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SEP 28 2010
King County Prosecutor
Appellate Unit

64704-4

NO. 64764-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DRAKE,

Appellant.

~~2010 SEP 28 PM 3:59
COURT OF APPEALS DIVISION ONE
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 improperly admitted evidence of Appellant's prior bad acts under ER 404(b), which unfairly influenced the outcome of the trial.

2. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertinent to Assignments of Error

1. Did the trial court err when it admitted irrelevant and prejudicial evidence that Appellant had abused the complaining witness's dog contrary to ER 401, 402, and 403?

2. Did the trial court err when it found the dog abuse evidence admissible under an ER 404(b) exception?

3. Did the trial court's erroneous admission of the dog abuse evidence unfairly affect the outcome of Appellant's trial?

4. Did Appellant preserve his challenge to the dog abuse evidence for appeal?

5. If Appellant did not preserve his challenge to the dog abuse evidence for appeal, then was appellant denied his right to ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jason Howard Drake, (Drake), was charged by amended information with first degree burglary (Count One), felony harassment (Count Two), second degree assault (Count Three), unlawful imprisonment (Count Four), residential burglary (Count Five), and intimidating a witness (Count Six). CP 10-14; RCW 9A.52.020; RCW 9A.46.020(1), (2); RCW 9A.36.021(1)(g); RCW 9A.40.040; RCW 9A.52.025; RCW 9A.72.110. The State alleged that each of the crimes involved domestic violence and an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple instances over a prolonged period of time. CP 10-14; RCW 10.99.020; RCW 9.94A.535(h)(i).

A jury found Drake guilty of first degree burglary and residential burglary, and entered special verdicts finding that the crimes were aggravated domestic violence offenses. CP 86, 94, 107-15. The jury found Drake not guilty of second degree assault, but guilty of the lesser included offense of fourth degree assault, and not guilty of intimidating a witness, unlawful imprisonment, and harassment. CP 96, 98-101. The court sentenced Drake to 90 months of incarceration with an 18-month term of community custody. CP 107-15. Drake appeals. CP 119.

2. Substantive Facts

Drake began dating Vanessa Rose in June of 2004. 3RP 8.¹ The couple's relationship continued for approximately 5 years. 3RP 7. Rose claimed Drake became violent with her approximately a year into their relationship. 3RP 10. The couple moved to Florida in March 2006 and returned to Washington in August 2007. 3RP 12-14.

Rose estimated Drake assaulted her approximately 20 times over the course of their relationship. 3RP 16. She recalled one occasion when Drake left with her dog; Drake called the next day and she could hear her dog crying in the background “like [Drake] was punching him or doing something to him, and he told me he was hitting him, and he thought it was funny.” 3RP 31. According to Rose, when Drake returned three days later, the dog had “welts on his back and he was missing a toenail.” 3RP 31.

Rose said she eventually broke up with Drake around May 2008 and that Drake moved back to Florida in July 2008. 3RP 24. Drake and Rose spoke on the phone nearly every day during the 10 months that Drake lived in Florida. 3RP 36, 38. After Drake returned to Washington, the couple started dating again and Drake moved into Rose’s home. 3RP

¹ The eight-volume verbatim report of proceedings is referenced as follows: 1RP – 11/23/2009, 11/24/2009, and 12/18/2009 (three-volume consecutively paginated set) (final date is sentencing); 2RP – 12/1/2009 (morning session); 3RP – 12/1/2009 (afternoon session); 4RP – 12/2/2009; and 5RP – 12/8/2009.

38. Drake and Rose broke up again in May 2009. 3RP 46. Drake moved out of Rose's home but kept his property on her fenced-in porch; Drake was homeless and would return to Rose's home to change his clothes on her porch and to speak with Rose. 3RP 45-46.

Around 5 a.m. on June 25, 2009, Drake knocked on Rose's door. 3RP 49. Rose got up, opened the door, and Drake entered. 3RP 49-50. Rose claimed she only opened the door about a foot wide, but then Drake placed his foot in the crack and pushed the door open. 3RP 49-50. Rose and Drake started arguing and she asked him to leave, but he did not respond. 3RP 51. Rose went back to sleep with Drake still in her home. 3RP 51.

When Rose woke up at 6:30 a.m., she saw that Drake and her car were gone. 3RP 52. At 7 a.m., around the time Rose had to leave for work, Drake returned with the car and gave Rose a coffee he had purchased for her. 3RP 52. Drake asked Rose whether he could drive her to work and borrow her car; Rose refused and they argued for a while before she drove to work. 3RP 52-3.

Rose returned home at 5:30 that evening. 3RP 54. When she arrived she noticed the door was unlocked and Drake was asleep on her couch. 3RP 54. Rose became angry when she saw that her puppy was out of its kennel and had made a mess; she started yelling at Drake. 3RP 54.

Rose claimed Drake had refused her request to help clean up the puppy's mess. 3RP 55. Rose said she asked Drake to leave, but they continued to argue instead. 3RP 55. Rose was washing a knife in her kitchen sink when Drake slapped her on her behind "really hard, like your parents would spank you." 3RP 55. Rose turned around with the knife in her hand and Drake responded, "what are you going to do, stab me?" 3RP 55.

Later, Rose and Drake started arguing because Drake wanted to take her phone to look at her text messages. 3RP 56. Rose claimed Drake tried to take her phone from her and "somehow [she] ended up on the ground between the couch and the coffee table." 3RP 56. She further claimed Drake sat on her and held her wrists, and that his pants were "kind of on my neck" and "it wasn't like choking me, but it was really uncomfortable, and it was putting pressure on my neck." 3RP 56.

Rose got up and went to her bedroom to change her clothes and Drake followed. 3RP 58-59. They started arguing again about Rose's phone and text messages. 3RP 59. They wrestled and ended up on her bed and Rose hit him with her shoe and Drake got up and called her crazy. 3RP 59-60. Rose claimed she ran for the door but Drake put up his hands, "and he just kind of let my neck run into his hands, and then kind of squeeze it, and threw me up against the wall. 3RP 60. Rose eventually left and drove to her mother's home. 3RP 62.

Rose stayed at her mother's home and went to work the next day. 3RP 65. Around lunchtime, Drake called her on her cell phone and said she owed him money; she hung up and he did not call her back. 3RP 66. When she returned home that evening she noticed Drake was gone, some items were missing from her apartment, and her rug had been cut. 3RP 66. Rose called police and an officer arrived and took pictures of her and her apartment. 3RP 68. The photos of her show some bruising on her wrist and a small cut near her neck. 3RP 70.

About a week later, Drake called Rose "[l]ike everything was okay;" he did not believe that she had called the police on him. 3RP 76. Sometime later, Drake called Rose after he received paperwork in the mail from the police. 3RP 76. Drake was angry, asked her to drop the charges, and told her that he was going back to Florida. 3RP 77. Drake was later arrested in Florida and extradited back to Washington. 2RP 73-74.

3. Pretrial ER 404(b) Ruling

On November 20, 2009, defense counsel moved to exclude Rose's previous domestic violence allegations against Drake under ER 403 and ER 404. Supp CP __ (sub no. 82, Defense Trial Memorandum, filed 09/15/10). At the subsequent ER 404(b) hearing, Rose claimed Drake assaulted her approximately 20 times over the course of their 5-year relationship, and detailed the alleged assaults in regard to a number of the

incidents. 1RP 25-26, 29. Rose claimed many of the incidents occurred because of Drake's extensive drug use. 1RP 28.

Rose also testified about the alleged incident where Drake left with her dog, and how he allegedly called later and she could hear her dog crying in the background. 1RP 45-46. She said when her dog was returned it had a missing toenail and welts on its back. 1RP 46.

Drake renewed his objection to the admission of the ER 404(b) evidence asserting that, apart from proving the reasonable fear element of the harassment charge, the evidence was irrelevant; Drake also argued that the evidence should be excluded under ER 403 because it was more prejudicial than probative. 1RP 75-76. The trial court found the previous alleged assaults were proved by a preponderance of the evidence and held they were admissible to prove the reasonable fear element of the felony harassment, unlawful imprisonment and witness tampering charges. 1RP 81. Alternatively, the trial court found the evidence admissible to "help explain the credibility of Ms. Rose with regard to why she might of delayed reporting [the alleged incidents to law enforcement]" and to show motive. 1RP 81.

C. ARGUMENT

THE TRIAL COURT'S IMPROPER ADMISSION OF PRIOR BAD ACT EVIDENCE UNFAIRLY INFLUENCED THE OUTCOME OF THE TRIAL. TO THE EXTENT THIS ISSUE WAS WAIVED DUE TO INADEQUATE OBJECTION, THEN DRAKE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The jury heard evidence that Drake abused Rose's dog. This evidence was not admissible under ER 404(b).² Accordingly, Drake's convictions should be reversed because the trial court erred when it admitted this evidence, which unfairly influenced the outcome of his trial. Moreover, the trial court should have excluded this evidence under ER 402 because it was not relevant to any issue before the jury, as well as under ER 403 because it was unduly prejudicial and allowed the jury to view Drake as having a cruel and vicious character, capable of committing violent acts. Further, the improper admission of the prior bad act evidence made it likely that the jury returned guilty verdicts based on his propensity to commit abusive acts. This court should reverse his convictions.

² ER 404 provides in relevant part:

- (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
...
- (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, or absence of mistake or accident.

(a) Standard of Review

This court reviews the interpretation of an evidentiary rule de novo as a question of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). This court reviews a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion only if the trial court correctly interprets the rule. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neil, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. Fisher, 165 Wn.2d 727.

(b) The Trial Court Improperly Admitted Irrelevant and Highly Prejudicial Character Evidence That Depicted Drake as Cruel and Inhumane With a Violent Personality

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328,

333, 989 P.2d 576 (1999). To that end, ER 402 prohibits a trial court from admitting irrelevant evidence.³ And ER 403 prohibits a trial court from admitting relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.⁴

ER 404(b) prohibits a trial court from admitting character evidence to prove the person acted in conformity with that character on a particular occasion. See note 2, supra. Evidence of a defendant's prior misconduct is not admissible to show he is a "criminal type" and is thus likely to have committed the crimes for which he is charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) protects a defendant from the admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) provides that evidence of other crimes, wrongs, or acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In determining whether prior bad conduct evidence

³ ER 402 provides: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

⁴ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

is admissible under ER 404(b), the trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Wade, 98 Wn. App. at 334.

“ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403.” State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) thus incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62.

ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In the context of an ER 404(b) determination, the evidence must be logically relevant to a material issue before the jury, which means the evidence is “necessary to prove an essential ingredient of the crime charged.” Saltarelli, 98 Wn.2d at 362.

Propensity evidence that is logically relevant may not be legally relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). Although propensity evidence is logically relevant, the risk that a jury

uncertain of guilt will convict anyway because a bad person deserves punishment “creates a prejudicial effect that outweighs ordinary relevance.” Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

A trial court must exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

Here, the trial court erred when it determined that evidence of Drake’s prior abuse of Rose’s dog was admissible under the “motive” exception to ER 404(b). The fact that Drake may have abused Rose’s dog does not reveal any motive for Drake to commit any of the charged crimes. There is no logical connection between Drake’s alleged abuse of Rose’s dog and the reasons for his assaults on Rose. And there is no connection between the dog abuse evidence and any other enumerated ER 404(b) exception. Additionally, because Drake’s alleged abuse of Rose’s dog took place well before June 25, 2009, it does not fall within the res gestae exception to ER 404(b). State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

The trial court's erroneous admission of the irrelevant prior dog abuse evidence is reversible error. Evidence that Drake may have abused Rose's dog was highly prejudicial and did not constitute harmless error. In contrast with the ER 404(b) evidence of Drake's alleged prior assaults against Rose, which showed the couple had a volatile relationship and often engaged in arguments that could deteriorate into physical violence inflicted by both parties,⁵ evidence that Drake had abused Rose's dog allowed the jury to view the defendant as cruel and violent by nature towards not just Rose, but to an otherwise helpless creature as well. The admission of this evidence thus created the danger that the jury found Drake guilty of first degree burglary, residential burglary, and fourth degree assault because it viewed him as a bad person deserving of punishment rather than because the State proved the charges beyond a reasonable doubt.

Moreover, because Rose was the only witness to Drake's alleged assaults against her, and Drake provided a contrary account of the events leading to his criminal charges, the jury's credibility determination was crucial to its finding of guilt. The State did not provide any witnesses, apart from Rose, who saw Drake commit any violent acts. Accordingly,

⁵ At trial, Drake testified that Rose often initiated physical altercations between them, including hitting, kicking, and scratching him. 4RP 30-32. Rose admitted in her testimony that she had hit, scratched, and probably kicked Drake during their past physical altercations, but she claimed she did so in self-defense. 4RP 10.

absent the dog abuse evidence, which tended to show Drake had an unusually deviant propensity for violence, the jury could have acquitted him of the charges upon finding his testimony that his assaults against Rose were in self-defense was credible.

Further, the trial court's limiting instruction as to the ER 404(b) evidence of Drake's alleged prior assaults against Rose, informed the jury that it could only use that evidence to evaluate her state of mind as it related to the harassment and unlawful imprisonment charges, to evaluate her credibility, and for purposes of the special verdicts. The jury's not guilty verdict on the harassment charge indicates that it did not believe Drake's alleged prior assaults on Rose caused her to have a reasonable fear that Drake would carry out a threat to kill her. Therefore, the evidence that Drake had abused Rose's dog likely influenced the jury's guilty verdicts on the burglary and assault charges. Because the trial court erred when it admitted this irrelevant and highly prejudicial evidence under ER 404(b), this court should reverse Drake's convictions.

- (c) Drake's Contention With the Admission of the Dog Abuse Evidence is Properly Preserved for Appeal. But if Not, Then He was Denied His Right to Effective Assistance of Counsel.

Because Drake objected to the admission of ER 404(b) evidence and the trial court made a final ruling admitting the evidence at the ER

404(b) hearing, the issue is properly preserved for appeal. See State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (party who loses evidentiary objection on a motion in limine “is deemed to have a standing objection where a judge has made a final ruling on the motion, ‘[u]nless the trial court indicates that further objections at trial are required when making its ruling.’” (quoting State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), 113 Wn.2d 520, 782 P.2d 1013 (1989))). However, should this Court determine Drake waived this issue due to his counsel’s failure to specifically object to the evidence that he had abused Rose’s dog, defense counsel rendered ineffective assistance.

The Sixth Amendment to the United States Constitution and art. 1, § 22 (amend 10) of the Washington Constitution guarantee an accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 2052 (1984); State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001). An accused received ineffective assistance of counsel when (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the accused. Strickland, 466 U.S. at 687-89; Lopez, 107 Wn. App. at 275. Counsel’s performance is deficient if it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88; Lopez, 107 Wn. App. at 275. Where

counsel's conduct cannot be characterized as legitimate tactics, counsel has rendered ineffective assistance. Strickland, 466 U.S. at 687-89; Lopez, 107 Wn. App. at 277.

Any reasonable and competent attorney would have specifically objected to evidence showing Drake's prior abuse of Rose's dog. The evidence was irrelevant to any issue before the jury and was highly prejudicial because it characterized the defendant as a cruel and inhumane person capable of committing violent acts. There was no legitimate tactic for defense counsel's failure to object to the admission of this evidence. Further, the trial court would have likely sustained an objection to the dog abuse evidence because the evidence was irrelevant, highly prejudicial, and did not fall within an ER 404(b) exception.

The entirety of the State's case against Drake rested on Rose's testimony. Likewise, Drake's defense relied on his conflicting account of the events leading to his criminal charges. Accordingly, the jury's evaluation of Rose's and Drake's credibility was crucial to determining whether Drake was guilty of the crimes charged. Allowing the jury to hear the irrelevant and highly prejudicial evidence of Drake's alleged prior abuse of Rose's dog not only likely affected the jury's credibility determination, but also made it likely that the jury found him guilty because it viewed him as having an unusually deviant disposition toward

violence. Thus, defense counsel's failure to specifically object to evidence of Drake's prior abuse of the dog prejudiced him and denied his constitutional right to effective assistance of counsel.

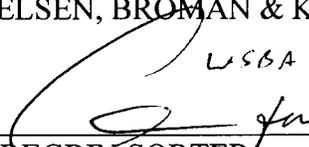
D. CONCLUSION

For the reasons stated above, this Court should reverse Drake's first degree burglary and fourth degree assault convictions.

Respectfully submitted this 28th day of September, 2010.

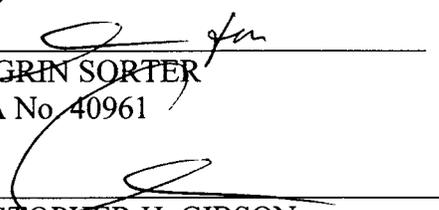
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64764-4-I
)	
JASON DRAKE,)	
)	
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 28TH DAY OF SEPTEMBER, 2010, 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] JASON DRAKE
DOC NO. 793137
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*