

65528-1

65528-1

NO. 65528-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON DODD,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES

1. The State is permitted to amend the charges up until it rests its case, unless the defense can show some prejudice from the amendment. The State amended the charges to add a count of felony harassment the day the trial began. Dodd could not articulate any prejudice from the amendment. Did the trial court properly exercise its discretion by permitting the amendment?

2. Evidence Rule 608(b) prohibits extrinsic evidence offered to prove prior acts of dishonesty. The trial court allowed Dodd to cross examine the rape victim about prior allegedly false allegations of domestic violence, but did not permit Dodd to offer extrinsic evidence of the allegedly false allegations. Did the court properly exclude Dodd's extrinsic evidence of prior acts of dishonesty?

3. Evidence Rule 404(b) allows the State to offer testimony about prior misconduct within a domestic violence relationship to explain why a victim of domestic violence would return to an abusive partner. The State offered evidence that Dodd had previously supplied drugs to the victim to manipulate and control her. Did the court properly exercise its discretion by allowing evidence that Dodd previously supplied drugs to the victim?

4. A defendant can waive an objection to the inclusion of an out-of-state conviction in his offender score. Dodd's counsel conceded that the Georgia conviction was comparable to Washington's assault in the third degree. Did the trial court properly include Dodd's Georgia conviction in his offender score based on Dodd's concession?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Clifton Dodd, was charged by information with rape in the first degree (domestic violence), and felony violation of a no contact order (domestic violence). CP 1-2. The State alleged that on February 19th, 2009, Dodd attacked his ex-girlfriend, Nancy Davis, by raping her, and strangling her, and threatening to kill her. CP 1-5.

An omnibus hearing was held on February 19, 2010. The State provided notice that the charges would be amended at trial to add assault in the second degree, unlawful imprisonment, and allege a history of domestic violence as an aggravating factor. RP 2. The State and the defense requested a two week continuance to prepare for trial to complete interviews with expert

witnesses. RP 1-3. The State and defense were preparing to call forensic pathologists to testify about Davis' injuries. Id. While Dodd's lawyer joined the request for a continuance, Dodd objected. RP 4-5. The court granted a two week continuance. RP 6.

The trial began on March 8, 2010. The State moved to amend the information to add one count of assault in the second degree, felony harassment, and the history of domestic violence aggravating factor. RP 9-10. The prosecutor believed she had notified the defense of her intent to add the felony harassment charge rather than unlawful imprisonment. RP 12. Dodd's attorney indicated she did not receive notice of the felony harassment charge. RP 11. Dodd objected to the addition of the felony harassment charge. RP 12. The court permitted the amendment because the defense could articulate no prejudice, and there were no additional facts that were alleged to support the felony harassment charge. RP 24. Dodd did not request a continuance. RP 23.

The court began the pretrial hearing to determine the admissibility of Dodd's statements. During this hearing Dodd interrupted and addressed the court. RP 42. Dodd complained that he was uncomfortable because of the additional charge, and

that he felt unprepared for the possibility of testifying at the pretrial hearing. RP 42-44. Later in the hearing Dodd's lawyer indicated that Dodd wanted to request a continuance of the trial. RP 74. The presiding judge denied the motion to continue the trial date, but authorized a brief recess to allow Dodd to confer with his attorney. RP 90-91.

The trial resumed and Dodd was found guilty of rape in the second degree¹, felony violation of a no contact order, assault in the second degree, and felony harassment. CP 97, 99, 101, 103. The jury found the State had proved the history of domestic violence as an aggravating factor. RP 993-95.

Dodd was sentenced on May 19, 2010. The State calculated Dodd's offender score including several convictions from the state of Georgia. CP 105-06. Dodd was convicted of false imprisonment and aggravated battery in Georgia in 1996. Id. Dodd was also convicted of family violence battery in Georgia in 2004. Id. At the sentencing hearing Dodd conceded these convictions

¹ Dodd was charged with rape in the first degree, but he was convicted of the lesser charge of rape in the second degree. RP 992. As a result of a scrivener's error, the judgment and sentence reflects the original charge of rape in the first degree, but the serious level and sentencing range correctly reflect rape in the second degree. The court should remand the case to the trial court to enter an order correcting this scrivener's error.

were comparable to Washington felonies. CP 105-06; RP 996, 999. The court accepted Dodd's concession and included the Georgia convictions in his offender score. Dodd received a standard range sentence.

2. SUBSTANTIVE FACTS

Nancy Davis was a homeless woman and she suffered mental health problems. RP 384, 386. She met Clifton Dodd approximately two years before the rape. RP 385. She was standing on the sidewalk, distraught and crying, when Dodd approached her. RP 384. Dodd said he helped homeless people and offered to buy her some food. RP 387. He invited her to stay at his apartment. RP 388. Davis had stayed at Dodd's apartment for two weeks before they became intimate. RP 390. Dodd soon became the payee for Davis' disability payment and would deposit her money into his own account. RP 391, 395.

The relationship lasted approximately two years and was marred by Dodd's controlling and violent behavior. Dodd controlled Davis' money, and supplied her with cocaine. RP 394, 402. They used cocaine almost daily. RP 402. Dodd referred to himself as the "candy man." RP 403. Dodd physically hurt Davis on several

occasions. In January of 2008, he pushed Davis down concrete stairs and punched her in the jaw. RP 396. Davis needed stitches from this incident. RP 396. In May of 2008, Dodd pushed Davis off of a step stool and broke her ankle. RP 398-99. Davis described how she would wake up to find Dodd standing over her with a pillow, saying he was going to smother her. RP 401.

Davis tried to leave Dodd several times during the relationship, but Dodd stalked, threatened, and coaxed her to come back. RP 400. In October of 2008, Davis tried to leave Dodd and went to a shelter for women. RP 403. Dodd found her and promised her money. RP 404. He pulled out a gun and threatened her. RP 405. Davis ran back to the shelter and called the police. RP 406. Davis obtained a protection order in October of 2008. RP 414.

In February of 2009, Dodd began to call Davis. He told her that he had \$500 of her money to give to her, and that he would buy a plane ticket so her daughter could fly out from the Midwest to visit her. RP 408. Dodd sent two cards to Davis. RP 409. Dodd wrote "I am sorry. I will always be there for you. Please call. I'll be your candy man. Love ya." RP 412-13. He also asked her to let him "bless" her with "candy" and money. RP 412-13.

Davis went back to Dodd's apartment on February 18, 2009 to get some of her belongings. RP 421. They talked and had dinner together. RP 423. Davis stayed the night, but slept on the couch. RP 421. The next day Dodd begged Davis to stay. RP 425. They drank together and Dodd obtained cocaine for them. RP 426. They argued and Dodd became angry. RP 429.

Dodd told Davis, "this will be the last time I see you bitch" and "I am taking you out." RP 429. Dodd grabbed Davis by the hair and dragged her to the bedroom. RP 429. He took Davis' pants down and raped her. RP 430-31. He told her, "Bitch I will kill you." RP 435. Dodd then strangled Davis until she lost consciousness. RP 431, 434.

When Davis regained consciousness, Dodd was gone. Davis ran to the neighbors to call the police. RP 172. Madolyne Lawson lived next door to Dodd. RP 172. She had heard yelling from Dodd's apartment and was about to call the police when things quieted down. RP 177. A few minutes later she heard Davis in the hallway yelling for help. RP 177. Lawson let Davis in her

apartment to call 911. RP 178. Davis immediately disclosed that she had been raped² and strangled. RP 181.

When the paramedics arrived, Davis was hyper-ventilating and had an elevated pulse. RP 159. She told the paramedics she had been raped and choked. RP 160-61. She had what appeared to be cigarette burns and scratches on her face. RP 161. There was redness around her neck. RP 162. She was taken to Harborview Medical Center because they have the facilities to handle sexual assault and trauma cases. RP 160.

Davis disclosed the rape to the nurses at Harborview and consented to a sexual assault exam. RP 233, 267, 306. Medical personnel noted numerous bruises and abrasions on Davis' face, back, thigh, and arms. RP 241-48. The nurses specifically noted abrasions around Davis' neck. RP 243.

On February 20, 2009, Seattle Police Detective Kevin Grossman spoke to Dodd on the phone. RP 537. Dodd told police that he had been Davis' caregiver and payee for two years. RP 540. He denied ever having a dating relationship with her, and

² Dodd indicates that Lawson did not remember Davis telling her about the rape. Brief of Appellant, at 29. While Lawson did not remember it, the 911 recording was played (and transcribed) in which it was Lawson who told the operator that Davis had reported being raped. 3/10/10RP 181.

denied ever having sex with her. RP 542. He acknowledged that she had a restraining order against him but told police she had mental problems. RP 541, 542. He claimed that she came over to get some of her belongings and demanded money. RP 543. He told her that he had no money and she became angry. RP 543. She threw a lamp at him so he left. RP 543. Dodd specifically denied having sex with Davis on February 19th. RP 575.

Dodd agreed to provide a DNA sample. When Dodd met Detective Grossman to provide the sample, he acknowledged that he had had a sexual relationship with Davis. RP 575. He told the detective that he had had sex with Davis a few days before the alleged rape. RP 575. He still denied having sex with her on February 19th. RP 575.

Samples from Davis' sexual assault exam were sent to the Washington State Patrol Crime Lab. Sperm was detected. RP 144. A DNA profile was obtained and matched the sample Dodd provided. RP 146.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INFORMATION BECAUSE THERE WAS NO PREJUDICE TO DODD.

Dodd argues that the trial court should not have permitted the State to amend the information to add an additional count of felony harassment on the day of trial. He further contends that the court erred in denying his motion for a continuance once the court allowed the amendment. Dodd is incorrect on both counts. Washington law allows for liberal amendment of the information before the State has rested, as long as there is no prejudice to the defense. Dodd could not articulate any prejudice from the State's amendment nor any additional preparation that was required. The court properly exercised its discretion.

a. The Trial Court Properly Allowed The Amendment Of The Information.

Amendments to the information are governed by CrR 2.1(d) which states, "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." In addition, the Washington State Constitution requires that, "the accused shall

have the right ... to demand the nature and cause of the accusation against him." Article 1, Section 22. The Washington Supreme Court has avoided technical rules when interpreting the state constitution's notice provision. Instead, it has tailored the rules to the practical problems that Article 1, Section 22 was designed to address, which are charging documents that prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281(1993). A trial court's decision to allow the State to amend the charge is reviewed for abuse of discretion. State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

Unless there is prejudice to the defendant, amendments are permitted until the State rests its case. In State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987), the Washington Supreme Court created a bright-line rule prohibiting amendment of the information after the State rests its case. The Court decided that a "criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." Id. at 491. An amendment under these circumstances is reversible error, and the defense is

not required to show prejudice. State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

In State v. Schaffer, the Supreme Court specifically declined to expand the reach of Pelkey's bright-line rule to embrace amendments during the State's case in chief. 120 Wn.2d at 619-20. Washington courts consistently hold that "Pelkey only prohibits amendments after the State has rested its case because the likelihood of prejudice is so great." State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995); see also State v. Phillips, 98 Wn. App. 936, 940-41, 991 P.2d 1195 (2000) (finding that the State may amend the information to correct a defect before the State rests); State v. Murbach, 68 Wn. App. 509, 843 P.2d 551 (1993) (allowing amendment of charges where it occurred before the State rested and there was no prejudice); State v. Wilson, 56 Wn. App. 63, 782 P.2d 224 (1989) (State allowed to add additional counts on the day of trial). Our Supreme Court reasoned that "there is no need to redraw the line established in Pelkey to a point earlier in the criminal process." Vangerpen, 125 Wn.2d at 790.

There are no cases that prohibit the State from amending the information on the day of trial without a showing of prejudice. In State v. Wilson, 56 Wn. App. 63, 64, 782 P.2d 224 (1989), the court

allowed the State to amend the charges to add additional counts on the day of trial. Wilson was charged with two counts of indecent liberties. Id. at 64. One of the victims was interviewed on the weekend before the trial and disclosed an additional instance of sexual abuse. Id. The State moved to amend the charges on the day of trial to add an additional count of indecent liberties. Id. The defense objected to the amendment but did not request a continuance. Id. at 65. The Court held that "since no specific evidence was offered to support a claim of prejudice, it must fail." Id.

The defense relies upon State v. Ziegler, 138 Wn. App. 804, 158 P.3d 647 (2007). However, Ziegler adheres to the same principle, that the defense must show prejudice from an amendment to the information prior to the State resting its case. Id. at 810. In Ziegler, the State amended the information, mid-trial, after two child victims had testified. Id. at 806-07. The amended information reduced one count of rape of a child to child molestation, and added two additional counts. Id. The court affirmed the amendment to the lesser charge of child molestation because, "[u]nder these facts, and where the charge was amended from child rape to child molestation, the lack of additional discovery

or a continuance did not adversely affect Ziegler's defense." Id. at 810. Ziegler was able to show prejudice from the amendment adding two additional counts of child rape, they had never been mentioned in the discovery, and because the additional counts would have affected his trial strategy and plea negotiations. Id. at 810-11.

Dodd's defense, in contrast, was not adversely affected by the additional felony harassment charge. Dodd was charged with raping Davis on February 20, 2009. CP 1. During the rape Dodd threatened to kill Davis. RP 429, 435. As the trial court pointed out, the charging documents contained references to Dodd's threats to kill. RP 16; CP 4. These threats would have been admissible in the rape trial even if felony harassment were not charged. RP 13. It would be impossible for Dodd's lawyer to be prepared to defend against the rape charge without being prepared to address the threats made during the rape.

Dodd's defense was to deny the allegations and claim that Davis fabricated her claims. This defense remained the same regardless of the amendment. The defense conducted a two-hour interview with the victim about the rape. RP 20. It is unlikely that counsel failed to ask about the threats simply because they were

not charged. Even if that were the case, the State offered an additional opportunity to interview the victim about the specific threats. RP 21.

The presiding judge noted that Dodd was unable to articulate any prejudice from the amendment. RP 14. When the court asked what prejudice there was from the amendments, the defense replied, "Well, I don't - - I think that it is a matter of notice, your honor." RP 14. After listening to the defense attempt to articulate some prejudice, the court permitted the amendment because, "in the absence of there being any demonstrable prejudice to the defense that the - - State can make the amendment." RP 24. The court noted there were no new facts or allegations to prepare for. Id. The court did not abuse its discretion by allowing the amendment in the absence of any prejudice.

b. The Court Properly Denied Dodd's Request For A Continuance.

Dodd next argues that the trial court erred by denying his belated motion to continue. Dodd was unable to articulate any prejudice from the amendment, nor any additional trial preparations that were necessary. The court properly denied the continuance

motion and permitted a brief recess for part of the day to provide additional time to the defense.

Courts review a denial of a motion to continue for abuse of discretion. State v. Williams, 84 Wn.2d 853, 529 P.2d 1088 (1975). A trial court's denial of a continuance may only be reversed upon "a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted." State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982). The court should examine the totality of the circumstances at the time the request is denied. Id. at 114-15.

When the court permits the State to amend the information on the day of trial, the court should allow a continuance if the defense requests one. In State v. Purdom, 106 Wn.2d 745, 748, 725 P.2d 622, 624 (1986), the Supreme Court held, "We find as a matter of law that substantial rights of the defendant were violated by amending the charge on the day of trial without granting a continuance when one was requested." Id. at 748. However, when the defendant does not request a continuance when confronted with the State's request to amend, courts consider this a waiver of the claim. Wilson, 56 Wn. App. at 65. Other courts have found the failure to request a continuance at least "persuasive of lack of

surprise and prejudice." State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

In the present case, Dodd did not request a continuance when the State's motion to amend was granted. The State invited the defense to make such a request if more time was needed to prepare. RP 22. The defense did not request a continuance and instead chose to press their objection to the amendment of the charges.³ RP 23-24.

The parties had resumed pretrial hearings to determine the admissibility of Dodd's statements when Dodd interrupted the hearing to ask for a continuance. RP 41-42. Dodd complained about the new charges, and that his lawyer had not reviewed discovery with him. RP 43-44. Dodd went on to complain that he did not know he would have the opportunity to testify at the pretrial hearings, and he wanted time to prepare to testify. RP 44.

It was clear that the requested delay was not due to Dodd's lawyer's need to prepare. Dodd's attorney told the court, "He [Dodd] indicates he would like a continuance, he says, for ten

³ Dodd's attorney later indicated that she did not request a continuance because she did not think Dodd would agree to it. RP 74, 86. However, she had previously requested continuances over her client's objections when she felt additional preparation was needed. RP 2-3.

days." RP 74. The only additional preparation that Dodd's attorney said she needed were interviews of medical experts that related to the original rape charge, and had nothing to do with the felony harassment charge that had been added. RP 87-89. The trial court denied the motion to continue but allowed a half-day recess.

The trial court did not abuse its discretion when it denied Dodd's request for a continuance. Dodd did not request a continuance in response to the amendment of the information. Dodd could point to no specific prejudice nor any specific additional preparations that required continuance. The presiding judge denied the continuance but authorized the trial court to recess to give the defense attorney additional time to confer with Dodd. This was not abuse of its discretion.

**2. THE TRIAL COURT CORRECTLY PROHIBITED
EXTRINSIC EVIDENCE OF A PRIOR FALSE
ACCUSATION.**

Dodd argues that the trial court erred by refusing to allow him to impeach Davis with extrinsic evidence that she had made a false allegation of domestic violence against him in the past. Dodd is incorrect. Evidence Rule 608(b) specifically prohibits extrinsic evidence to prove such specific instances of conduct.

a. Relevant Facts.

Dodd sought to admit evidence that Davis had once called the police to report that Dodd had struck her with a baseball bat. RP 120-23. Officer Hunt responded to the call, but did not observe any visible injuries. RP 120. The State did not elicit testimony about the baseball bat incident, nor did the State rely upon it as evidence of the aggravating domestic violence allegation. Dodd wished to call Officer Hunt to prove Davis' allegation was "false." RP 120-23. The trial court, consistent with ER 608, permitted Dodd to cross examine Davis about the baseball bat incident, but did not allow Dodd to call Officer Hunt. RP 124.

Dodd initially proffered extrinsic evidence of Davis' "false allegations" under ER 404(b). At trial, Dodd argued that evidence of false allegations was admissible substantively under ER 404(b) to show that "she makes false allegations, or at best exaggerated allegations." RP 359. The court noted that the defense offer was propensity evidence and that "it's basically saying she lied about it before so she's lying about it this time." RP 361. Dodd has abandoned that argument on appeal and does not cite ER 404(b) as a basis to admit the evidence.

Dodd then argued that the evidence was admissible under ER 608, but later had to concede ER 608 did not allow extrinsic evidence. Dodd's lawyer told the court, "I agree with counsel that under that ER 608 I'm limited to just cross examining Ms. Davis." RP 359.

b. The Trial Court Did Not Abuse Its Discretion.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Luvane, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Powell, 126 Wn.2d at 258. Similarly, a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

Evidence Rule 608(b) governs impeachment with specific acts of dishonesty. The rule allows cross examination about prior instances of dishonesty. The rule unambiguously prohibits proving

such instances with extrinsic evidence. The rule states that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence." ER 608(b). The trial court properly applied this rule by allowing Dodd to ask Davis about her allegations but declined to allow him to offer extrinsic evidence.

There are no cases in Washington that support admission of extrinsic evidence of prior acts of dishonesty, even false allegations. Washington courts recognize that the trial court has the discretion to limit even cross examination about prior "false allegations." State v. Harris, 97 Wn. App. 865, 873, 989 P.2d 553 (1999); State v. Demos, 94 Wn.2d 733, 619 P.2d 698 (1980); State v. Mendez, 29 Wn. App. 610, 611-12, 630 P.2d 476 (1981); State v. Williams, 9 Wn. App. 622, 623, 513 P.2d 854 (1973). For example, in Harris, the court noted that even if cross examination were permitted, extrinsic evidence of the "false allegation" would not be admissible. Harris, 97 Wn. App. at 873. In the present case, the court did allow Dodd to cross examine Davis about the alleged "false accusation." However, the court properly excluded extrinsic evidence about the incident.

Dodd, on appeal, correctly points out that ER 613 permits impeachment with prior inconsistent statements if the witness is afforded the opportunity to explain or deny it. ER 613(b). Importantly, Dodd never requested the evidence be admitted under ER 613. Appellate courts will not address an evidentiary argument made for the first time on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Even if Dodd had asked to impeach Davis with her statement to Officer Hunt under ER 613, he could not offer further extrinsic evidence. Under ER 613, Dodd could ask Davis if she had told Officer Hunt she was struck with a baseball bat (which Dodd did ask). If she denied making the statement, Officer Hunt could be called to testify that Davis had said she was struck. The impeachment under ER 613 would be complete, and Dodd would still not be permitted to offer further extrinsic evidence that Davis had made a false allegation.

Dodd cites several cases regarding impeachment during cross examination. Dodd relies on State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2001). However, Darden found error when the defense was precluded from cross examining a police officer about his confidential observation post. Id. at 617-18. Darden did not address the admissibility of extrinsic evidence of prior acts of

dishonesty. Dodd was not precluded from cross examining Davis about the alleged false reporting.

Next, Dodd relies upon State v. Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872 (2005). However, the issue addressed in Clinkenbeard was the improper use of impeachment as substantive evidence. Id. at 568-70. In Clinkenbeard, the defendant was convicted of sexual misconduct with a minor. Id. at 559. However, the victim testified, and denied having sex with the defendant. Id. The prosecution impeached the victim with prior inconsistent statements, and went on to rely upon the impeachment as evidence that the sexual contact occurred. Id. at 570. The court held it was error to allow the proponent of the impeachment to rely upon it as substantive evidence. Id. at 571. Clinkenbeard does not hold that extrinsic evidence of prior acts of dishonesty are admissible. Its holding permits cross examination on inconsistent statements, but prohibits relying upon those statements as substantive evidence. Applying this case to Dodd, the defense would be permitted to impeach Davis with her inconsistent statement, but would not be permitted to use the impeachment as substantive evidence that her allegation was false.

Even if this Court concludes Dodd should have been permitted to offer Officer Hunt's testimony that he did not observe any injury on Davis when he responded to the baseball bat incident, this omission does not warrant reversal of Dodd's conviction. Excluding Officer Hunt's testimony was harmless.

The admission or exclusion of evidence is within the discretion of the trial court, and are reviewed for manifest abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Reversal is only required if there is a reasonable possibility that the testimony would have changed the outcome of trial. Id.

Dodd frames this as a violation of his constitutional right to present a defense. Brief of Appellant, at 20. However, Dodd's constitutional right to present a defense was satisfied by the trial court's decision to permit him to cross examine Davis about the prior alleged act of dishonesty. Dodd's constitutional right to present a defense does not extend to the introduction of otherwise inadmissible evidence. Id. at 363. Even if the Court were to apply the constitutional harmless error standard reversal would not be required. A constitutional error can be harmless when the court is convinced "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v.

Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The outcome of Dodd's trial was not affected by prohibiting Officer Hunt from testifying that he did not see visible injuries when he responded to the baseball bat incident. The defense wished to attack the credibility of Davis, and had ample opportunity to do so. The defense impeached Davis during cross examination by asking about the baseball bat incident. The jury heard Davis' 911 call where she tells the operator that the police did not believe her prior allegations. RP 191. Dodd was permitted to elicit testimony from Hunt that he had responded to Davis' complaints before and had taken no action. RP 695. Dodd elicited and argued that Davis was not injured during the January incident. The defense argued that Officer Pomper was at the apartment the next day and "doesn't remember the injuries she described" and that her behavior was "inconsistent with the injuries she sustained." RP 726-27, see 961. The defense also argued that Davis claimed that Dodd had injured her cat, but Officer Pomper specifically noted that the cat was uninjured and in good health. RP 725. The defense noted that Davis alleged that Dodd had threatened her with a gun, but the police could not locate any gun. RP 737, see 963. The defense

pointed out that Davis was mentally ill and high on drugs and alcohol when she reported the rape. RP 727, see 963.

None of these attacks on Davis' credibility was sufficient to overcome the evidence that corroborated the rape. Dodd's neighbor heard the sounds of a disturbance on the night of the rape. RP 176. Davis ran from Dodd's apartment in fear. RP 177-78. Davis reported the rape immediately to the 911 operator and to the paramedics that responded. RP 181. Medical personnel noted numerous abrasions and bruises on Davis. RP 241-48. The sexual assault exam revealed Dodd's semen on Davis' vaginal swabs. RP 146.

Even more damning were Dodd's deceptive statements to the police. Dodd initially told Detective Grossman that he had never had sex with Davis. RP 542. It was only when he was confronted with the need to provide a DNA sample that he changed his story and said he had had sex with Davis but still denied on the day of the rape. RP 575. The overwhelming evidence demonstrates that even if the court erred in refusing to allow Officer Hunt's testimony that he did not observe an injury, it was harmless.

3. THE COURT PROPERLY PERMITTED THE STATE TO ADMIT EVIDENCE THAT DODD USED DRUGS TO MANIPULATE AND CONTROL DAVIS.

Dodd contends that the trial court erred by admitting evidence that he called himself the "Candy Man" and supplied drugs to Davis. Dodd is incorrect. The evidence explained why Davis would agree to return to Dodd's apartment despite the long history of abuse and the protection order that was in place. The trial court did not abuse its discretion by admitting this evidence.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character and show action in conformity therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). Such evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the

evidence is of consequence to the action and makes the existence of the identified fact more probable. Powell, 126 Wn.2d at 258-59. Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. Powell, 126 Wn.2d at 258; State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

Washington courts have recognized that a clear understanding of an ongoing domestic violence relationship is important when evaluating the victim's choice to associate with the defendant, and to assess credibility. For example, in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), the history of domestic violence was relevant to explain the victim's actions. The defendant in Grant had been convicted of assaulting the victim in the past. Id. at 101. That history was relevant to explain why the victim would voluntarily associate with the defendant despite having

a protection order and despite having been hurt by him before.⁴ Id. at 108. The court noted that, "Grants' history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no-contact order, and why she minimized the degree of violence when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail." Id. at 108, 109. Grant clearly holds that prior misconduct can be admitted under ER 404(b).

Dodd argues that the trial court misapprehended State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2007), as holding that prior domestic violence can be admitted under ER 404(b). The trial Court never specifically cited to Magers when ruling on the admissibility of the evidence. RP 114. The prosecutor cited to Magers to support the admission of prior misconduct in a domestic violence relationship under ER 404(b). RP 114. The prosecutor was correct, the majority in Magers did so hold.

Magers was charged with domestic violence assault in the second degree and unlawful imprisonment. The State sought to

⁴ Grant recognized a number of legitimate reasons to admit evidence of prior abuse, including to assess the victim's credibility, to assess a victim's recantation, and to explain delays in reporting or minimization of a defendant's conduct. 83 Wn. App. at 106-08.

admit two types of prior misconduct: prior domestic violence of the defendant against the victim, and prior violence by the defendant against others⁵. First, the court analyzed prior domestic violence between Magers and the victim. The Court held that this was relevant to assess the victim's credibility in light of her recantation. Justice Madsen (joined by Justice Fairhurst) concurred with this holding,

Although I agree with the majority that evidence of prior acts which are offered to explain recantation by a victim of domestic violence may be admissible under ER 404(b), I disagree that the evidence of fighting was admissible for this purpose under the facts here. The charge of fighting did not involve Ms. Ray and was, therefore, not a part of the dynamic of domestic violence.

Id. at 194.

The second category of prior misconduct analyzed in Magers was violence toward others. The victim testified that Magers had previously been in trouble for fighting. Id. at 180. The State offered the evidence to prove the victim's state of mind, i.e., that she "reasonably feared bodily injury" as required to prove assault in the second degree. Id. at 181. The lead opinion believed this was permissible, but as noted above, Justices

⁵ Dodd's analysis fails to distinguish between two distinct categories of prior misconduct addressed in Magers.

Madsen and Fairhurst disagreed with that portion of the lead analysis. Id. at 194.

In the present case, the State sought to admit evidence that Dodd had supplied cocaine to Davis. The jury may have wondered why Davis would return to Dodd's apartment when there was a history of violence. The fact that Dodd used Davis' money and could obtain drugs provides that explanation. As in Grant, the evidence was relevant to explain the "inconsistent actions" of voluntarily going to Dodd's apartment even though there was a protection order. Dodd introduced Davis to crack cocaine. RP 402. They used together regularly. RP 402. Dodd would supply Davis with cocaine. RP 402. Dodd referred to himself as the "Candy Man." RP 403, 413.

Furthermore, Dodd controlled Davis' money and used the money to control Davis. When Davis left, Dodd sent her cards using the drugs and money to induce Davis to come back to him. One of the cards said, "I will always be there for you. Please call. I'll be your candy man." RP 412. Another card offered to "bless" her with "candy" and money. RP 412-13. These cards were sent in the months leading up to the rape, and Davis returned to Dodd on February 19th. RP 411.

When Davis went to Dodd's apartment he supplied her with cocaine. RP 426. The cocaine was one means to manipulate Davis and induce her to return to the abusive relationship. The trial court properly admitted the evidence so the jury would understand why Davis would return to Dodd's apartment on February 19th despite the past abuse and the protection order.

Any error in the admission of evidence that Dodd supplied drugs to Davis in the past was harmless. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id. The jury knew that Dodd supplied drugs to Davis on the night the rape occurred. There was no undue prejudice from evidence that he had supplied drugs to her before. There is no reasonable probability that the jury's verdict was materially affected by hearing that Dodd referred to himself as the "candy man."

4. DODD CONCEDED THAT HIS GEORGIA CONVICTION FOR FAMILY VIOLENCE BATTERY WAS COMPARABLE TO WASHINGTON'S ASSAULT IN THE THIRD DEGREE.

Dodd argues, for the first time on appeal, that the trial court erred by including his prior Georgia conviction for family violence battery. However, Dodd conceded that this conviction was comparable to Washington's assault in the third degree and should be included in his offender score.

Out-of-state prior convictions may count in the offender score if they are comparable to a Washington felony. RCW 9.94A.525(3). Comparability is both a legal and a factual question. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the Washington statute defines the offense with elements that are identical to, or broader than, the foreign statute, then the conviction under the foreign statute is necessarily comparable to a Washington offense. But if the Washington statute defines the offense more narrowly than the foreign statute, then the court must determine whether the defendant's conduct, as evidenced in the records of the foreign conviction, would have violated the Washington statute. Id. at 606. The facts underlying the foreign conviction must have been admitted or stipulated to or proved to

the finder of fact in the foreign jurisdiction beyond a reasonable doubt. State v. Farnsworth, 133 Wn. App. 1, 18, 130 P.3d 389 (2006).

The State normally bears the burden to prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of evidence. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). A determination whether an out-of-state conviction is comparable is a legal and factual question, and a defendant may waive his challenge to comparability. When a defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score, the trial court does not need further proof of classification before imposing a sentence based on that score. State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999).

In State v. Collins, 144 Wn. App. 547, 182 P.3d 1016 (2008), this Court ruled that the comparability analysis can be waived. Collins pleaded guilty and explicitly agreed to his criminal history and offender score. Id. at 549. At sentencing, he attempted to contest the scoring of his out-of-state convictions unless the State proved them. Id. This Court held that when Collins affirmatively acknowledged that the California convictions were properly

included in his offender score as part of his plea agreement, he thereby relieved the State of its normal burden of proof. *Id.* at 558. The Court found that "comparability is both a legal and a factual question." *Id.* at 553. Factual issues may be waived.⁶ *Id.* The Court reasoned that when a defendant affirmatively acknowledges the comparability of foreign convictions in his criminal history, the trial court needs no further proof. *Id.* This comports with State v. Ross, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004), which involved a similar challenge to out-of-state convictions by defendants who had affirmatively acknowledged comparability.

In the present case, Dodd acknowledged his Georgia conviction for family violence battery. Dodd's attorney expressly agreed with the State that the conviction was comparable to Washington's assault in the third degree. The prosecutor stated, "I did speak to Ms. Brinster, and she confirmed that she was, in fact, conceding the defendant's - - agreeing that the defendant's

⁶ Legal issues, in contrast, cannot be waived. In re Personal Restraint Petition of Goodwin, 146 Wn.2d 681, 874, 50 P.3d 618 (2002). The Supreme Court held that a defendant cannot waive a legal error leading to an excessive sentence. Goodwin, 146 Wn.2d at 874. Goodwin's collateral attack was permissible because the validity of his sentence depended upon the resolution of an immediately apparent legal issue rather than the resolution of a factual dispute. The Goodwin court did note that "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *Id.* at 874.

offender score should include what is listed on Appendix B as the State has presented it." RP 996. Dodd's lawyer affirmed, "I did concede that it would count as one point, comparable to an assault in the third degree." RP 999. Dodd's lawyer went on to say that she was in agreement about the standard ranges for the offenses. RP 1002.

When Dodd addressed the court, he started by indicating that he did not agree with his lawyer's calculation of his offender score. RP 1005. During the sentencing hearing, Dodd objected to the inclusion of his Georgia convictions, but not because they were not comparable. RP 1006. He argued they should wash out, an argument he has not pursued on appeal. Id.

Dodd complains that the trial court accepted the State's argument that the conviction was comparable "without any independent analysis." Brief of Appellant, at 33. However, as previously noted, once a defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score, the trial court does not need further proof. State v. Ford, 137 Wn.2d at 483 n.5.

Furthermore, the State was correct that Dodd's Georgia conviction is comparable to assault in the third degree. Dodd was

convicted of family violence battery in Georgia in 2004. CP 169.

This was a felony.⁷ Dodd assaulted his wife, breaking her cheekbone and knocking out a tooth. CP 148. The Georgia statute defines battery as:

(a) A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.

(b) As used in this Code section, the term "visible bodily harm" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.

GA ST 16-5-23.1. Dodd conceded that the Georgia statute is comparable to Washington's assault in the third degree which states in relevant part:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree"

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

RCW 9A.36.031. The Georgia statute is broader than Washington's assault in the third degree. The court must turn to

⁷ Under Georgia law, the first conviction for battery is a misdemeanor, and the second conviction is a felony. GA ST 16-5-23.1. Dodd had a prior conviction for family violence battery. CP 105.

the facts, as evidenced in the records of the foreign conviction, that show Dodd would have violated the Washington statute. Morley, 134 Wn.2d at 606. The prosecutor submitted a transcript of Dodd's plea hearing from Georgia to establish the facts Dodd agreed to pursuant to his plea.

The prosecutor in Georgia outlined the factual basis for Dodd's plea, which included, "On January 1st, of this year, in Gwinnett County, Mr. Dodd got into an argument with his wife. During the argument Mr. Dodd struck his wife, broke her cheekbone, and knocked out one of her teeth." CP 148. When Dodd was asked if this was correct he replied, "To an extent, yes sir." CP 154. Dodd argues that his admission was equivocal. Brief of Appellant, at 36. As Dodd noted, this was a straight plea of guilt. Brief of Appellant, at 37. Dodd did not deny any of the facts outlined by the prosecutor, and when asked if the facts were correct Dodd responded in the affirmative.

Dodd's felony conviction for family violence battery was comparable to Washington's assault in the third degree. Dodd's attorney properly conceded that the conviction should be included in his offender score, and the trial court did not err by accepting this concession.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Dodd's convictions and sentence. The court should remand the case to the trial court to enter an order correcting the judgment and sentence to reflect the proper conviction of rape in the second degree.

DATED this 15th day of March, 2011.

Respectfully submitted,

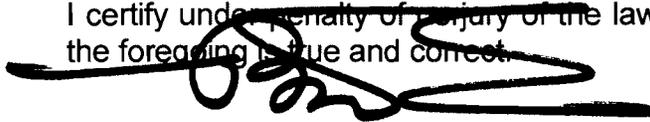
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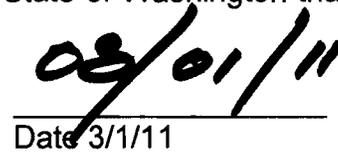
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle WA 98101, containing a copy of the Brief of Respondent, in STATE V. CLIFTON DODD, Cause No. 65528-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date 3/1/11