

No. 33702-9-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

ROBERT M. CHICANO,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley

---

BRIEF OF APPELLANT

---

THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

FILED  
2006 MAY -14 PM 4:59

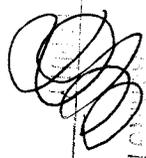
FILED  
COURT OF APPEALS  
USDC - 9 PM 12:47  
STATE OF WASHINGTON  
BY 

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 3

D. STATEMENT OF THE CASE ..... 4

E. ARGUMENT ..... 7

    1.    IN THE ABSENCE OF ANY EVIDENCE TO  
          THE CONTRARY, THE STATE FAILED TO  
          DISPROVE ROBBIE’S CLAIM OF SELF-  
          DEFENSE BEYOND A REASONABLE  
          DOUBT ..... 7

        a. The State bears the burden of proving each of the  
          essential elements of the charged offense beyond a  
          reasonable doubt. .... 7

        b. The State failed to disprove beyond a reasonable  
          doubt that Robbie acted in self-defense..... 8

        c. This Court must reverse and remand with  
          instructions to dismiss the conviction. .... 10

    2.    DEFENSE COUNSEL RENDERED  
          INEFFECTIVE ASSISTANCE IN FAILING TO  
          OBJECT TO THE EVIDENCE OF PRIOR  
          CONDUCT BETWEEN ROBBIE AND MR.  
          THOMPSON WHICH UNDERCUT ROBBIE’S  
          SELF-DEFENSE CLAIM ..... 11

        a. Robbie had the right to the effective assistance of  
          counsel..... 11

b. Ms. Oestreich's testimony regarding what Mr. Thompson told her about the fall 2003 incident was inadmissible hearsay. ....	13
c. The testimony about the fall 2003 incident between Robbie and Mr. Thompson was not admissible under ER 404(b).....	14
<i>i.</i> The evidence of the fall 2003 incident was not admissible as evidence of <i>res gestae</i> .....	15
<i>ii.</i> The evidence of the incident was not admissible as evidence of intent. ....	16
<i>iii.</i> The evidence of the 2003 incident was not admissible as evidence of motive.....	17
<i>iv.</i> The evidence of the prior incident was more prejudicial than probative requiring exclusion under ER 403. ....	18
d. Counsel's failure to object to the admission of the 2003 incident constituted deficient performance. ....	19
e. Robbie suffered prejudice from counsel's deficient performance and is entitled to a new trial. ....	22
F. CONCLUSION .....	24

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV ..... 7

U.S. Const. amend. VI..... 11, 12

### FEDERAL CASES

*Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63  
S.Ct. 236, 87 L.Ed.2d 268 (1942) ..... 11

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147  
L.Ed.2d 435 (2000) ..... 7

*Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530  
(1972) ..... 12

*Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1  
(1978) ..... 11

*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799  
(1963) ..... 11

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368  
(1970) ..... 7

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560  
(1979) ..... 8

*McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d  
763 (1970) ..... 12

*Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158  
(1932) ..... 11

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80  
L.Ed.2d 674 (1984) ..... 11, 12, 23

WASHINGTON CASES

*Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994) ..... 14

*State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984) ..... 8

*State v. Callahan*, 87 Wn.App. 925, 943 P.2d 676 (1997)..... 9

*State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989) ..... 21, 22, 23

*State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996)..... 10

*State v. Dawkins*, 71 Wn.App. 902, 863 P.2d 124 (1993)..... 19, 20

*State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950)..... 14

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 7

*State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 9

*State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996) ..... 8

*State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980)..... 16

*State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995) 13, 16, 17, 18

*State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982)..... 15

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 8

*State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982)..... 15, 17

*State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986) ..... 18

*State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981) ..... 15, 17

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) ..... 22, 23

*State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) ..... 8, 9

*State v. Walker*, 40 Wn.App. 658, 700 P.2d 1168, *review denied*,  
104 Wn.2d 1012 (1985) ..... 8

STATUTES

RCW 9A.16.020 .....8

RULES

ER 403 ..... ii, 18

ER 404 ..... passim

ER 801 ..... 13

TREATISES

Black's Law Dictionary (4th ed. 1968) ..... 17

Edward Cleary, *McCormick's Law Of Evidence* (2d ed. 1972) ..... 15

## A. SUMMARY OF ARGUMENT

In 2004, Robert Chicano (Robbie) was a senior at Aberdeen High School and dating schoolmate Justine Sturm. Ms. Sturm had previously dated Brad Thompson with whom Robbie had an amicable relationship. Once Robbie began dating Justine, Mr. Thompson became upset and began making threats to kill Robbie, both personally and in instant computer messaging. On November 30, 2004, Robbie entered the lunch room at school and encountered Mr. Thompson. Believing Mr. Thompson would follow through in his threats to harm him, Robbie pushed and then struck Mr. Thompson, causing Mr. Thompson to suffer a broken jaw. Robbie was charged with second degree assault and offered a defense of self-defense.

At trial the State was allowed to admit without defense objection testimony concerning an event occurring over one year prior to the date of the charged offense where Robbie "shoulder checked" Mr. Thompson. This prior incident would not have been admissible had defense counsel objected. Robbie was subsequently convicted as charged.

On appeal Robbie contends the State failed to disprove his claim of self-defense beyond a reasonable doubt and defense

counsel failed to render effective assistance of counsel when he did not object to the admission of the prior incident which cast doubt upon Robbie's self-defense claim.

**B. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence presented to support the jury's verdict.

2. The State failed to disprove beyond a reasonable doubt that Robbie acted in self-defense.

3. Defense counsel rendered ineffective assistance of counsel by failing to object to a prior encounter between Robbie and Mr. Thompson which occurred approximately one year before the charged assault.

4. Defense counsel rendered ineffective assistance in failing to object to the testimony of the victim, Brad Thompson, regarding a prior incident that occurred over a year before the charged incident.

5. Defense counsel rendered ineffective assistance of counsel in failing to object to the hearsay testimony of Christine Oestreich regarding an incident between Mr. Thompson and Mr. Chicano that occurred a year before the charged incident.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense beyond a reasonable doubt. In Washington, an act done in self-defense is a legal act and the State bears the burden of disproving self-defense beyond a reasonable doubt. Where Robbie provided ample proof he acted in response to the death threats made by Mr. Thompson and the State provided nothing to counter this proof, did the State disprove Robbie acted in self-defense beyond a reasonable doubt?

2. A criminal defendant has a constitutionally protected right to the effective assistance of counsel. An attorney is charged with knowing the rules of evidence. ER 404 bars evidence of prior acts of the defendant except in certain limited circumstances. Where the State was allowed to admit evidence of a prior incident involving Robbie and Mr. Thompson without defense objection, the incident occurred over one year before the date of the charged offense, and the incident was not otherwise admissible, did defense counsel fail to provide the effective assistance of counsel by failing to timely object to the admission of the inadmissible evidence of the prior incident?

#### D. STATEMENT OF THE CASE

In 2005, Robbie is attending college at the College of the Siskiyous in Northern California. RP 233. On November 30, 2004, Robbie was a senior at Aberdeen High School. RP 233. Robbie had known Brad Thompson since junior high school and had never had any problem with him. RP 233.

In September 2003, Robbie began dating Justine Sturm. RP 234. Justine had dated Mr. Thompson in junior high school. RP 213. Problems between Robbie and Mr. Thompson began almost immediately after Robbie began dating Justine. RP 234.

In January and February 2004, Justine received several instant computer messages from Mr. Thompson that she shared with Robbie. RP 219. In these messages Mr. Thompson threatened to kill Robbie. RP 224.

In September 2004, Robbie approached Mr. Thompson attempting to defuse their contentious relationship. RP 238. At the time Robbie was attending high school and Mr. Thompson was no longer attending school. RP 225. Mr. Thompson refused to discuss the matter and, while walking away, again threatened to kill Robbie. RP 238.

On November 30, 2004, Robbie and his friend, Seveye Trautman, went to Privatsky's for lunch. RP 239.<sup>1</sup> Robbie discovered Mr. Thompson was in the seat where Robbie always sat. RP 239. When Mr. Thompson saw Robbie, he stood up and turned his back, causing Robbie to think Mr. Thompson was reaching for a weapon. RP 239. When Robbie was sure Mr. Thompson was not armed, he pushed Mr. Thompson against the wall, threw him down onto the floor, then struck him several times. RP 241. Mr. Thompson gathered his belongings and left Privatsky's. RP 241. It was later determined Mr. Thompson had suffered a broken jaw. RP 171.

Robbie was charged with second degree assault. CP 1. During the subsequent jury trial, the State asked Mr. Thompson without objection about an incident which occurred in the fall 2003, over one year from the charged incident:

Q: Now I understand, that you – at some point you had a hernia operation?

A: Correct.

Q: When was that?

A: It was while I was still going to school. So I believe it was around wrestling season.

Q: Fall semester, 2003?

A: Right.

---

<sup>1</sup> Privatsky's was a lunch spot on the campus of Aberdeen High School.

Q: There was an incident in which you ran into – the defendant – you ran into him on campus?  
A: Correct.  
Q: And what happened?  
A: I was on my way to meet my mother in the parking lot to – for her to administer my medication for my pain and my anti-biotics [sic] and he was coming from weight lifting with Justine, and I attempted to avoid him but he walked straight towards me and shoulder checked me on my way and kept walking and called me a fag.  
Q: Did you tell your mother about it at that time?  
A: I did.

RP 99-100.

The prosecutor continued unabated and without defense objection asked Mr. Thompson's mother, Christine Oestreich about what he had told her about the 2003 incident:

Q: Do you recall a time when your son came to you and spoke to you about an incident that occurred between himself and the defendant?  
A: I do.  
Q: What did he tell you happened?  
A: It was his first day back to school and I was waiting for him in the parking lot and he approached the car shaking and visibly upset and said, did you see that, and I said no, and he said he was walking to his class and he crossed – he was outside, he crossed paths with Robbie Chicano who was walking with Justine Sturm. Robbie did a shoulder block on him, kind of went out of his path of travel to run into Brad with his shoulder and Brad of course was due for his pain pill so he was already uncomfortable and having his torso twisted after surgery.

RP 166.

Based upon Robbie's proffered defense, the court instructed the jury on self-defense. CP 76-77. The jury convicted Robbie as charged. CP 79.

E. ARGUMENT

1. IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY, THE STATE FAILED TO DISPROVE ROBBIE'S CLAIM OF SELF-DEFENSE BEYOND A REASONABLE DOUBT

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to disprove beyond a reasonable doubt that Robbie acted in self-defense. In Washington, self-defense is the use of lawful force. Lawful force is the degree of force necessary to protect oneself from potential or actual injury by another. RCW 9A.16.020(3). To make a prima facie case, the defendant must establish that there was a confrontation, not provoked by himself, from which a reasonable person would have perceived a danger of imminent bodily harm. *State v. Walker*, 40 Wn.App. 658, 662, 700 P.2d 1168, *review denied*, 104 Wn.2d 1012 (1985). Once the defendant presents a prima facie case, the burden shifts to the State to prove the absence of self-defense *beyond a reasonable doubt*. (Emphasis added.) *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984). The use of force may be justified by a subjective reasonable fear of imminent harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

To prove self-defense, the following elements must be met: “(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor.” *State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997) (citations omitted). The evidence of self-defense is assessed from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees, which incorporates both objective and subjective elements. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective element requires the trier of fact to stand in the shoes of the defendant and consider all the facts and circumstances known to him. *Walden*, 131 Wn.2d at 474. The objective element requires the trier of fact to use this information to determine what a reasonably prudent person similarly situated would have done. *Id.* “Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *Id.*

The evidence at trial amply supported Robbie’s self-defense claim. Justine Sturm testified about Mr. Thompson’s numerous

threats to kill Robbie and introduced instant messages from Mr. Thompson supporting her testimony. RP 216-17, 224. Robbie testified about Mr. Thompson's threats to kill him and testified about an incident in September 2004, where Robbie attempted to resolve the differences between the two and Mr. Thompson responded by again threatening to kill Robbie. RP 238. The State provided no counter evidence; no evidence of any threats by Robbie or any other evidence which proved Robbie did *not* act in self-defense, responding to Mr. Thompson's many threats to kill him. Given the overwhelming amount of evidence supporting Robbie's self-defense claim and the dearth of any evidence to the contrary, the State failed to disprove Robbie's self-defense claim beyond a reasonable doubt.

c. This Court must reverse and remand with instructions to dismiss the conviction. Since the State failed to disprove self-defense, there was insufficient evidence to support the conviction and this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the

prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. DEFENSE COUNSEL RENDERED  
INEFFECTIVE ASSISTANCE IN FAILING TO  
OBJECT TO THE EVIDENCE OF PRIOR  
CONDUCT BETWEEN ROBBIE AND MR.  
THOMPSON WHICH UNDERCUT ROBBIE'S  
SELF-DEFENSE CLAIM

a. Robbie had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment right to counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the right to have

counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

Defense counsel failed to challenge any aspect of the 2003 incident, failing to object to Ms. Oestreich's testimony as inadmissible hearsay, failing to object to the admission of the incident as inadmissible character evidence, and failing to argue the evidence of the 2003 incident was more prejudicial than

probative despite evidence that each of these grounds were viable. Further, since evidence of the 2003 incident was inadmissible, its admission undercut Robbie's self-defense claim resulting in prejudice to Robbie.

b. Ms. Oestreich's testimony regarding what Mr. Thompson told her about the fall 2003 incident was inadmissible hearsay. Ms. Oestreich did not witness the 2003 incident and testified solely about what her son told her about the incident. This testimony was inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence for the truth of the matter asserted." ER 801(c). Where a witness testifies on the basis of his or her personal observations, those statements are not hearsay. *State v. Powell*, 126 Wn.2d 244, 265, 893 P.2d 615 (1995). Ms. Oestreich's testimony was based not on her own observations but what Mr. Thompson told her. In addition, her testimony was admitted for the truth of what Mr. Thompson said, otherwise the testimony was not relevant to the action at hand. Ms. Oestreich's testimony was hearsay.

It may be argued Mr. Thompson's statements to Ms. Oestreich fell within the excited utterance hearsay exception.

Under this exception, a hearsay statement is admissible where the declarant is still under the influence of an exciting or stressful event. *Id.* But, according to Ms. Oestreich's testimony, the stressful event Mr. Thompson was under was not the "shoulder block" Robbie gave Mr. Thompson, but Mr. Thompson's pain as a result of his recent hernia surgery, a fact which there was no evidence Robbie was even aware of. RP 165-66. Failing to fall within a hearsay exception, Ms. Oestreich's hearsay testimony about the 2003 incident was not admissible and should have been excluded.

c. The testimony about the fall 2003 incident between Robbie and Mr. Thompson was not admissible under ER 404(b).

Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show the defendant acted in conformity therewith. ER 404(b); *Carson v. Fine*, 123 Wn.2d 206, 221, 867 P.2d 610 (1994). However, when demonstrated, such evidence may 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); *see also State v. Goebel*, 36 Wn.2d 367, 369, 218 P.2d 300 (1950) (establishing exceptions). If admitted for other purposes, a trial court must identify that purpose and determine whether the

evidence is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); *State v. Tharp*, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. *Saltarelli*, at 362-63.

*i. The evidence of the fall 2003 incident was not admissible as evidence of res gestae.* Under the *res gestae* doctrine, ER 404(b) evidence is admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), *quoting* Edward Cleary, *McCormick’s Law Of Evidence* § 190, at 448 (2d ed. 1972), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981). To be admissible under the *res gestae* exception, each incident must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Tharp*, 96 Wn.2d at 594.

Under the *res gestae* exception, the evidence of other bad acts is admissible “to complete the story of the crime on trial by proving its *immediate* context of happenings *near in time and place*.”

(Emphasis added.) *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (finding acts occurring two days before charged offense admissible as *res gestae*).

Here the incident occurred more than one year prior to the charged offense. Thus, it was not near in time as required under the *res gestae* exception. *Powell*, 126 Wn.2d at 263. Further, the evidence showed this to be an isolated event; there was no evidence of any further interaction between Mr. Thompson and Robbie until the charged offense. Thus, the evidence of the 2003 incident did nothing to place the charged offense in any context other than improperly implying propensity, Robbie did it once before so he must have done it this time, which ER 404(a) specifically prohibits.

*ii. The evidence of the incident was not admissible as evidence of intent.* ER 404(b) provides that prior acts may be admitted where it is necessary to prove among other things, intent. Prior disputes or quarrels may be admissible to prove the defendant's intent. *State v. Parr*, 93 Wn.2d 95, 102, 606 P.2d 263 (1980).

However, to admit prior misconduct evidence, it must be *necessary* to prove a material issue. Therefore, prior misconduct evidence is only necessary to prove

intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent.

*Powell*, 126 Wn.2d at 262, citing *Saltarelli*, 98 Wn.2d at 365-66.

Here intent was never at issue. Robbie admitted pushing and striking Mr. Thompson but contended it was done in self-defense. As a consequence, the evidence of the 2003 shoulder check was not admissible under ER 404(b) to prove intent where intent was simply not at issue. *Powell*, 126 Wn.2d at 262 (prior misconduct evidence improperly admitted for intent where intent not a disputed issue).

*iii. The evidence of the 2003 incident was not admissible as evidence of motive.* The Washington Supreme Court has defined motive as: "Cause or reason that moves the will. . . . An inducement, or that which leads or tempts the mind to indulge a criminal act." *Tharp*, 96 Wn.2d at 597, quoting Black's Law Dictionary 1164 (4th ed. 1968). Evidence of prior threats or quarrels may be probative of motive where motive is of consequence to the action. *Powell*, 126 Wn.2d at 260. Motive can be demonstrated by any impulse, desire, or other moving power which causes a person to act. *Id* at 259. The evidence, however, must also be of consequence to the current action. *Id* at 260.

There was no evidence presented that Robbie threatened Mr. Thompson at any time prior to the charged incident: in fact the only threats presented were the numerous threats by Mr. Thompson to kill Robbie. In the absence of any prior threats, the evidence of the 2003 incident fails to prove Robbie acted with any motivation other than his fear of Mr. Thompson. The evidence of the shoulder check fails to provide a motivation for the charged incident, it is merely propensity evidence – Robbie did it once before so he must have done it this time. This would be an improper basis for admission of the prior incident under ER 404(b).

*iv. The evidence of the prior incident was more prejudicial than probative requiring exclusion under ER 403.*

Assuming that the evidence from the 2003 incident was admissible under ER 404(b), the evidence must still be excluded where its probative value is substantially outweighed by the danger of undue prejudice to Robbie. ER 403. “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Powell*, 126 Wn.2d at 264. “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” *Id*, citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The evidence of the 2003 shoulder check was likely to provoke an emotional response in the jury rather than a rational decision. The evidence of the incident was intertwined with evidence Mr. Thompson had just undergone hernia surgery and the shoulder check caused him substantial pain. But there was no evidence that Robbie was aware of the fact that Mr. Thompson had recently had the surgery and was still suffering its after effects, thus the sole reason the evidence was admitted was to invoke sympathy for Mr. Thompson and paint Robbie as a bad person. Provoking the jury to reach this emotional response would have rendered the evidence unduly prejudicial.

d. Counsel's failure to object to the admission of the 2003 incident constituted deficient performance. Counsel's failure to object to the evidence of the 2003 incident constituted deficient performance under *Strickland*. Two cases from different divisions of this Court illustrate that a failure to object by defense counsel is deficient performance.

In *State v. Dawkins*, this Court found the trial court did not abuse its discretion when it granted a new trial after finding defense counsel's trial performance constituted ineffective assistance. 71 Wn.App. 902, 863 P.2d 124 (1993). Mr. Dawkins was charged with

two counts of second degree child molestation. The State moved to admit at trial two incidents of uncharged sexual contact with the two victims. Mr. Dawkins' counsel failed to object to the admission of these two uncharged incidents either pretrial or at trial. *Dawkins*, 71 Wn.App. at 904-05. Following Mr. Dawkins' conviction, the trial court *sua sponte* raised the issue of the incompetence of defense counsel for failing to object to the admission of the two uncharged incidents. *Id* at 906. Counsel countered he believed the uncharged incidents would have been admissible under a lustful disposition theory, and he chose not to challenge the admission of the evidence after discussion with Mr. Dawkins. *Id*. The trial court appointed new counsel, who moved for a new trial based upon ineffective assistance of counsel. *Id*. The trial court granted a new trial, finding the evidence of the two uncharged incidents would have been excluded had counsel objected because their prejudicial effect outweighed their probative value. *Id*.

The State appealed the court's ruling and this Court affirmed the trial court. *Dawkins*, 71 Wn.App. at 911. This Court concurred in the trial court's analysis that counsel's failure to object constituted deficient performance and Mr. Dawkins suffered

prejudice from the deficient performance as the outcome of the trial probably would have been different. *Id* at 909-11.

A similar result was reached by Division One in *State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989). Mr. Carter was originally charged with first degree robbery, but following his jury trial, a mistrial was declared because of a deadlocked jury. *Id* at 218. The State was then allowed without objection to amend the charge to first degree assault. *Id*. Mr. Carter was subsequently convicted of first degree assault. *Id*. For the first time on appeal, Mr. Carter alleged ineffective assistance of counsel for failing to object to the amendment of the information on mandatory joinder grounds under CrR 4.3. *Id*. The State conceded that the two offenses resulted from the same conduct. *Id* at 219. Division One found counsel's performance to be deficient in light of the fact an objection to the amendment would have been sustained under CrR 4.3. *Id* at 224 ("Carter's showing that counsel failed to bring a motion to dismiss for failure to join the assault charge in the first trial was sufficient to demonstrate that counsel's representation was not sufficient."). The Court also ruled counsel's deficient performance prejudiced Mr. Carter:

Had counsel made the motion to dismiss, unless the prosecution could come up with better reasons for its decision not to originally charge the assault, as it had all the facts and evidence at hand at that time, the motion would have been granted as a matter of law.

*Carter*, 56 Wn.App. at 225.

Here, similar to counsel in *Dawkins* and *Carter* counsel, for unknown reasons, failed to object to the admission of the 2003 incident. As in *Carter*, this could not be termed a tactical decision or trial strategy, since the admission of the prior incident undercut the self-defense claim and made it more likely than not Robbie would be convicted. Thus there was no advantage to be gained by counsel not objecting. Counsel's failure to object to the admission of the evidence of the 2003 incident constituted deficient performance in light of the fact the evidence was inadmissible and would have been excluded.

e. Robbie suffered prejudice from counsel's deficient performance and is entitled to a new trial. "Prejudice resulting from ineffective representation is established when the defendant shows there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceeding would have been different." *Carter*, 56 Wn.App. at 224, *citing State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "It is not necessary that a

defendant 'show that counsel's deficient conduct more likely than not altered the outcome of the case,'" only that there was a reasonable probability that the outcome would have been different absent counsel's deficient performance. *Id*, quoting *Strickland*, 466 U.S. at 693.

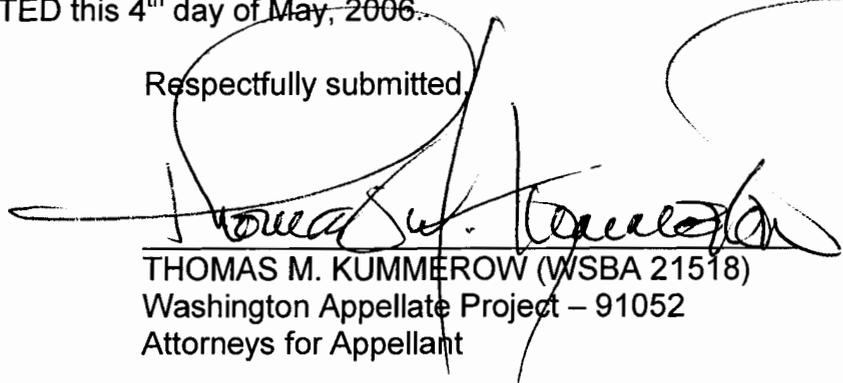
Robbie's defense at trial was self-defense. The evidence of the shoulder check by Robbie on Mr. Thompson severely undercut the argument that Robbie was fearful of Mr. Thompson at Privatsky's on the day of the charged incident. Since defense counsel was charged with knowing the Rules of Court, had defense counsel made an objection to Mr. Thompson's and Ms. Oestreich's testimony regarding the 2003 incident, which the court would have been obligated to sustain as the evidence of the prior incident was inadmissible, there was a reasonable probability the outcome of the trial would have been different, that Robbie's conduct would have been seen as lawful. *Thomas*, 109 Wn.2d at 226. Counsel's deficient performance denied Robbie a proper defense and severely prejudiced him at trial. Robbie is entitled to a new trial for ineffective assistance of his attorney at trial. *Carter*, 56 Wn.App. at 225-26.

F. CONCLUSION

For the reasons stated, Robbie submits this Court must either reverse his conviction with instructions to dismiss or reverse and remand for a new trial.

DATED this 4<sup>th</sup> day of May, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", is written over a horizontal line. The signature is stylized and somewhat cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 33702-9-II
	)	
ROBERT CHICANO,	)	
	)	
APPELLANT.	)	

---

**DECLARATION OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 4<sup>TH</sup> DAY OF MAY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THIS **STATEMENT OF ARRANGEMENTS** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> GERALD FULLER, DPA<br>GRAYS HARBOR CO. PROSECUTOR'S OFFICE<br>102 W. BROADWAY AVENUE, ROOM 102<br>MONTESANO, WA 98563-3621 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> ROBERT CHICANO<br>COLLEGE OF SISKIYOU'S RESIDENCE HALL<br>800 COLLEGE AVENUE<br>WEED, CA 96094                             | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF MAY, 2006.

x \_\_\_\_\_ *aml*