fualaau admitted holding Hough captive and injuring him but maintained it was done for non-criminal purposes, evidence of the prior crimes would have been relevant to intent. But Fualaau's defense was general denial. Therefore, the evidence was not relevant for this purpose.

b. The Unfair Prejudice Outweighed Any Probative Value.

Not only was evidence of the prior crimes irrelevant to the charged offenses, it was highly and unfairly prejudicial. The trial court recognized that the evidence would likely "have serious prejudicial impact." CP 66. But the court found this serious prejudice outweighed by the signature quality of the earlier offenses and the fact the earlier conduct "is no more heinous than the crimes he is currently charged with." CP 66.

The court's first rationale has already been addressed above. The five-year-old offense was not a signature crime. As to

the second rationale, whether the first crime is no worse than the current crime is not a determining factor. The danger is that jurors would have focused on the brutality in the first crime to conclude that Fualaaau surely committed the second set of crimes because he has a propensity for violence. That the earlier crime was no more heinous than the current crime does not mitigate this prejudice.

The erroneous admission of evidence under ER 404(b) requires reversal if, within reasonable probabilities, the evidence materially affected the outcome of the trial. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Evidence of Fualaaau's prior crimes portrayed him as a violent individual with a propensity to commit serious crimes, thereby making it more likely jurors would reject his alibi defense and find the State's two main witnesses credible.

The court provided jurors with an instruction telling them they could only consider evidence of the prior crime for identity, motive, and intent. CP 82. But this did not cure the erroneous admission of the evidence. Rather than a limiting instruction, jurors needed a curative instruction. See Thang, 145 Wn.2d at 645 (curative instruction necessary once jury hears improperly admitted evidence under ER 404(b)).

The prosecutor's closing argument exacerbated the prejudice. So important was this evidence of prior criminal conduct, it was the very first thing the trial deputy highlighted for jurors. See 13RP 8-10 (telling jurors the prior crime demonstrates the "twisted and warped philosophy" Fualaau lives by). Later, the trial deputy spent considerable time discussing similarities between the two criminal episodes. See 13RP 33-41. Finally, during rebuttal, he told jurors "[w]e know the defendant did this because the defendant told a prior jury how he does hits. This is not some kind of random act by the defendant. . . . And whether you think his motives are crazy, they are obviously his motives because that's what he told the prior jury. I Sasa people when they disrespect my family. And that's what he did." 13RP 65-66.

Even in close cases, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." Myers, 49 Wn. App. at 247; Bennett, 36 Wn. App. at 180. The trial court erred, thereby denying Fualaau his right to a fair trial.

2. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW.

CrR 3.1(e) permits the withdrawal of counsel "upon written consent of the court, for good and sufficient reason shown." Good

cause justifying withdrawal includes conflict of interest, irreconcilable conflict, and a complete breakdown of communication between attorney and client. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). The trial court's decision is reviewed for an abuse of discretion. State v. Hegge, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989).

Marchi was required to withdraw from his representation of Fualaa because he had a conflict of interest and there was a complete breakdown of communication.

a. Conflict of Interest

The right to conflict-free counsel is not simply rule based. The Sixth Amendment to the United States Constitution guarantees every criminal defendant the right to competent representation, including representation free from conflicts of interest. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

"In order to establish any violation of the Sixth Amendment based on a conflict of interest, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. . . . If this standard is met, prejudice is presumed."

State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008) (citations omitted).

“An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of representation, the attorney’s and defendant’s interests ‘diverge with respect to a material factual or legal issue or to a course of action.’” Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993) (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n.3, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)), cert. denied, 511 U.S. 1022 (1994). An “actual conflict” is “a conflict that affected counsel’s performance – as opposed to a mere theoretical division of loyalties.” Regan, 143 Wn. App. at 428 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). Whether counsel had a conflict is a legal question this Court reviews de novo. Regan, 143 Wn. App. at 428.

To show “adverse effect,” the defendant:

need not demonstrate prejudice that the outcome of his trial would have been different but for the conflict – but only “that some plausible alternative defense strategy or tactic might have been pursued’ but was not and that ‘the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.’” United States v. Stantini, 85 F.3d 9, 16, (2d Cir. 1996)(quoting Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993)). Thus, the

conflict (1) “must cause some lapse in representation contrary to the defendant’s interests,” *State v. Robinson*, 79 Wash. App. 386, 395, 902 P.2d 652 (1995)(quoting *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983)); or (2) have “likely” affected particular aspects of counsel’s advocacy on behalf of the defendant, *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992).

Regan, 143 Wn. App. at 428.

RPC 1.7 provides that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.” RPC 1.7(a)(2).

Once Fualaaau attacked Marchi, Marchi had a conflict of interest. He was Fualaaau’s lawyer *and* his crime victim. Marchi was to give a report to law enforcement, could be called to testify as a witness against Fualaaau, and had valid concerns for his personal safety. 12RP 4-5, 16-19. Even after trial was recessed so that Marchi could attempt to “rebuild some trust,” Marchi recognized he could no longer ethically represent his client and renewed his motion to withdraw. 12RP 36-40; 13RP 3. His interests and his client’s interests had permanently diverged.

Courts routinely allow attorneys to withdraw when they have been assaulted by their clients. See Gilchrist v. O'Keefe, 260 F.3d 87, 90 (2nd Cir. 2001) (appointed counsel withdraws after client punched him in the ear), cert. denied, 535 U.S. 1064 (2002); United States v. Leggett, 162 F.3d 237, 240 (3rd Cir. 1998) (initial trial counsel withdraws due mainly to client's threats of physical harm; subsequent counsel withdraws after client assaulted him), cert. denied, 528 U.S. 868 (1999); United States v. McLeod, 53 F.3d 322, 325-26 (11th Cir. 1995) (counsel withdraws where client verbally abusive and threatened physical harm); United States v. Jennings, 855 F. Supp. 1427, 1432-1433 (M.D. Pa. 1994) (counsel withdraws after client hits counsel in head), aff'd, 61 F.3d 897 (3rd Cir. 1995); Legal Aid Society v. Rothwax, 415 N.Y.S.2d 432, 433-434, 69 A.D.2d 801 (1st Dept. 1979) (citing the "duty to protect its officers," court allows appointed counsel to withdraw following threatened assault by client).

The conflict between Marchi and Fualaau had an adverse impact because it affected counsel's advocacy, i.e., there was a defense strategy that might have been pursued but was not and conflicted with counsel's interests. Regan, 143 Wn. App. at 428. Prior to the assault, the defense gave notice that it might call as

many as five witnesses. CP 50. Marchi had only called one of these witnesses, Eric Saunoa, at the time of the assault. Saunoa was called to establish Fualaau's alibi on February 27, 2007. 11RP 13-14. Using additional witnesses, Marchi also planned to establish and argue that because of Fualaau's physical limitations – his confinement to a wheelchair – he was not capable of assaulting Hough. 12RP 17.

Marchi indicated that in light of the assault in which he was the victim, he was no longer in a position to present this defense. 12RP 17. Not only would proceeding with this planned defense have been contrary to what jurors witnessed, it would have been contrary to Marchi's claim that he himself was the victim of an assault perpetrated by Fualaau. His professional duty as Fualaau's advocate (requiring that he argue Fualaau was not capable of assault) conflicted with his personal interests (his claim that he was Fualaau's assault victim). When trial reconvened the following week, Marchi simply rested. 13RP 2, 7.

Because Fualaau was forced to proceed with an attorney who had a conflict of interest and the conflict resulted in an adverse impact at trial, prejudice is presumed and reversal required.

b. Complete Communication Breakdown.

In addition to the conflict of interest that required Marchi to withdraw, the assault also resulted in a complete breakdown in communication between Marchi and Fualaau. This Court examines the extent and nature of the breakdown and the breakdown's effect on the representation. If representation is inadequate due to the breakdown, prejudice is presumed. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

A physical assault on defense counsel would seem to indicate the ultimate breakdown in communication.

In State v. Williams, 99 Ohio St. 3d 493, 794 N.E.2d 27 (2003), the defendant punched one of his two attorneys after hearing the guilty verdict in the jurors' presence. Citing "a breakdown in the attorney-client relationship," both attorneys moved to withdraw. 794 N.E.2d at 49. The attorney who had been assaulted indicated he could no longer consult with his client without "some fear of getting popped," he worried his feelings might be conveyed to jurors, and he was now unable to speak to the client about mitigating factors for the sentencing phase of trial. Neither attorney could assure the trial court of his ability to represent the defendant zealously thereafter. 794 N.E.2d at 49.

The Supreme Court of Ohio found that the trial court had abused its discretion in denying counsels' motion to withdraw. Id. at 50.

The facts in Fualaaau's case are similar. Marchi expressed concern for his personal safety. 12RP 16-17. He indicated that Fualaaau should not have an attorney who was distracted and could not focus on the case. 12RP 18-19. Marchi asked for a recess of several days to try and reestablish a relationship with Fualaaau and convince himself of his assured personal safety. 12RP 34, 36-37. When court reconvened the following week, however, Marchi again moved to withdraw, which indicates that despite his best efforts, Marchi still did not believe he could put aside the assault and competently represent Fualaaau. 13RP 3. This undermines the court's finding that Marchi, as a seasoned trial attorney, could simply continue in his representation with no ill effect. CP 62.

As previously discussed, Marchi's representation of Fualaaau suffered after the assault. He called no more witnesses and abandoned any attempt to argue that Fualaaau was incapable of the charged assault. This resulted in inadequate representation and presumed prejudice. On this alternative ground, reversal is required.

c. The Trial Court Denied The Motion To Withdraw On Untenable Grounds

The trial court denied Marchi's motion to withdraw in large part because it did not want to encourage this type of conduct, which the court found was calculated to create a conflict and force a mistrial. 12RP 21, 33; CP 62. The Rules of Professional Conduct do not recognize a distinction for conflicts resulting from a client's intentional behavior. If the client's interests conflict with the attorney's, the attorney must withdraw. RPC 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.").

The court's fear of rewarding Fualaau for manipulating the system was unfounded. Had the court properly recognized that Marchi had to withdraw, it could have required Fualaau to proceed pro se for the remainder of trial, having forfeited his right to the assistance of counsel.

"[F]orfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." City of Tacoma v. Bishop, 82 Wn. App. 850, 858-59, 920 P.2d 214 (1996) (quoting United States v. Goldberg, 67 F.3d 1092, 1100 (3rd Cir. 1995)).

“Scenarios . . . that are suggestive of an attempt to manipulate the court would seem to present a stronger case for a finding of forfeiture.” Gilchrist, 260 F.3d at 99 n.8.

“[A] defendant’s egregious misconduct may warrant forfeiture of the right to counsel.” Bishop, 82 Wn. App. at 860. Assaulting an attorney satisfies this standard. See Gilchrist, 260 F.3d at 90-100 (trial court finds that defendant forfeited right to counsel by punching attorney; Habeas relief denied); Leggett, 162 F.3d at 249-251 (“We do not hesitate to conclude that such an attack qualifies as the sort of ‘extremely serious misconduct’ that amounts to the forfeiture of the right to counsel.”); McLeod, 53 F.3d at 326 (conduct that included threats of physical harm to counsel sufficient for forfeiture); Jennings, 855 F. Supp. at 1443-1445 (defendant who assaulted counsel required to proceed pro se).

In fact, in State v. Williams, the case in which the Supreme Court of Ohio concluded that the trial court erred in denying counsels’ motion to substitute counsel following an in-court assault, the court noted its analysis would differ were there any evidence the defendant had been deliberately manipulative. The court then cited to Gilchrist v. O’Keefe, the Second Circuit forfeiture of counsel case, implying that under such circumstances, Williams would have

been forced to proceed without the assistance of any counsel.

Williams, 794 N.E.2d 50 n.2.

In Fualaau's case, the trial court could have avoided rewarding or encouraging his conduct by allowing Marchi to withdraw and holding that Fualaau had forfeited his right to counsel for the remainder of trial. It could not, however, simply force Marchi to continue as Fualaau's attorney to the detriment of counsel and client. The Sixth Amendment and Rules of Professional Conduct required Marchi's withdrawal.

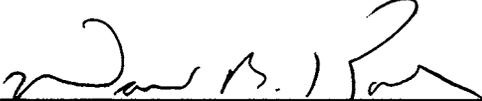
D. CONCLUSION

The trial court erred under ER 404(b) and denied Fualaau a fair trial when it permitted evidence of his prior crimes. The trial court also erred when it denied defense counsel's motion to withdraw. Both mistakes require a new trial.

DATED this 10th day of July, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
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Office ID No. 91051

Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

NOV 12 2008

SENIOR CLERK
BEVERLY ANN ENEBRAD
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 07-C-03711-6 KNT

vs.

ROGER FUALAAU,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING INTRODUCTION OF
EVIDENCE PURSUANT TO ER
404(B)

1. Undisputed Facts

The State is seeking to introduce evidence of a prior incident where Defendant Fualaa assaulted another individual. It is the State's position that this assault occurred in much the same manner and for the much the same reason as ~~he assaulted~~ ^{the assault on} John Hough in this case; because the defendant felt that his family was being disrespected by the respective victim. It is the State's position that this evidence is relevant and admissible on the issue of the defendant's identity as the person who ^a Assaulted and had John Hough Kidnapped as well as his motives and intent for committing those crimes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING INTRODUCTION OF EVIDENCE
PURSUANT TO ER 404(B) - 1

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1 In 2002, the Kent Police Department was investigating a murder where it was alleged that
2 Neelesh "Knobby" Phadnis murdered his parents. During the course of that investigation, Kent
3 police learned that Mr. Phadnis may have tried to employ Defendant Fualaau to do the killing for
4 him. In September, 2002, Kent Dets. Kathy Holt and Steve Kelly contacted Defendant Fualaau who
5 gave them an extensive statement about his involvement with Mr. Phadnis, who he knew as
6 "Knobby". During the course of that interview, Defendant Fualaau described how he had brutally
7 beaten Knobby much in the same way Mr. Hough describes that Defendant Fualaau had beaten him.
8 Defendant Fualaau referred to his beat down method as "Sasa". The defendant was called as a
9 witness by the State in the trial against Mr. Phadnis. The State obtained a transcribed statement of
10 the defendant's testimony at that trial, given under oath, and has asked that portions of that
11 transcript be read to the jury. (Copy of that transcribed statement is attached as Appendix A and is
12 incorporated into these findings by reference).

13
14 2. Disputed Facts

15 The defense objects to the introduction into evidence of the reading of the transcript to
16 the jury. The defense does not object to the fact that the defendant did testify under oath at the
17 prior trial and that the transcript is an accurate copy of the defendant's testimony in that trial.

18
19 3. Courts Findings regarding the admissibility of the reading of the transcript into evidence.

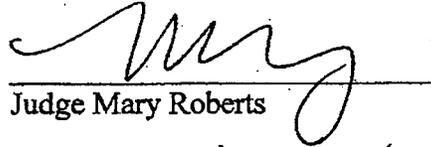
20 The Court finds that this evidence is admissible under ER 404 (b) as proof of the
21 defendant's identity, motive and intent in committing the crimes he is charged with in this case.
22
23

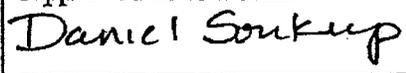
- 1 a. The Court has determined that by a preponderance of the evidence the prior act
2 occurred. This is based upon the fact that it is the sworn testimony of the
3 defendant given at a prior court proceeding regarding his own actions.
- 4 b. The Court has determined that the purpose for the admission of this evidence is to
5 show the defendant's identity in committing the crimes he is presently charged
6 with, as well as his motive and intent in committing these crimes.
- 7 c. The Court has determined that the evidence is relevant to prove an element of the
8 crime charged and to rebut a defense. The defendant's identity, motive and intent
9 are all at issue, ^{given the defendant's general denial.} ~~especially in light of the defendant's claim that he was not the~~
10 ~~person who committed these acts and that he was in fact somewhere else at the~~
11 ~~time these acts occurred.~~ The court finds that the similarities between these two
12 incidents are striking. In both cases they both involved a dispute over a gun. In
13 both cases the defendant was upset because he felt a family member had been
14 negatively impacted by the victim's actions. In both cases the defendant had the
15 victim brought to him. In both cases he verbally abused and physically attacked
16 the victim. In both cases he used different types of weapons during the course of
17 the beating. In both cases the attack lasted for a prolonged period. In both cases he
18 had the victim cleaned up after ^{the attack was over.} ~~he was done attacking them.~~
- 19 d. The Court has determined that the probative value of this evidence outweighs its
20 prejudicial effect. This evidence ^{will likely} ~~may have some~~ prejudicial impact because of the
21 ^{serious} violent nature of the beating the defendant admitted to inflicting on ~~his victim.~~
22 ~~Mr. Phadnis.~~ However, this is outweighed by the fact that the crime is no more heinous than the
23 crimes he is currently charged with and the method employed in the commission

1 of both crimes is ~~so~~ ^{such} unique that proof the defendant committed one of these
2 crimes creates a high probability that he also committed the crimes with which he
3 is charged.

4 Accordingly, under ER 404 (b) and the relevant case law the Court finds that this
5 evidence is admissible at trial. The transcript will be read to the jury. The transcript will not go
6 back to the jury room during deliberations. Upon request of the parties, the Court will give the
7 appropriate limiting instructions on the use of this evidence.

8
9 Dated this 2TH day of November, 2008

10
11 
12 Judge Mary Roberts

13 Presenting via email
Approved as to Form:
14 

15 Deputy Prosecuting Attorney
Attorney for Plaintiff

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Attorney for Defendant

APPENDIX B

FILED
KING COUNTY WASHINGTON

NOV 12 2008

SUPERIOR COURT CLERK
BEVERLY ANN ENEBRAD
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ROGER FUALAAU,

Defendant.

No. 07-C-03711-6 KNT

COURT'S FINDINGS REGARDING
DEFENSE MOTION FOR MISTRIAL
AND TO WITHDRAW AS COUNSEL

On November 6, 2008, during the course of the trial, defense made a motion for the court to declare a mistrial and to withdraw as counsel for the defendant. Defense also raised concerns about the defendant's competence to proceed in this matter. These motions were made as a result of an outburst by the defendant in open court in the jury's presence on November 5, 2008. Based upon the court's observations of the defendant's actions throughout the trial, the evidence presented up until this point, the arguments made by counsel, and the relevant case law, the court finds that there is no reason to doubt the defendant's competency and also denies the motions for mistrial and for withdrawal of counsel. The reasons for the court's rulings are set out below. The court also incorporates by reference its oral rulings made on November 6, 2008 on these issues.

COURT'S FINDINGS REGARDING DEFENSE
MOTION FOR MISTRIAL AND TO WITHDRAW AS
COUNSEL - 1

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1 Defendant's Competency

2 During the course of the defendant's outburst in court he said word's to the effect of, "I
3 need my medications". Additionally, it was reported to the court staff by the jail that once the
4 defendant was transported from the courtroom he began to say that he was "hearing voices".
5 These statements, plus the fact that the defendant ~~appeared to~~ physically attack ^{ed} his own attorney
6 does cause the court some concerns regarding the defendant's mental state.

7 However, the court has reviewed the reports and findings in the defendant's prior
8 competency proceedings that were conducted in this case. At that time, the defendant also
9 claimed to be "hearing voices". The defendant was found to be competent by Judge Jay White.
10 There does not appear to be any new or different information or symptoms which would change
11 the court's view that the defendant is competent. Additionally, up until the outburst by the
12 defendant in court on November 5, 2008 the defendant has been attentive and respectful while in
13 court. At one point in the proceedings the defendant addressed the court about his view that the
14 judge should recuse herself from hearing the trial. The court finds that his argument was coherent
15 and logical and shows that the defendant understands the nature of the proceedings against him
16 and is able to assist his attorney in the presentation of his case.

17
18 Defense Motion for Mistrial

19 The defendant's in-court outburst was fairly serious. The defendant's attorney, Mr.
20 Marchi was visibly shaken as a result of the defendant's actions. The jury was in the court room
21 and did have the opportunity to observe the defendant's actions. However, the outburst appeared
22 to be calculated by the defendant to interrupt the proceedings. Just prior to the outburst, the
23 defendant began to become visibly agitated as the State cross examined one of his witnesses,

1 who had been identified as the defendant's nephew. As was noted before, up until that time the
2 defendant has been attentive and respectful while in court. There is no evidence to suggest that
3 the defendant's actions were not voluntary nor by his own volition. Under these circumstances,
4 to permit such an attack to cause a new trial would encourage unruly courtroom behavior and
5 would greatly disrupt judicial administration. Additionally, the court will read an oral
6 admonishment to the jury that they disregard the defendant's in-court outburst and not consider
7 that outburst as evidence in the case.

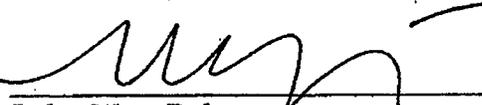
8
9 Defense Motion to Withdraw as Attorney for the Defendant

10 The court recognizes that the defense attorney, Mr. Marchi, has been placed in a difficult
11 position as a result of the defendant's actions. However, defense is charged with representing the
12 defendant to the best of his abilities. Defense counsel is a seasoned trial attorney who has
13 represented many different types of defendants in all types of cases. Given this, and the fact that
14 the defendant was the person who caused the disruption and placed defense in the position he is
15 in, it is the court's belief that defense will be able to continue as counsel for the defendant.
16 Additionally, the court did grant defense a short recess of 5 days based upon the representations
17 of defense that he needed the additional time to re-establish a rapport with his client, reevaluate
18 what defenses are available at trial and to decide how best to represent his client given the
19 circumstances. To do otherwise would have the effect of endorsing and encouraging disruptive
20 behavior by the defendant.

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For the above forgoing reasons, the court finds the defendant to be competent, denies the motion for a mistrial and denies the defense motion to withdraw as counsel in this case.

Dated this 21st day of November, 2008



Judge Mary Roberts

Approved as to form: *Presented via email*
by DPA Daniel Satterberg

Attorney for Plaintiff

Attorney for Defense

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62746-5-I
)	
ROGER FUALAAU,)	
)	
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 10TH DAY OF JULY, 2009, 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] ROGER FUALAAU
 DOC NO. 707139
 WASHINGTON STATE REFORMATORY/MCC
 P.O. BOX 777
 MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JULY, 2009.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUL 10 PM 4: 22