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FILED  
October 6, 2016  
Court of Appeals  
Division I  
State of Washington NO. 71467-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

EMYLL MATOS-RAMOS,

Appellant.

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

The Honorable Bill Bowman, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN ADMITTING EVIDENCE OF A PRIOR BAD ACT WHEN MATOS-RAMOS DID NOT CLAIM TO HAVE ACCIDENTALLY INJURED A.S. AND WHEN THE PRIOR INCIDENT WAS NOT SIMILAR TO THE CHARGED OFFENSE.

The doctrine of chances, which underlies the exceptions to ER 404(b)'s ban on evidence of prior bad acts, does not come into play without two specific factual prerequisites. First, as more than one commentator has noted, "The doctrine of chances only applies when the act itself is assumed to have been performed by the defendant." Eric D. Lansverk, Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 Wash. L. Rev. 1213, 1236 (1986) (citing II J. Wigmore, Evidence § 302 (Chadbourn rev. 1979)). Second, there must be sufficient similarity between the two acts to create a logical rebuttal to the claim of accident. State v. Baker, 89 Wn. App. 726, 734-35, 950 P.2d 486 (1997) (citing State v. Roth, 75 Wn. App. 808, 819, 881 P.2d 268 (1994)). Neither of these prerequisites is met in this case. This Court should therefore reverse because the trial court erred in admitting evidence of prior misconduct.

When prior bad acts are admitted to rebut a defense of accident, the similarities between the prior act and the charged act "must meet a threshold of noncoincidence." Baker, 89 Wn. App. at 734-35 (citing Roth, 75 Wn.

App. at 819). For example, the trial court in Roth relied heavily on the similar circumstances between the death of Roth's second and fourth wives. 75 Wn. App. at 814-15. In affirming, this Court again relied on those similarities in finding the evidence of the death of Roth's second wife admissible in the case charging him with murder of his fourth wife. Id. at 819-20. State v. Fernandez, 28 Wn. App. 944, 952-953, 628 P.2d 818 (1980), cited in Roth, also involved prior conduct under strikingly similar circumstances: "In addition to the marked similarity of the prior incidents to the crime charged, Fernandez employed similar distinctive means to carry out his scheme."

By contrast, here the prior conduct involved minor abrasions as a result, allegedly, of Matos-Ramos' overly vigorous attempt to control A.S. during a tantrum. RP 769, 860. That scenario bears little resemblance to either the accidental injury described by Matos-Ramos or the claimed intentional and cold-blooded severe injury described by A.S. RP 521-22, 1024, 1169.

Without an admission by Matos-Ramos of some conduct that could have caused the injury accidentally, there is no accident to rebut. State v. Bowen, 48 Wn. App. 187, 193-94, 738 P.2d 316 (1987). Moreover, even if there were, the two incidents are not sufficiently similar to give rise to an inference of noncoincidence under the doctrine of chances.

The lack of similarity between the incidents also refutes the State's claim that the prior incident would be relevant to show intent. The State relies on State v. Daniels, 87 Wn. App. 149, 157-58, 940 P.2d 690 (1997), in which the court was held to have properly admitted a prior incident of abuse to show the parent's intent or recklessness in causing injury. Brief of Respondent at 17. But in Daniels, the two incidents were extremely similar. The court explained that the other incident admitted at trial resulted in bruises "in similar locations to the June bruising." Daniels, 87 Wn. App. at 157. Therefore, the court held, "Daniels should have learned that such extreme discipline of a young child can cause injury." Id. at 158. By contrast here, nothing about the minor abrasions allegedly caused by his attempt to control A.S.'s tantrum should give rise to any assumption about Matos-Ramos' intent under the very different circumstances described in the charged incident.

2. STATE V. LAMAR DOES NOT RESOLVE THE CONCERNS FOR A VERDICT BASED ON COLLECTIVE RATHER THAN INDIVIDUAL OR SMALL GROUP DELIBERATIONS.

All parts of jury deliberations must be the common experience of all jurors. State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979). Jurors may not deliberate if even one juror is absent or not privy to the group conversation. State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46

(2014). Nothing in the written or oral jury instructions in this case informed the jury of this requirement. RP 1277-90; CP 35-54. Yet the State argues that a shared deliberative process was guaranteed by an instruction that does not address that requirement. Brief of Respondent at 44-49. This Court should reject that argument.

Juries are generally presumed to follow instructions. See, e.g., State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). But the State's argument in this case requires a presumption that the jury followed an instruction that was never given. Lamar does not require or even suggest such a conclusion.

Lamar addressed a different aspect of the guarantee of jury unanimity than the one before the Court in this case. The Lamar court was concerned that, with the instruction as given, the alternate juror may have been left out entirely from certain jury decisions that may have been made before the alternate juror joined them. 180 Wn.2d at 587. The effectiveness of the pattern instruction in addressing the aspect of entirely shared deliberations was not before the court. The court was not asked to decide the question in this case: whether juries must be expressly instructed that deliberations may only occur when all of them are present.

Nor does the polling of the jury alleviate the concern for shared deliberations. Nothing in the jury poll asks the jury whether any part of the

deliberations occurred without the presence of all 12 jurors. RP 1293-95. The jury poll merely assures that each juror agrees with the outcome. Id. It does not ask or guarantee that each juror was present for every aspect of deliberations. Id. Because nothing in the instructions to the jury guaranteed that the deliberations were entirely the collectively shared experience of all, the constitutional error is manifest and requires reversal of Matos-Ramos' conviction. Lamar, 180 Wn.2d at 585-86.

The State also claims Matos-Ramos has failed to show prejudice from the failure to properly instruct the jury and therefore this Court should refuse to consider the issue. Brief of Respondent at 46-47. But the burden is not on Matos-Ramos to prove actual prejudice. Instead, he need only show “[t]he asserted error had practical and identifiable consequences” in order to satisfy RAP 2.5(a)(3). Lamar 180 Wn.2d at 585. He has done so by noting his jury’s opportunity for deliberation that complied with the instructions received from the court, but which do not comply with the constitutional requirement for the deliberations to be the ““common experience”” of all the deliberating jurors. Id. (quoting People v. Collins, 17 Cal. 3d 687, 693, 552 P.2d 742 (1976)). Thereafter, the burden shifts to the State to prove the constitutional error was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588. The State has failed to meet its burden in this regard. Remand for a new trial is warranted.

3. APPELLATE COSTS SHOULD NOT BE IMPOSED.

Matos-Ramos asks this Court to deny appellate costs in the decision terminating review for two main reasons. First, appellate costs and the subsequently accruing interest are a substantial and onerous burden in comparison to trial level legal financial obligations. Second, imposing appellate costs based on speculation that indigency may end at some unknown point is patently unfair when the debt is accruing substantial interest in the mean time.

It is unknown at this time how much the appellate costs will be. However, in similar cases, the amount has run between \$4,000.00 and \$6,000.00. This is not a small debt. By comparison, the trial court only imposed \$600 in mandatory legal financial obligations. CP 58. The interest was not waived. CP 58. Because appellate costs become part of the judgment, interest will also accrue on appellate costs. See RCW 10.73.160(3).

Yet the State urges this Court to impose the appellate costs because some time in the future, Matos-Ramos may be able to surmount the combined disadvantages of his undisputed present indigency and felony conviction. Even assuming that eventuality should occur, it would almost certainly take years. During those years of struggle, Matos-Ramos' debt to the State of Washington, the price of his constitutional right to appeal his

conviction, would be accruing interest at the civil rate of 12 percent. Matos-Ramos reiterates his request that this Court exercise its discretion to deny any request by the State for costs on appeal.

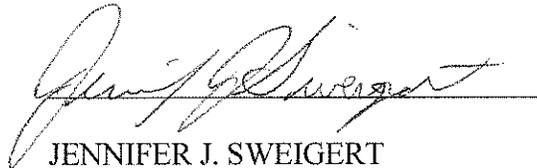
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Matos-Ramos requests this Court reverse his conviction.

DATED this 16<sup>th</sup> day of October, 2016.

Respectfully submitted,

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