

NO. 71128-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT REED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

AMENDED BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JACOB R. BROWN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
JAMES CAYCE
JUL 11 2011
KING COUNTY
COURT

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS.....	3
C. <u>ARGUMENT</u>	14
1. REED OPENED THE DOOR TO EVIDENCE OF PROSTITUTION.....	14
a. Additional Facts.....	14
b. Standard Of Review.....	21
c. The Trial Court Properly Ruled That Reed Opened The Door To Evidence Of Prostitution	22
2. REED RECEIVED EFFECTIVE REPRESENTATION ..	28
a. Additional Facts.....	29
b. Standard Of Review.....	34
c. Counsel Had Legitimate Strategic Reasons Not To Propose An ER 404(b) Instruction And This Decision Did Not Prejudice Reed	36
d. Counsel Had Legitimate Strategic Reasons Not To Object To The ER 609 Limiting Instruction And This Decision Did Not Prejudice Reed	38
D. <u>CONCLUSION</u>	41

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)34, 35, 36

United States v. Gonzalez-Lopez, 548 U.S. 140,
126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)35

Washington State:

Ang v. Martin, 118 Wn. App. 553,
76 P.3d 787 (2003), *aff'd*,
154 Wn.2d 477, 114 P.3d 637 (2005).....21

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004).....35

State v. Barragan, 102 Wn. App. 754,
9 P.3d 942 (2000).....35, 36, 37

State v. Brockob, 159 Wn.2d 311,
150 P.3d 59 (2006).....22, 24

State v. Gefeller, 76 Wn.2d 449,
458 P.2d 17 (1969).....22

State v. Gutierrez, 92 Wn. App. 343,
961 P.2d 974 (1998).....23

State v. Hampton, __ Wn. App. __,
332 P.3d 1020 (2014).....35

State v. Madison, 53 Wn. App. 754,
770 P.2d 662 (1989).....35

State v. Ortega, 134 Wn. App. 617,
142 P.3d 175 (2006).....21

<i>State v. Pete</i> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	21
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	35, 36, 37
<i>State v. Stockton</i> , 91 Wn. App. 35, 955 P.2d 805 (1998).....	21
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	34
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	34, 36
<i>State v. West</i> , 139 Wn.2d 37, 983 P.2d 617 (1999).....	34
<i>State v. White</i> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	36
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	35, 36

Statutes

Washington State:

RCW 9.94A.535.....	2
RCW 9A.36.011.....	2
RCW 10.99.020	2

Rules and Regulations

Washington State:

ER 403	24
ER 404	1, 23, 28-33, 35-39

ER 6091, 28, 29, 31, 32, 38, 39, 40
RAP 2.5.....23, 32

A. ISSUES PRESENTED

1. Otherwise inadmissible evidence is admissible on cross-examination if the defendant opens the door and the evidence is relevant to some issue at trial. Defendant Roosevelt Reed elicited testimony from the victim, Jane Gregory, on cross-examination that referred to Reed's involvement with prostitutes. He then testified on direct examination that he was previously involved in a "relationship that had gone bad." The trial court ruled that he had opened the door to evidence that he was involved with prostitutes. Did the trial court properly exercise its discretion?

2. A defense attorney's failure to object or propose a limiting instruction is presumed to be the result of legitimate trial strategy. Reed's attorney refrained from objecting to the trial court's ER 609 limiting instruction and from proposing an ER 404(b) limiting instruction. While the State concedes that the ER 609 instruction was submitted in error, it was actually helpful to Reed's defense. Further, an ER 404(b) limiting instruction would only have encouraged the jury to consider Reed's convictions in a way that served the State's theory of the case. Reed was not prejudiced by these tactical decisions. Did Reed receive effective representation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Roosevelt Reed with Assault in the First Degree, contrary to RCW 9A.36.011(1)(c). CP 1. The State alleged that on September 5, 2012, with the intent to inflict great bodily harm, Reed assaulted and did inflict great bodily harm upon Jane Gregory.¹ CP 1. The State further alleged that Reed's act was a crime of domestic violence, in that Jane was a family or household member at the time of the assault. CP 1; RCW 10.99.020.

The State also alleged two aggravating factors: (1) that Reed's crime was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time (an aggravated domestic violence offense); and (2) that Reed committed this offense shortly after being released from incarceration. CP 1-2; RCW 9.94A.535(3)(h)(i), (t).

¹ In order to avoid confusion, some witnesses in this case are referred to hereafter by first name only. No disrespect is intended. The victim, Jane Gregory, is referred to as Jane. Her daughter, Hope Darnell, is referred to as Hope. The appellant's brother, Precious Reed, is referred to as Precious.

Jury trial was held before The Honorable James Cayce. Report of Proceedings (RP).² The jury convicted Reed of first-degree assault as charged. CP 80; 12RP 465. The jury also found that Reed and Jane were members of the same family or household. CP 82; 13RP 25-26. At a bifurcated trial held subsequently, the jury also convicted Reed of both aggravators, finding that Reed committed an aggravated domestic violence offense and that his crime constituted rapid recidivism. CP 81; 13RP 26.

Reed's standard sentence range was 240 to 318 months. CP 94; 14RP 6. The trial court imposed an exceptional sentence of 360 months. CP 94-96, 99-100; 14RP 25.

This appeal timely followed. CP 104.

2. SUBSTANTIVE FACTS.

Jane Gregory met and began dating defendant Roosevelt Reed in Los Angeles, in the 1980s. 6RP 62. They habitually took drugs together. 6RP 63. Jane left Reed when she found out that she was pregnant. 6RP 63. She gave birth to a daughter, Hope Darnell. 6RP 63.

² The State refers to the report of proceedings in this case as follows: 1RP – Sep. 9, 2013; 2RP – Sep. 10, 2013; 3RP – Sep. 11, 2013; 4RP – Sep. 12, 2013; 5RP – Sep. 16, 2013; 6RP – Sep. 17, 2013; 7RP – Sep. 18, 2013; 8RP – Sep. 19, 2013; 9RP – Sep. 23, 2013; 10RP – Sep. 24, 2013; 11RP – Sep. 25, 2013; 12RP – Sep. 26 and 27, 2013; 13RP – Sep. 30, 2013; 14RP – Nov. 1, 2013.

Many years later, in 2008, Jane received a call from a friend in prison. 6RP 64. The friend told her that another man in prison wanted to speak to her. 6RP 64. That man was Reed. 6RP 65.

Reed began calling Jane regularly and speaking to Hope. 6RP 65. Jane and Hope began visiting Reed in prison, and would bring Hope's children to meet their grandfather. 6RP 66-68.

In April of 2012, Reed was released from prison and moved in with Jane, in an apartment in Des Moines. 6RP 69-70; 12RP 360. Initially, they had only minor arguments. 6RP 70. But in the weeks leading up to September, Reed became increasingly physically aggressive toward Jane. 6RP 76. At one point, he slapped her. 6RP 76; 7RP 76. He would also warn her, "Don't take me to that dark place . . . I have this dark place and you don't need to take me there." 7RP 82.

In early September, Jane and Reed drove to Spokane to visit Hope and the grandchildren. 6RP 71-72. Hope noticed that Reed was controlling toward Jane. 7RP 8. He became angry over small things and called Jane a bitch. 7RP 8.

Hope also observed Reed giggling to himself while using his cell phone. 7RP 9-10. When Reed asked Hope for help deleting something on his phone, Hope saw that he was exchanging text messages with another

woman. 7RP 9. Reed later explained that the messages were about an incident involving a knife and a girl in a car. 6RP 74; 7RP 10.

Hope told Jane about Reed's behavior and his text messages. 6RP 72-73; 7RP 11. Jane confronted Reed as they drove back to Seattle, on September 4. 6RP 74. Reed told her that the messages were about a girl that he had "beat up" years ago, and admitted that he had been laughing about it. 6RP 74. Jane told him that she didn't think it was funny that he was laughing about assaulting a girl. 6RP 74. She added that that was why he had been sent to prison. 6RP 74.

Reed's demeanor changed and he became very angry. 6RP 75. Jane feared she would be assaulted. 6RP 75. She exited the freeway and came to a stoplight. 6RP 75. He took the keys and drove away, leaving her on the side of the road. 6RP 75. After she called him and threatened to call the police, he returned, and they drove back home to Des Moines. 6RP 75-76.

The next day, September 5, Reed called in sick to work and left the house around 12:45 p.m., to meet his friend, Joe Kelley, at a car wash in Federal Way. 6RP 76-77; 12RP 334. He then went to Anthony's Homeport with Kelley for lunch, in Des Moines. 12RP 335. The two men finished lunch around 2:30 or 2:35 p.m. 12RP 335. They drove to Kelley's residence to drop off Reed's car. 12RP 336. Then, Kelley drove

Reed to the Department of Corrections (“DOC”) office in Burien, so that Reed could meet with his Community Corrections Officer (“CCO”), Stacey Westberg. 9RP 83, 88-89; 12RP 336.

Reed checked in to his appointment with Westberg at approximately 3:10 p.m. 9RP 92; 12RP 338. At the beginning of his DOC appointment, Reed was smiling and seemed happy. 9RP 92-93. However, when Westberg told Reed that he would need to pick up his own travel permits in the future, and not rely on Jane to pick them up for him, his body language and demeanor changed. 9RP 93. He became angry. 9RP 93.

Reed left the DOC office at approximately 4:05 p.m. 12RP 338. Forensic analysis of his cell phone later confirmed that he received a phone call at 4:07 p.m. while heading south from the DOC office, in the direction of Des Moines. 8RP 33-34; 9RP 133-34. While the content of that call is unknown, the call was from Jane. 9RP 128, 133-34. Based on cell phone records, she was home at the time, in Des Moines.³ 8RP 51.

When Reed arrived home from his DOC appointment, he and Jane began arguing, possibly about money. 6RP 77. He pushed her, so she

³ Because of the nature and extent of her injuries, Jane had difficulty recalling details of the day of the assault. 6RP 66-67, 76-79, 97. She testified that she accompanied Reed to his DOC appointment. 6RP 77, 99-104. However, cell phone records suggested that she remained home during this time. 8RP 50-51.

pushed him back. 6RP 78. She told him that she thought they had agreed not to fight anymore and he pushed her harder, into a wall. 6RP 78-79. She snatched the gold chain necklace that he was wearing from his neck, and that was the last thing that she remembered. 6RP 78. Hours later, she regained consciousness briefly in an ambulance, and heard a voice telling her that she was being taken to Harborview. 6RP 78.

Meanwhile, at 4:34 p.m., Reed began making a series of eight phone calls to his brother, Precious Reed, and to his friend, Kelley. 8RP 34-35, 41-42, 71; 9RP 128-30; 12RP 371-75. He also made a call to check his voicemail. 12RP 373-74. All of the calls were made from the immediate vicinity of the apartment. 8RP 34-35. Precious's wife, Shantel Smith-Reed, was at home in Fife when Precious picked up the phone. 9RP 5. She overheard Reed tell Precious, "I need you to get over here" and "I think I killed the bitch." 9RP 6.

Over half-an-hour later, at 5:07 p.m., Reed finally called 911. 9RP 128; 12RP 375. In the intervening time, while Reed was calling his brother and Kelley, and checking his voicemail, Jane was lying critically injured on the floor of the apartment. 12RP 373-75. He waited all that time to call 911 because purportedly he "wanted to do [his] own research" about what happened to Jane. 12RP 341.

Officers arrived to find Jane severely beaten, semi-conscious and unable to speak, with her eyes swollen shut. 6RP 14-15, 42-44; Ex. 1A-D. Reed told officers that he came home from his DOC appointment to find Jane lying in the doorway. 6RP 23-24. He also told his brother that someone had kicked the door open. 11RP 200. However, officers found no sign of a break-in or forced entry, and nothing was missing from the apartment. 6RP 26-27, 49-50. Nevertheless, because officers were unable to communicate with Jane and gather any explanation to the contrary, they did not arrest Reed or treat him immediately as a suspect. 6RP 27, 50.

Jane was taken to the hospital where doctors diagnosed her with multiple severe facial fractures. 6RP 85; 7RP 101-02, 113-14. Doctors told Jane that if she had been hit one more time—two at the most—she would have been killed. 6RP 92.

Reed went to see Jane in the emergency room. 7RP 119-20. When he walked into her room, she immediately recoiled from him. 7RP 120. He did not react sympathetically, but told her in a loud and angry voice to calm down. 7RP 120, 127. A hospital social worker was struck by the way that Jane recoiled from Reed and thought that his behavior was “a real unusual response for a family member.” 7RP 121. When Reed angrily told Jane to calm down, she began vomiting. 7RP 121, 127.

Because of the swelling in her face, doctors were unable to immediately operate on Jane. 6RP 82; 12RP 343-44. Jane declined to stay in the hospital and was released back to Reed. 6RP 78; 12RP 345.

The next day, September 6, Detective Geandreau called to speak with Jane about the assault. 9RP 69. Reed answered the phone. 9RP 69. When Geandreau identified himself as a police detective and asked to speak to Jane, Reed asked him why. 9RP 69; 12RP 379. Geandreau thought the question was odd and suspicious, given that Jane had just been the victim of a serious assault. 9RP 69. Reed gave the phone to Jane, who told Geandreau that she couldn't speak to him because she was on too much pain medication. 6RP 81. Reed was sitting right next to her, at the time. 12RP 381. Jane was afraid of Reed because of what he did to her, and also because she was aware of his history of domestic violence.⁴ 6RP 81-82.

A couple days later, Jane took a picture of herself on her cell phone and sent it to her daughter, Hope. 6RP 84-85; 7RP 32. She told Hope that she had been injured in a car accident. 6RP 84-85. She lied to Hope

⁴ Jane knew that Reed once hit a girlfriend in the head with a brick, and that he jumped on another's girlfriend's car, broke the windshield, and dragged her out of the vehicle through the broken window. 6RP 81-82.

because she didn't want her grandchildren to know what Reed did to her.⁵ 6RP 90-91. However, Hope did not believe Jane, and traveled to Seattle to be with her. 7RP 15-17. When Hope arrived in Seattle, Jane told her, "I can't believe he did this to me." 7RP 20. She also told Hope that she remembered grabbing Reed's chain necklace, and a fist coming at her, but nothing after that. 7RP 20.

Hope and her mother packed up the car in an attempt to leave. 6RP 86; 7RP 21. But the vehicle broke down as they tried to leave town. 6RP 86-87; 7RP 21-22. They were forced to call Reed for help. 6RP 86-87; 7RP 21-22. When Reed realized that Hope was in town and that she knew what had happened, he asked her, "So what happens next?" 7RP 22.

On the way back from the repair shop, Hope had to ride with Reed. 7RP 23. He kept telling her, "You know I messed up, Hope, you know I messed up, you know I have anger issues." 7RP 23. He added that his mother would be mad at him because he had messed up so badly. 7RP 23.

Hope had to return to eastern Washington without Jane. 7RP 38. Reed dropped Hope off at the bus station. 7RP 39. He told her again that he had messed up and had anger issues. 7RP 39. But he also told her,

⁵ Jane also initially lied to investigators or a social worker, claiming that she answered the door at her apartment and saw a flash of blue before losing consciousness. 7RP 68-69. She told this lie to protect Reed. 7RP 69.

“You know, she’s talking about me going, being with some other b[itch], and you don’t know everything that happened, Hope.” 7RP 39. She asked him why he had continued to hit Jane, even after she was unconscious. 7RP 39-40. He told her it was because Jane had threatened his freedom and he felt that he had nothing to lose. 7RP 28, 39-40.

Despite this, Hope never reported Reed to the police, because she was afraid of him. 7RP 27. He told her that if the truth of the assault ever came out, she would have to “watch [her] family’s life.” 7RP 27, 40-41.

On September 13, Jane underwent surgery to repair the injuries to her face. 6RP 87. Doctors installed four titanium plates to reinforce her broken bones. 7RP 103-05. A piece of plastic with titanium mesh also had to be installed in order to prevent her eye from sagging beneath its socket. 7RP 103-06.

After having surgery, Jane continued to live with Reed. 6RP 87. For a few days, he waited on her attentively. 7RP 83. He cried and told her that his mother would kill him if she knew what he did to her. 7RP 83. He explained, though, that he “never had a female ever raise their hands to him before.” 7RP 85.

Soon, Reed’s apparent remorse ran out: around September 20, when Jane called him at work to say that she didn’t feel well, Reed told her that he was sick of hearing her complain. 6RP 92; 12RP 347-48.

When she heard that, Jane knew that she had to leave. 6RP 92. She told her daughter that she was coming to Spokane. 6RP 87.

Reed came home from work to find Jane packing. 7RP 74. He told her that he would leave instead, packed his things, and left. 7RP 74.

Jane left for Spokane on September 20. 6RP 87. On September 24, she called Reed's CCO, Westberg, and told her that she was in a safe place. 9RP 108. Westberg contacted a DOC domestic violence victim's advocate, and asked her to reach out to Jane. 9RP 34-35. When the advocate called Jane, Jane told her that Reed had assaulted her. 9RP 35-36. The advocate told Detective Geandreau that Jane was ready to talk to law enforcement. 9RP 37-38, 71-72.

On October 3, Geandreau spoke with Jane by telephone. 9RP 72. She was still staying with family near Spokane. 9RP 72. After speaking with Jane, Geandreau made arrangements for Reed to be arrested. 9RP 73. Reed was arrested that same day. 12RP 381.

Once in jail, Reed instructed his brother Precious to obtain his cell phone and to hide it where no one could find it. 11RP 194-96. It was recovered by officers from Precious's vehicle in November, when he was arrested on unrelated charges. 9RP 15, 146. Officers examined the phone, but found that most of the data from September 4 through September 6—

the critical dates surrounding the assault—was missing and could not be recovered. 9RP 53-56.

Reed also instructed Precious to pawn his gold necklace. 11RP 203-05. Officers subsequently recovered the necklace from the pawn shop and confirmed that the clasp junction appeared to have been broken and put back together. 10RP 91; 99.

Finally, Reed instructed Precious not to talk to the police, and to otherwise claim that he had been threatened by the police and knew nothing about the assault. 11RP 175-76, 178; 12RP 383. Nevertheless, on October 10, Precious called Detective Geandreau and told him that Reed called him on September 5, to say “I think I killed her” and “You better get out here.” 11RP 225-26, 245. Then, on February 26, 2013, Geandreau spoke to Precious at the King County Courthouse. 11RP 246-48. Precious again told Geandreau that Reed had called him on September 5 to say, “You better get out here because I think I killed her.”⁶ 11RP 190-91, 246-49.

Additional facts and procedural history are set forth below as appropriate.

⁶ At trial, Precious initially denied telling Detective Geandreau that Reed called him to say, “I think I killed her.” 11RP 159. Upon further questioning, he admitted telling the detective that, but claimed that he was high and felt threatened. 11RP 159-62, 190-91. However, Precious told a defense investigator that what he said to Detective Geandreau was true. 11RP 184-85. He also told the defense investigator that Reed had “gotten himself in a world of trouble.” 11RP 186.

C. ARGUMENT

1. REED OPENED THE DOOR TO EVIDENCE OF PROSTITUTION.

Reed asserts that the trial court erred by admitting evidence that he was previously involved with prostitutes, and that the admission of this evidence requires reversal of his conviction for first-degree assault. But Reed himself elicited evidence, on cross-examination, of his previous involvement in prostitution. He also sought to create a half-truth on direct examination, testifying that he was merely involved in relationships that had gone bad. The trial court did not abuse its discretion when it ruled that Reed had opened the door. If the trial court erred, the error was harmless in light of the overwhelming evidence as a whole. Reed's claim should be rejected.

a. Additional Facts.

On cross-examination—in a strategic attempt to paint Jane as jealous and vindictive—Reed's attorney asked Jane whether she was ever jealous of his involvement with other women. 6RP 104. Her answer alluded to Reed making money from prostitutes:

Defense: Were you jealous that he was talking to another woman?

Jane: Not at all. Because when I got with him in Los Angeles, he had another woman. She was

in jail. *And I know what he claims to be as his profession in life. And so it's like if he had another girl, he's coming home to me every night, I don't care if he gets money from another girl, so what? I mean, that's how we lived. It's kind of sick now.*

6RP 104 (emphasis added). Reed did not object to Jane's answer or request a limiting or curative instruction. 6RP 104.

Later on cross-examination, Reed's attorney again questioned Jane as to whether she was jealous of Reed. 7RP 62-63. Again, she answered with a reference to Reed's involvement in prostitution:

Defense: Did you in the past accuse Mr. Reed of cheating on you?

Jane: No.

Defense: And you never accused him of being with other women?

Jane: Like I said before, ma'am, our relationship was like if he had other women, it wasn't a problem with me. When I got with him, he had another woman. I don't care about that. *Because I know it's not about a sex thing, it's about a money thing.* So I don't have a problem with that.

7RP 62-63 (emphasis added). Reed again did not object or request an instruction. 7RP 62-63.

Reed took the stand and testified in his own defense. 12RP 301-56, 359-87, 390-96, 398-401. He embraced his criminal past, admitting that he was previously "living another side of the law, drugs,

alcohol, just a self-destruct [sic], self-defeating lifestyle, from '80 pretty much all the way to '99." 12RP 303. But he sought to distance himself from his past, testifying that after being imprisoned twice for assault, he had made an effort to change his life for the better. 12RP 307, 367.

On direct examination, Reed described the circumstances of his first domestic assault conviction:

Defense: Now, you had a 1993 case, or there's been some mention of a 1993 case. Can you describe what that case was about?

Reed: Yes. I was in a relationship that had went bad. We were living a destructive lifestyle, and it was a bunch of cheating on both ends.

And the young lady that I was charged with assaulting, I had ran into her in the streets, and went up to try to talk to her; she didn't talk to me.

And I wound up breaking the window, and in the process, she got cut by some of the glass, and I was taken to jail for it. And I pled guilty, and did my time, and took responsibility for what I did, because that's how I was living back then.

12RP 306.

Reed's attorney also asked him about his 1999 domestic assault conviction:

Defense: Now, what about—you had a case in 1999.

Reed: Yes.

Defense: Can you tell the jury a little bit about that case?

Reed: That case was a little more in depth, but similar in [sic] the '93 case. I was really heavy into alcohol and drugs. And, also, in the '99 case, I was still involved in alcohol and drugs, but in a deeper depth. And, also, the person that I assaulted was on drugs, also, which was the first time I had ever got involved with someone that also used drugs with me. And that's what the case—it all—that's just one of the worst experiences of my life.

Defense: Okay.

Reed: And I went and I did—I went to prison, and I decided to change my life, and I got out. That was in 1999, and I was released in 2012.

12RP 306-07.

Reed referenced the 1993 assault again, later on direct examination, testifying that there was a misunderstanding when Hope and Jane thought that he was sending text messages and laughing about committing that assault. 12RP 329.

Prior to beginning cross-examination, the State requested clarification as to whether Reed had opened the door to further detail about the circumstances surrounding his previous assault convictions. 12RP 356. The trial court ruled that Reed had opened the door to further detail about the 1993 conviction. 12RP 357. Reed did not object, but apparently conceded that he had opened the door, "[b]ecause that was

related to the text messages.” 12RP 357. However, the trial court ruled that the State could only explore the 1999 conviction to the extent that it was “a serious assault on a woman.” 12RP 357.

The prosecutor then questioned Reed about his 1993 conviction:

Prosecutor: The 1993 relationship you had—

Reed: Yes.

Prosecutor: —you mentioned that it was a relationship that went bad?

Reed: Yes.

[. . .] (Exhibits shown to witness)

Prosecutor: Now, what was your relationship with the victim in this case?

Reed: We were in that—that destructive lifestyle.

Prosecutor: What was your relationship with her? What was her relationship with you?

Reed: Well, we were a couple, if that’s what you’re wanting me to say, or are fishing for.

I don’t understand. What was the relationship? We were into a negative lifestyle which committed—I mean, which consisted of illegal activities.

Prosecutor: What sort of illegal activities?

Reed: I’d rather not go into detail. Do I need to?

Prosecutor: We can take that up later

12RP 364-65. Reed did not object to the prosecutor's cross-examination.

12RP 364-65.

Reed went on to admit that he had accosted his ex-girlfriend in public, jumped on the hood of her car, broke out the windshield, and that she was stabbed during the encounter. 12RP 366. He pleaded guilty to third-degree assault and was imprisoned for 13 months. 12RP 367. He also admitted to "seriously assault[ing]" another girlfriend in 1999, and to being imprisoned as a result of that conviction until 2012. 12RP 367-68.

Outside the presence of the jury, the prosecutor again asked to explore the defendant's 1993 conviction in further detail. 12RP 388. The prosecutor argued that Reed had testified that the victim in that case was his girlfriend, but that

[i]n actuality . . . he was her pimp. He didn't want to answer that question. And she did not put money on his books, and that's why he had assaulted her, and I wanted to go into that. But I wanted to make sure and get a ruling from the Court first.

12RP 388. Reed objected, arguing that "this case ended up as an Assault-3, and there's no charge of any type of prostitution related crime, and we believe it's highly prejudicial." 12RP 389. The prosecutor countered that Jane had already testified about the lifestyle that both she and Reed had lived, presumably referring to Jane's testimony about

Reed's involvement in prostitution.⁷ 12RP 389. He added that Reed had also testified about this prior lifestyle. 12RP 389. The trial court ruled that the defense had opened the door to evidence of Reed's prior involvement in prostitution. 12RP 389.

Cross-examination continued:

Prosecutor: Mr. Reed, I was asking you earlier questions about the 1993 case. When I asked you, you initially said that it was a woman that you had a relationship with, the victim in that case.

Reed: Yes.

Prosecutor: And I asked you what that relationship was, and your answer was that you would rather not answer it; right?

Reed: Yes it was. That was my answer.

Prosecutor: What was that relationship?

Reed: I still would rather not answer it.

Prosecutor: Your Honor, I would ask that he be required to answer the question.

Court: I'm instructing you to answer the question.

Reed: I had prostitutes back then. That was part of the lifestyle that I was living in my past.

⁷ This understanding is confirmed by defense counsel's contemporaneous request to offer evidence of Jane's own involvement in prostitution, at that time. 12RP 389. The trial court denied that request. 12RP 389-90.

12RP 390. Reed went on to testify that he had assaulted her because he was upset at her for leaving him. 12RP 391. He denied assaulting her because she wouldn't give him money. 12RP 391. He testified again that, since that case, he had turned his life around. 12RP 392.

b. Standard Of Review.

Otherwise inadmissible evidence is admissible on cross-examination if the defendant "opens the door" and the evidence is relevant to some issue at trial. *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). A trial court has considerable discretion to determine whether the door has been opened. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005). Its ruling will be reversed only upon an abuse of discretion. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). The appellate court must find that no reasonable judge would have ruled as did the trial court. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

Erroneous rulings that the door has been opened are still subject to harmless error analysis. *Stockton*, 91 Wn. App. at 43. An evidentiary error is harmless if the improperly admitted evidence is of minor

significance in reference to the overall, overwhelming evidence as a whole. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006).

The Washington Supreme Court has explained that the purpose of the “open door” rule is to prevent a party from deceiving the fact-finder with half-truths:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

c. The Trial Court Properly Ruled That Reed Opened The Door To Evidence Of Prostitution.

The trial court did not abuse its discretion when it ruled that Reed had opened the door to evidence of his involvement with prostitutes. Reed twice elicited evidence of his involvement with prostitutes, when he questioned Jane about whether she was jealous of his history with other

women.⁸ 6RP 104; 7RP 62-63. She responded that he claimed a certain “profession,” in which he “had” other women and made money off them. 6RP 104; 7RP 62-63. Reed did not object to this testimony. 6RP 104; 7RP 62-63. Instead, he sought to create a half-truth when he minimized this history on direct examination, referring to only being involved in a “relationship that had went bad.” 12RP 306. He did not attempt to hide his effort to create a half-truth—he expressly refused to answer questions about this relationship on cross-examination and explained that “I’d rather not go into detail.” 12RP 365. The trial court had to instruct him to answer the prosecutor’s question. 12RP 390.

This evidence was also relevant to a material issue at trial. The State’s primary purpose in offering evidence of Reed’s history of violence against women was to explain Jane’s reasonable fear and her behavior, in the aftermath of the assault. 3RP 2-3, 8-12; CP 131-37 (State’s Supplemental Memorandum on ER 404(b)). Jane knew that Reed employed and dated prostitutes, and that he assaulted at least two of his previous girlfriends. 6RP 81-82, 104; 7RP 62-63. A reasonable judge

⁸ Reed asserts that his testimony about a relationship “gone bad” was a mere passing reference, insufficient to open the door. Br. of Appellant, at 18. But Reed ignores Jane’s earlier testimony on cross-examination, elicited by the defense, that he was previously involved with prostitutes. While the trial court did not expressly rely on Jane’s testimony in ruling that the door had been opened, a trial court may be affirmed on any basis supported by the record. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); RAP 2.5(a).

could have found a connection between Reed's pimping activities, his violent history toward women, and Jane's reasonable fear of his behavior.

While evidence of Reed's involvement in prostitution may not initially have been admissible,⁹ it became admissible when he opened the door on both direct and cross-examination. At the very least, because it cannot be said that *no reasonable judge* would have ruled as did the trial court, the trial court did not abuse its discretion. Reed's claim should be rejected.

Even if the trial court abused its discretion by ruling that Reed opened the door to evidence of prostitution, Reed's conviction should be affirmed because any error was harmless. The evidence at issue was of minor significance in reference to the overall, overwhelming evidence as a whole. *See Brockob*, 159 Wn.2d at 351.

As the trial court observed at sentencing, it was "obvious" that Reed committed this assault. 14RP 25. Jane's last memory before losing consciousness was of being pushed by Reed and snatching his gold chain from his neck. 6RP 78-79. Reed then placed multiple phone calls from the apartment, attempting to reach Kelley and Precious, all while Jane lay

⁹ The argument could be made that the probative value of this evidence was, initially, outweighed by the danger of unfair prejudice. ER 403. But this balance changed once Reed introduced evidence of his prostitution activities on cross-examination and sought to minimize and create half-truths on direct examination.

on the floor with severe injuries. 8RP 34-35, 41-42, 71; 9RP 128-30; 12RP 373-75. He told Precious, "I think I killed the bitch." 9RP 6. There was no evidence of a break-in or that anyone else had been at the apartment. 6RP 26-27, 49-50.

Reed also told Hope that he assaulted Jane because she had threatened his freedom and he felt that he had nothing to lose. 7RP 28, 39-40. He further explained that no "female" had ever raised her hands to him before. 7RP 85. He admitted to having anger issues and that his mother would be upset with him, if she knew what he had done to Jane. 7RP 23, 83.

When Reed went to visit Jane in the emergency room, she immediately recoiled from him. 7RP 120. Instead of acting with sympathy, he angrily told her to calm down. 7RP 120, 127. She started vomiting. 7RP 121, 127.

When Detective Geandreau called the day after the assault to speak to Jane, Reed asked him, "Why?" 9RP 69; 12RP 379. Reed's question was odd and suspicious, because Jane had just been the victim of a serious assault. 9RP 69.

In contrast to the strength of the evidence against him, Reed's defense was highly incredible. He claimed that he came home to find Jane injured, and left her to bleed on the floor of the apartment for over

half-an-hour while he tried to call his brother and Kelley, and even checked his voicemail. 12RP 371-75. He explained the delay by testifying that he “wanted to do [his] own research.” 12RP 341. He finally called 911 after realizing that Jane had a “scar” above her eye, and that her face was “sensitive to the touch.” 12RP 342. The jury would have weighed this explanation against the photographs in evidence, showing Jane’s horrific injuries—photographs that, Reed admitted, accurately depicted her appearance at the time of the assault. 12RP 369-71; Ex. 1A-C.

Reed’s defense was also beset by other inconsistencies. He called CCO Westberg the day after the assault and left her a voicemail, claiming to have gone straight home after his DOC appointment to find Jane injured. 9RP 95. But at trial, Reed testified that he actually went to Kelley’s house after his DOC appointment to get his car, then went home. 12RP 338-39, 364. He testified that his voicemail to Westberg was mistaken. 12RP 364. He gave similarly inconsistent or incomplete accounts of his whereabouts to responding officers, on September 5. 6RP 25, 29.

Reed also testified that he never got in any physical confrontations with Jane and that she never ripped his gold chain from his neck. 12RP 315, 324, 342. But Smith-Reed testified that when she and Precious

arrived at the apartment, Reed took Precious aside and told him that he and Jane had argued over him seeing another woman, and that she broke his chain necklace.¹⁰ 9RP 11, 29.

Reed also claimed that Jane's account was motivated by jealousy and the desire to regain possession of her car. 12RP 435, 438. While some evidence superficially supported this defense (for example, Jane admitted that she probably wouldn't have involved the police if Reed had simply returned her car, 7RP 79), this defense did not explain why Smith-Reed overheard Reed say to Precious that he thought he "killed the bitch." 9RP 6. It also did not explain why Precious twice admitted to Detective Geandreau that Reed called him to say that he thought that he killed Jane. 11RP 190-91, 225-26, 244-49. Reed's explanation, that he merely said, "*someone*" killed "*my*" bitch, and that "bitch" in this context was a term of endearment, rang hollow. 12RP 339, 341 (emphasis added).

Finally, as noted above, Reed fully acknowledged his criminal past at trial, a legitimate strategy to neutralize its effect. He admitted his prior lifestyle and his serious assault convictions, but stressed that "that was Roosevelt then," and that he had changed his ways. 12RP 307, 367. In

¹⁰ The transcript here uses the word "brought" instead of "broke." 9RP 11. Either this is a typographical error, or Smith-Reed misspoke. This is apparent from the record as a whole, and from Smith-Reed's subsequent testimony on cross-examination, in which she clarifies that she overheard Reed say that Jane "grabbed his necklace off of his neck." 9RP 29.

light of the defense strategy regarding his criminal past, and the evidence of his serious assault history, Reed was not prejudiced by the introduction of evidence that he was involved in prostitution. Because this evidence was insignificant in light of the overwhelming evidence as a whole, any error in its admission was harmless. Reed's conviction should be affirmed.

2. REED RECEIVED EFFECTIVE REPRESENTATION.

Reed argues that his attorney was ineffective for failing to request an ER 404(b) limiting instruction. He further asserts that his attorney was ineffective for failing to object to the ER 609 instruction given by the trial court, allowing the jury to consider evidence of his convictions for the purpose of determining his credibility as a witness.

Reed's claims should be rejected. His attorney made a legitimate strategic decision not to request an ER 404(b) limiting instruction, in order to avoid reemphasizing the substantive purposes for which the jury could consider this evidence. Further, while an objection to the ER 609 instruction likely would have been sustained, counsel strategically refrained from objecting because the ER 609 instruction was favorable to Reed's defense. Even if counsel was deficient either for failing to request an ER 404(b) limiting instruction or to object to the ER 609 instruction,

Reed cannot demonstrate prejudice. For all of these reasons, his conviction should be affirmed.

a. Additional Facts.

Before trial, the prosecutor announced his intent to offer evidence of Reed's 1993 and 1999 assault convictions, for purposes of establishing Jane's delay in reporting the instant assault, to allow the jury to evaluate her credibility with knowledge of the details and context of the relationship, to explain Jane's reasonable fear and reasons for initially lying about who assaulted her, to show Reed's motive through his increasing hostility toward Jane, and to provide background information on Reed's relationship with Jane. CP 128-29 (State's Trial Memorandum), 131-37 (State's Supplemental Memorandum on ER 404(b)); 3RP 2-12.

The prosecutor reiterated that the convictions were being offered strictly under ER 404(b), and were not being offered for purposes of determining Reed's credibility under ER 609. 2RP 27; 3RP 12. The trial court found the convictions admissible under ER 404(b). 5RP 2-4. Specifically, the trial court found that the convictions were relevant to the issue of Jane's credibility and the dynamics of a domestic violence relationship—that is, why she feared Reed and initially lied about the

assault. 5RP 2-4. The trial court also found that evidence of Reed's 1993 conviction was admissible to establish the *res gestae* of the instant crime, because Reed and Jane had argued about that conviction on September 4, the day before the assault. 5RP 2.

Evidence of Reed's assault convictions was admitted several times at trial. Jane testified that, the day before Reed assaulted her, she confronted Reed about sending text messages and laughing about a time when he assaulted a girl. 6RP 74-75. She told him that it wasn't funny and that that was why he was sent to prison. 6RP 74. Reed became angry, and Jane was worried that she would be assaulted. 6RP 75. He left her on the side of the road and only returned when she threatened to call the police. 6RP 75-76.

The day after the assault, Jane refused to speak to Detective Geandreau over the telephone. 6RP 81-82. Reed was sitting right next to her at the time. 12RP 381. Jane feared for her life because she knew of Reed's criminal history—that he had gone to prison for hitting one girlfriend in the head with a brick, and for jumping on the car of another girlfriend, breaking the windshield, and pulling her out of the car. 6RP 81-82.

After the State rested, outside the presence of the jury, the prosecutor referred to the court's pre-trial ER 404(b) rulings, and asked

whether Reed's attorney planned to submit an ER 404(b) instruction. 11RP 297. Reed's attorney said, "It's been so long ago, I can't remember." 11RP 297. The trial court suggested that defense attorneys often "don't even want to go there," but added that it would issue an instruction if she requested. 11RP 297. Defense counsel confirmed her understanding that Reed's convictions were not being offered under ER 609. 11RP 298. She added that the defense intended to discuss Reed's 1993 and 1999 convictions in its case-in-chief. 11RP 298. She did not confirm whether she would request an ER 404(b) instruction. 11RP 298.

Reed testified on direct examination about his 1993 and 1999 convictions. 12RP 306-07. He acknowledged his previous engagement in criminal activity, but testified that he had decided to change his life after being released from prison in 2012. 12RP 307, 309.

Prior to cross-examination, the Court ruled that Reed had opened the door to additional questions about the 1993 case. 12RP 357. The court ruled that the State could only question Reed about the 1999 case to the extent that it involved a serious assault on a woman. 12RP 357.

On cross-examination, Reed again acknowledged his 1993 and 1999 convictions. 12RP 360, 364-68. In keeping with the defense strategy, he stressed again that "that was Roosevelt then." 12RP 367.

Outside the presence of the jury, the prosecutor asked to cross-examine Reed regarding his involvement in prostitution, as it related to his 1993 conviction. 12RP 388. The court ruled that the door had been opened. 12RP 388-99.

The prosecutor then asked Reed what his relationship was, with the victim in the 1993 case. 12RP 390. After initially refusing to answer the question, and being instructed to answer by the trial court, Reed testified that she had been one of his “prostitutes.” 12RP 390.

After both sides rested, the parties litigated jury instructions. 12RP 402. The State proposed an ER 609 instruction.¹¹ Supp. CP ___ (sub no. 79, at 9) (State’s Proposed Jury Instructions); 12RP 402. The defense did not object to the instruction. 12RP 402-03. The trial court then instructed the jury that:

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant’s testimony, and for no other purpose.

CP 62 (Instruction 4). While the reading of instructions to the jury was not transcribed, there is no indication in the record that defense counsel objected when instructions were read. 12RP 409.

¹¹ The State concedes that this instruction was submitted in error. However, Reed did not object to this instruction below, and thus the inquiry on appeal is limited to whether Reed’s trial attorney was ineffective for failing to object. RAP 2.5(a). While Reed apparently assigns error to the instruction, itself, he has—appropriately—briefed only the ineffective assistance of counsel argument. *See* Br. of Appellant, at 1.

The State did not propose, and the defense does not appear to have requested, an ER 404(b) instruction. Supp. CP __ (sub no. 79) (State's Proposed Jury Instructions); 12RP 402. The trial court did not instruct the jury on the limitations of evidence offered under ER 404(b). CP 56-79 (Instructions 1-19).

During closing argument, the prosecutor stressed that Jane's behavior was explained by the cycle of domestic violence.¹² 12RP 419. Jane knew that Reed went to prison for assaulting one girlfriend. 12RP 419-20. She knew that, after he got out of prison, he went to prison again for assaulting another girlfriend. 12RP 419-20. Jane also knew that, the day before she was assaulted, Reed was laughing about assaulting a woman. 12RP 420. She herself was almost beaten to death by Reed. 12RP 420. Eventually, Jane made it to Spokane, where she was safe; there, no longer afraid, she reported the assault. 12RP 420.

Reed's attorney argued that Jane was jealous, angry, and felt that Reed owed her a debt for all that she had done for him. 12RP 435. She was upset that he moved out. 12RP 435. She was assaulted on September 5 but didn't report Reed until September 24, despite having multiple opportunities to do so. 12RP 433-34. She told the hospital social

¹² A victim's advocate had earlier testified that it is common for domestic violence victims not to immediately report their abusers. 9RP 37. "Most of the time," victims delay reporting because they are "strategizing when it is safest to report." 9RP 37.

worker that she was struck by a stranger in the doorway. 12RP 439. She never would have told police that Reed assaulted her if had given her the car back. 12RP 438. That was her real concern, and the reason why she involved the criminal justice system. 12RP 435.

Neither attorney argued that the jury should consider Reed's prior convictions for the purpose of determining his credibility. 12RP 411-48, 451-59.

b. Standard Of Review.

A challenge based on ineffective assistance of counsel is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both: (1) that trial counsel's performance fell below a minimum objective standard of reasonableness (the performance prong); and (2) that the defendant was prejudiced by counsel's deficient performance (the prejudice prong). *State v. West*, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *State v. Thomas*, 109 Wn.2d 222, 226,

743 P.2d 816 (1987) (citing *Strickland*, 466 U.S. at 689). Courts will presume that a failure to object “can be characterized as *legitimate* trial strategy or tactics,” and the defendant bears the burden of rebutting this presumption. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (citations omitted) (emphasis original). This is because “[t]he decision of when or whether to object is a classic example of trial tactics,” and “[o]nly in egregious circumstances . . . will the failure to object constitute incompetence of counsel justifying reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The defendant must also show that the proposed objection would likely have been sustained. *Davis*, 152 Wn.2d at 714.

Similarly, the failure to request a limiting instruction for evidence admitted under ER 404(b) is presumed to be a legitimate tactical decision. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *State v. Price*, 126 Wn. App. 617, 649-50, 109 P.3d 27 (2005)¹³; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). A legitimate trial tactic cannot be the basis for a claim of ineffective assistance of counsel. *Yarbrough*, 151 Wn. App. at 91.

¹³ This Court recently recognized in *State v. Hampton*, __ Wn. App. __, 332 P.3d 1020, 1028-30 (2014), that *Price* implicitly was abrogated in part on other grounds by *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (concerning right to choice of counsel).

Regarding the prejudice prong, a defendant must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). Trial counsel does not guarantee a successful verdict, and competency is not measured by the result. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

c. Counsel Had Legitimate Strategic Reasons Not To Propose An ER 404(b) Instruction And This Decision Did Not Prejudice Reed.

Reed asserts that his trial attorney should have proposed an ER 404(b) limiting instruction.¹⁴ Yet Washington courts have routinely found that the decision not to request an ER 404(b) limiting instruction is a legitimate trial strategy, to avoid emphasizing damaging evidence. *See Yarbrough*, 151 Wn. App. at 90; *Price*, 126 Wn. App. at 649-50; *Barragan*, 102 Wn. App. at 762. While an ER 404(b) instruction may seem to assist the defense, because it prevents a jury from considering prior bad acts as evidence of character or propensity, it presents a severe

¹⁴ ER 404(b) provides that “[e]vidence 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.”

risk of reinforcing the exact purposes for which the State offers the evidence. *See Price*, 126 Wn. App. at 650 (reasonable not to request ER 404(b) limiting instruction in order to avoid emphasizing prior bad acts as proof of motive to commit murder).

In this case, the State offered evidence of Reed's prior convictions in order to explain Jane's behavior in the aftermath of the assault. Defense counsel relied in closing argument on the fact that Jane initially refused to talk to the police, claimed to have been attacked by a stranger, and did not report Reed as the assailant until several weeks after the attack. 12RP 433-34, 439. An ER 404(b) instruction would have undercut this defense by drawing the jury's attention to the State's theory—that Jane's actions resulted from her reasonable fear of Reed and the dynamics of a domestic violence relationship.

Instead of requesting a limiting instruction, defense counsel sought to neutralize Reed's criminal history by eliciting testimony that embraced his criminal past, but differentiated his current behavior. Reed testified that he had made efforts to change his life since being released from prison in 2012. 12RP 307, 309. This was a legitimate strategy. *See Barragan*, 102 Wn. App. at 762 (reasonable for defense counsel to elicit favorable testimony instead of requesting an ER 404(b) limiting instruction). Reed's claim should be rejected.

Even if defense counsel was deficient by failing to request an ER 404(b) limiting instruction, Reed has not shown a reasonable likelihood that, if such an instruction had been issued, the outcome of the trial would have been different. As described in detail above, the evidence against Reed was overwhelming. His defense, in contrast, was highly incredible. No reasonable jury would have believed that he came home to find Jane in a pool of blood, and spent half-an-hour making phone calls before finally calling 911 after realizing that she had a cut above her eye. His defense was further contradicted by multiple witnesses other than Jane, including Hope, Precious, and Smith-Reed. An ER 404(b) limiting instruction would not have made a difference in the result of the trial; instead, it would only have cemented the State's theory. Reed's conviction should be affirmed.

d. Counsel Had Legitimate Strategic Reasons Not To Object To The ER 609 Limiting Instruction And This Decision Did Not Prejudice Reed.

Reed asserts that his trial attorney should have objected to the ER 609 instruction, and that her failure to object constituted ineffective

assistance of counsel.¹⁵ The State agrees that Reed's convictions were admitted pursuant to ER 404(b), not ER 609. An objection to the ER 609 instruction would likely have been sustained. However, that does not mean that defense counsel lacked legitimate strategic reasons to refrain from objecting.

By limiting the jury's consideration of Reed's prior convictions to the sole issue of determining his credibility, rather than the substantive purposes for which the jury was actually entitled to consider this evidence, the ER 609 instruction *aided* Reed's defense. While the jury was still able to consider Reed's history of violence against women in judging Jane's behavior, a significant part of that history—the fact of Reed's convictions—was effectively removed from their consideration for that damaging purpose. Thus, because trial counsel is presumed to have made a reasonable tactical decision, this Court should presume that Reed's trial attorney refrained from objecting to the ER 609 instruction because she reasonably considered it helpful to his defense.

¹⁵ ER 609 provides that: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment." *Id.* at (a).

Even if counsel's failure to object to the ER 609 instruction was a mere oversight, Reed has not shown that its inclusion affected the outcome of his case. Reed's credibility was fatally undermined by the evidence. Smith-Reed overheard Reed say to Precious, "I think I killed the bitch." 9RP 6. Precious admitted as much to Detective Geandreau, on two separate occasions, and told a defense investigator that what he had admitted to Geandreau was the truth. 11RP 184-86, 190-91, 225-26, 244-49. Hope testified that Reed told her that he continued to hit Jane, even after she was unconscious, because Jane had threatened his freedom and he felt that he had nothing to lose. 7RP 39-40. Reed also instructed Precious to hide his phone, not to talk to the police, and to pawn his necklace—when officers recovered the phone, they discovered that the data from September 4-6 was oddly missing; when they recovered Reed's necklace, they found that it showed signs of having been broken at the clasp and put back together. 9RP 56; 10RP 91.

Because Reed's defense was at odds with the physical evidence, the testimony of the other witnesses, and simple common sense, the jury would have found him incredible, irrespective of its consideration of his prior convictions. There is no reasonable likelihood that, in the absence of the ER 609 instruction, the outcome of this trial would have been any different. Reed's claim should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Reed's conviction for Assault in the First Degree – Domestic Violence.

DATED this 12th day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

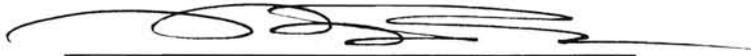
JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Jared Steed, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Amended Brief of Respondent, in State v. Roosevelt Reed, Cause No. 71128-8, 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.

Dated this 12 day of December, 2014.



Name
Done in Seattle, Washington