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JUN 30 2011

King County Prosecutor
Appellate Unit

NO. 66327-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

CURTISS WARE, JR.,

Appellant.

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

The Honorable Regina Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence of appellant's alleged prior misconduct with a third party as evidence of appellant's "state of mind" under ER 404(b).

2. The trial court erred when it found evidence of the alleged prior misconduct more probative than prejudicial.

3. Trial counsel deprived appellant of his constitutional right to effective assistance by failing to request a limiting instruction for evidence of the alleged prior misconduct.

Issues Pertaining to Assignments of Error

1. Appellant was charged with murder for allegedly shooting the complainant. Over defense objection, the trial court admitted evidence that appellant tried to punch a different person approximately one hour before the shooting under the "state of mind" exception to ER 404(b). There was no evidence the appellant threatened the person with a gun or that the person was involved in the disagreement that allegedly led to the shooting. Did the trial court err under ER 404(b) when it concluded the alleged encounter was sufficiently similar to the charged offense to constitute evidence of appellant's "state of mind?"

2. The trial court offered a limiting instruction prohibiting the jury from considering the alleged prior misconduct evidence as proof of

appellant's violent disposition. Defense counsel said he would consider the instruction, but failed to later request one, propose his own, or explain that he did not want an instruction. Where defense counsel acknowledged the testimony could improperly be considered evidence of appellant's violent propensity, was counsel ineffective in failing to ensure the court issued the limiting instruction?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Curtiss Ware, Jr. with second degree murder with a handgun based on a predicate offense of second degree assault. CP 1-7, 89-90. Ware's co-defendant, Jenita Freeman, was charged with first degree rendering criminal assistance. CP 1-7, 89-90.

Freeman's motion to dismiss for insufficient evidence was granted after the State's case in chief. 12RP 2-3.¹ A jury found Ware guilty. CP 83. The jury also returned a special verdict finding Ware was armed with a handgun. CP 84. Ware was sentenced to a standard range of 184

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – May 14, 2010; 2RP – September 16, 2010; 3RP – September 20, 2010; 4RP – September 22, 2010; 5RP – September 23, 2010; 6RP – September 27, 2010; 7RP – September 28, 2010; 8RP – September 29, 2010; 9RP – September 30, 2010; 10RP – October 4, 2010; 11RP – October 5, 2010; 12RP – October 6, 2010; 13RP – December 2, 2010.

months in prison, plus a consecutive 60 months for using a gun. CP 93-101; 13RP 12. Ware timely appeals. CP 91.

2. Trial Testimony

Melvin Evans was a homeless cocaine user. 5RP 55-57; 8RP 163, 166; 9RP 16; 10RP 194, 198, 200-01. Early one summer morning, Evans used Hal Goldsmith's cell phone to call a potential source to buy drugs. 8RP 145, 151, 153; 9RP 16-18. Goldsmith is a drug dealer, cocaine user, and has prior convictions for theft and burglary. 8RP 142-43, 163-66.

After using Goldsmith's phone, Evans walked toward South Byron Street in Seattle. Goldsmith remained on Rainier Avenue South. Goldsmith testified he saw Evans cross the street and talk to "Curt." 8RP 151-56; 9RP 28. Goldsmith later identified "Curt" in a photograph montage as Curt Dorsett. 9RP 23-25, 32.

Goldsmith testified the conversation between Evans and "Curt" became loud and animated. 8RP 1156-57. As Evans began walking away, "Curt" pulled a gun from the waistband of his shorts, raised his right arm, and fired five or six shots. 8RP 158, 174; 9RP 11. After the shots, Goldsmith said "Curt" entered a white truck, which turned left onto Rainier Avenue. 8RP 161-62, 184; 9RP 4-6. Goldsmith admitted he told police the truck was white because "everybody said it was." 8RP 185-86; 9RP 5.

Before seeing these alleged events, Goldsmith drank three or four beers and used cocaine. 8RP 150; 9RP 21.

Goldsmith ran toward the fallen Evans and called 911. 7RP 152; 8RP 171; 10RP 186. Mark Hines also called 911 after hearing as many as five gunshots. 7RP 24, 35-37, 79. Hines told the operator that from his bedroom window, he had seen an African American male waving his right arm and holding a "dark object" he said was a gun. 7RP 62-63. At trial, Hines testified he could not identify the dark object or the facial features of the man. 7RP 39-40, 42-46, 52, 69, 81. Hines watched the man get into the passenger side of a white truck with a canopy. 7RP 43, 56-57, 71, 84. The truck slowly backed up toward South Byron Street and went west. 7RP 58, 71. Hines did not see anything before hearing the shots, did not see the man shoot the gun, and did not see any injured people. 7RP 36-37, 65, 79.

Police arrived within minutes. 5RP 62-63, 81. Evans was lying face up and was unresponsive. 5RP 63-65; 7RP 17-20. Officer Stephanie Marks removed Evans' clothing and found a bullet wound in the upper left back. 5RP 68-70. A bindle of crack cocaine was found next to Evans' body. 5RP 71-72; 8RP 53. Evans was transported to Harborview Medical Center and died about 90 minutes later from a single gunshot wound to the back that penetrated his lung. 7RP 9-11, 111, 114-16, 122.

Police confiscated surveillance camera recordings from the residence of John Rogers, who lived near the shooting location. Rogers was asleep at the time of the incident. 8RP 8, 19-21, 28, 31. Forensic video analyst Grant Fredericks testified a flash depicted on the video was consistent with a gunshot being fired from an arm's length away from a person in white clothing. At the same time as the flash, the video showed a person walking away fall to the ground before getting back up. 9RP 34, 83-86. Fredericks could not make out any facial features, and did not see a gun. 9RP 85, 121-23.

No gun or shell casings were found at the incident scene. 6RP 112; 7RP 140. Ware's DNA was later found on the bindle lying next to Evans at the shooting scene. The bindle was not tested for Evans' DNA. 9RP 147-48, 150-51. No fingerprints were found on the bindle. 8RP 38, 41-43.

Officer Ryan Huteson spoke with Richard Ramey on the morning of the shooting. 6RP 108-10. Ramey is homeless and has prior convictions for theft and possession of stolen property. 9RP 159-60, 167-68; 10RP 11-12. Huteson admitted Ramey was intoxicated and possibly on drugs at the time of the conversation. 6RP 110-11, 113. Ramey admitted he may have drank "a couple beers" and taken pain medication the

morning of the incident. 10RP 15. Hutson's conversation with Ramey was not recorded. 6RP 113, 115-16.

Ramey testified he met Ware near the shooting scene 20 minutes to one hour before hearing gunshots. 10RP 12-13. Ramey said Ware tried to punch him with his fist, but Ramey caught the punch with his hand. Ware responded, "good catch," and told Ramey to "get off the block." 9RP 169-70, 175. Ramey walked to his mother's house and drank beer and played scratch tickets. He heard gunshots seven or eight minutes after entering the house. 9RP 171-72; 10RP 13.

Ten hours after the shooting, police found a white truck with a canopy parked several miles from the shooting scene. 7RP 130, 133-34; 10RP 104-05. After watching the truck for several hours, police arrested Ware as he got into the passenger side. 7RP 131, 133; 11RP 99-100, 107, 140. Fredericks testified pictures of the truck were not inconsistent with video images of the vehicle. 7RP 114-16, 119. A telephone taken from Ware during his arrest contained Goldsmith's number. 11RP 71.

Officers found no weapons inside the truck or the apartment near where the truck was found. 10RP 100-01; 11RP 110, 140. Ware's clothing was not tested for gunshot residue. 11RP 139.

Apartment resident Tracy Bunnell testified Ware and Freeman were staying with her the night of the shooting and watching movies in her

living room. 10RP 28, 37-39, 41. Bunnell said she consumed alcohol and pain medication the day of the incident. but Officer David Duty said she did not appear intoxicated when he interviewed her the same day as the shooting. 10RP 44-45; 11RP 41.

3. Prior Acts Evidence

Before trial, the State moved to admit evidence Ware had tried to punch Ramey the morning of the shooting to show Ware's "state of mind" under ER 404(b). The prosecutor explained, "my theory is that it relates to the anger that occurred from the drug deal that occurred previously that involved him pulling the gun on him. That was Mr. Ramey's speculation." 5RP 43. The prosecutor continued, "the fact that the defendant was, of course, angry enough to come up to him [Ramey] expressing that sort of verbal expression of his anger, I would argue that it continues to be relevant, as to how he was acting a few minutes later." 6RP 5.

The State offered no evidence of Ware's specific intent or state of mind toward Evans at the time he encountered Ramey. Nor was there evidence Ramey was involved with Ware or Evans before the shooting, or that Ware believed Ramey to be involved.

Defense counsel objected, arguing the encounter was improper propensity evidence. 6RP 5. "I don't think there is a purpose to that [the encounter] in terms of what it goes to, in terms of what is trying to show.

I think it should be kept out mainly because it is propensity, and not because it goes to anything relevant that night.” 6RP 6.

The trial court granted the prosecutor’s request. The court explained, “The contact, I think his demeanor and anger shows his state of mind at the time.” 5RP 45. The court further explained, “I think it goes to state of mind. I don’t think it goes to propensity towards anything in particular. It does show his state of mind for that evening, arguably five to 25 minutes, as I recall, but shortly before the shooting.” 6RP 2-6.

The court said it “would be happy” to give a limiting instruction forbidding the jury from considering Ramey's testimony to show propensity. 6RP 6. Defense counsel said he would consider the instruction, but later failed to request one, propose his own, or explain he did not want an instruction. 6RP 6-7.

C. ARGUMENT

1. THE COURT ERRED BY ADMITTING EVIDENCE OF WARE’S ENCOUNTER WITH RAMEY AS “STATE OF MIND” EVIDENCE UNDER ER 404(b).

a. Caution is Required When Admitting Evidence of Alleged Prior Acts.

“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 402² prohibits admission of irrelevant evidence. ER 403³ prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

The admissibility of other misconduct is governed by ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.

ER 404(b) not only excludes prior crimes, irrespective of convictions, but it likewise excludes acts that are merely unpopular or disgraceful. See, e.g., State v. Jamison, 93 Wn.2d 794, 799, 613 P.2d 776

² 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."

³ 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."

(1980) (error to permit witness to mention Jamison was formerly a resident at a juvenile facility). “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.” Wade, 98 Wn. App. at 336. Prior misconduct is “inadmissible to show the defendant is a ‘criminal type’ and is likely to have committed a crime for which charged.” State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). “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). Doubtful cases of admissibility under ER 404(b) should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

b. Ware's attempt to punch Ramey Was Not Relevant to a Material Issue.

“To admit prior misconduct evidence, it must be necessary to prove a material issue.” State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995). “Evidence is relevant and necessary under ER 404(b) 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 259.

“The test for logical relevance is whether the evidence is necessary to prove an essential element of the crime charged.” State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000). In this connection, evidence of prior misconduct is generally admissible when the accused admits doing the act, but claims he or she lacked the requisite state of mind to commit the charged offense. Hernandez, 99 Wn. App. at 322.

“State of mind” refers to “the condition or capacity of a person’s mind: mens rea.” Black’s Law Dictionary, Eighth Edition at 1446 (2004). “Intent” connotes the state of mind or purpose with which an act is done. Powell, 126 Wn.2d at 261. Intent is an element of intentional murder as well as felony murder. See RCW 9A.32.050(1)(a) and (b). Thus, the State was required to show either Ware shot Evans with specific intent to cause his

death, or that Ware caused the death while intentionally assaulting Evans with a deadly weapon.⁴

Prior misconduct evidence is necessary to prove intent, however, only when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent. “Otherwise, the intent exception would swallow the rule.” Powell, 126 Wn.2d at 262.

Powell is instructive here. Powell was convicted of murdering his wife through manual strangulation. Powell, 126 Wn.2d at 247-48. The trial court ruled evidence of prior assaults and quarrels between Powell

⁴ Jurors were instructed that to find Ware guilty of second degree murder, they had to find each of the following elements had been proven beyond a reasonable doubt:

(1) That . . . the defendant committing or attempted to commit Assault in the Second Degree;

(2) That the defendant caused the death of Melvin C. Evans in the course of and in furtherance of such crime or in immediate flight from such crime;

(3) That Melvin C. Evans was not a participant in the crime of Assault in the Second Degree; and

(4) That any of these acts occurred in the State of Washington.

CP 71 (instruction 10).

Jurors were also instructed that “[a] person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm, or assaults another with a deadly weapon.” CP 72 (instruction 9).

and his wife was admissible to help the jury understand “the movements of the parties” and to “get an accurate picture of what happened surrounding the series of events.” Powell, 126 Wn.2d at 253-54.

The Court observed that evidence of previous disagreements between the accused and the deceased is usually admissible in murder cases because the evidence tends to establish the nature of the parties’ relationship and their feelings toward each other, which in turn often bears directly on the accused’s state of mind. The Court nevertheless held the evidence of disagreements between Powell and his wife was improperly admitted because the intent to kill was “implicit in the doing of the act” of manual strangulation. Powell, 126 Wn.2d at 261-62.

The same reasoning applies in Ware’s case. Evans was shot in the back from close range and left to die. The intent to kill is implicit in this act, certainly as much as the act of strangulation. For this reason, evidence that Ware tried to punch Raney some time before the shooting was not necessary under ER 404(b) Ware’s “state of mind” because the act of shooting Evans itself established intent. The trial court erred in concluding otherwise.

c. The Attempted Punch was Not Sufficiently Similar to the Shooting to be of Probative Value.

Even if evidence of Ware's encounter with Ramey was relevant to a material issue at trial, "to use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves." Wade, 98 Wn. App. at 335. "This additional relevancy turns on the facts of the prior acts themselves and not upon the fact that the same person committed each of the acts." Wade, 98 Wn. App. at 336. "Otherwise, the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal." Wade, 98 Wn. App. at 336.

No similarities among the facts of the alleged acts exist here. Evans was shot in the back as he walked away. In contrast, Ramey alleged Ware tried to punch him in the face with his fist. Ware used no weapon against Ramey. Geographic proximity of the acts does not itself establish the required relevancy. See, e.g. Wade, 98 Wn. App. at 337 (fact prior incident occurred in same general area as charged act does not support an inference of intent where facts of previous acts and charged offense differ significantly)).

Moreover, evidence of an accused's ill will or abuse toward one person to show their "state of mind" or intent to harm a completely different person lacks logical relevance. Cf. State v. Billups, 62 Wn. App. 122.

130-31, 813 P.2d 149 (1991) (Evidence Billups previously asked a girl questions that did not show criminal intent to abduct girls was not admissible to show intent for attempted abduction of two different girls).

Ware's alleged encounter with Ramey cannot be considered probative evidence of Ware's state of mind toward Evans. The State theorized Ware shot Evans after they disagreed about a drug deal. 12RP 17. There is no evidence Ramey was involved in the disagreement or that Ware somehow believed him to be involved. The State offered no evidence as to Ware's specific intent or state of mind toward Ramey at the time of the alleged encounter. Indeed, Ware's comment, "good catch," to Ramey during the alleged encounter suggests the attempted punch was intended to be joking in nature rather than a serious attempt to injure. It therefore does not logically follow that Ware's alleged and unexplained behavior toward Ramey demonstrates his "state of mind" toward Evans approximately an hour later.

For these reasons, Ware's encounter with Ramey is neither sufficiently similar factually or logically to the charged offense to demonstrate evidence of Ware's "state of mind" on the day of the incident. The trial court abused its discretion in finding otherwise.

- d. The Erroneous Admission of the Prior Act Evidence was Not Harmless.

Evidentiary error is grounds for reversal if it results in prejudice. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Smith, 106 Wn.2d at 780. Here, the outcome of Ware’s trial was materially affected by evidence of his alleged encounter with Ramey.

Evidence of other misconduct is prejudicial because it “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal ‘presumption of innocence’ is stripped away.” State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), overruled on other grounds by, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Bowen, 48 Wn. App. at 196.

The admission of the evidence unfairly prejudiced Ware because it allowed the jury to infer he was a “criminal type.” “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020 (1991).

This prejudicial effect was compounded by the court’s failure to give a limiting instruction. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). Without a limiting instruction, the jury was free to consider Ware’s attempted assault on Ramey as evidence of his propensity

to commit the assault that led to Evans' death. Ware's case stands in contrast to those cases in which ER 404(b) errors were found harmless because the trial court instructed the jury to consider the evidence only for a limited purpose. See, e.g., State v. Giffing, 45 Wn. App. 369, 373-74, 725 P.2d 445 (1986) (probative value of evidence showing motive for killing was not outweighed by prejudice; jurors were cautioned to use evidence only for its appropriate and limited purpose), rev. denied, 107 Wn.2d 1015 (1986).

Moreover, a prosecutor exacerbates the prejudicial nature of erroneously admitted prior acts evidence by commenting on it in closing argument. State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The prosecutor in Ware's case did just that by stating, "Mr. Ware was angry already, even before he was coming in contact with Mr. Evans. Mr. Ware was already angry. He tried to hit Richard Ramey and told him 'you'd better get off this block.'" 12RP 21.

In a close case, where the reviewing court cannot determine whether the defendant would or would not have been convicted but for the error, the error is not harmless. State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968), cert. denied, 393 U.S. 1081 (1969). Ware's is that close case. This Court should therefore reverse the conviction and remand for a new trial.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR THE ALLEGED PRIOR MISCONDUCT EVIDENCE

Even if this Court concludes the trial court did not err in admitting the prior bad act evidence, it should still reverse Ware's conviction. Trial counsel deprived Ware of his rights to effective representation and a fair trial by failing to request an instruction directing jurors to consider the evidence solely to assess Ware's state of mind at the time of the charged crime.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's

performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

a. Counsel's Failure to Demand an Instruction was Deficient.

An accused is entitled to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). A limiting instruction must be provided if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); Wilson, 144 Wn. App. at 177. Counsel must nevertheless request the instruction and the failure to do so generally waives the error. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007).

In Ware's case, there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the character evidence. Had counsel requested an instruction, the court would have been required to give one and undoubtedly would have given its previously offered instruction. Defense counsel's decision not to request that instruction, or to

propose a limiting instruction of his own, is puzzling since he acknowledged the evidence demonstrated Ware's propensity for violence.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. Evidence that Ware tried to punch another person about one hour before the shooting was not of a type the jury could be expected to forget or minimize. Ramey repeatedly mentioned the encounter during his two days of testimony. The prosecutor hammered the point home in closing argument. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed a central piece of the State's case.

b. Counsel's Deficient Performance Prejudiced Ware.

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including as proof that Ware was a violent person. Indeed, the jury is naturally inclined to treat

evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822; see also Micro Enhancement Intern, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (“Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.”). Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict simply 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).

In State v. Cook,⁵ the trial court admitted evidence of Cook’s prior abuse against complainant O’Brien to assess O’Brien’s state of mind in recanting her prior statement that Cook had broken her finger during the charged assault. Cook, 131 Wn. App. at 854. The trial court’s instruction informed the jury it could consider the prior abuse to assess O’Brien’s credibility, but failed to eliminate the possibility the jury would consider the evidence for improper propensity purposes. Cook, 131 Wn. App. at 847. The Court of Appeals found the limiting instruction inadequate and reversed Cook’s conviction. The Court concluded that because the instruction was erroneous the jury was free to focus on Cook’s prior abuse

⁵ State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006), overruled on other grounds by, State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).

and assume “because he did it before, he did it now.” Cook, 131 Wn. App at 853.

The same danger exists here. Absent a limiting instruction, a reasonable juror would probably conclude Ware’s violent nature made it more likely he would assault and kill Evans. Counsel’s failure to request the instruction therefore undermines confidence in the outcome of Ware’s case. This Court should reverse his conviction.

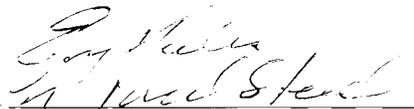
D. CONCLUSION

The trial court committed reversible error by admitting evidence of prior alleged misconduct between Ware and Ramey as evidence of Ware’s “state of mind” on the day of the incident. Alternatively, trial counsel was ineffective for failing to request a limiting instruction. This Court should reverse Ware’s convictions and remand for a new trial.

DATED this 30 day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 66327-5-1 |
| |) | |
| CURTISS WARE, JR., |) | |
| |) | |
| 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 1ST DAY OF JULY, 2011 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] CURTISS WARE, JR.
 DOC NO. 346157
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE, 2011.

x *Patrick Mayovsky*