Nº. 34353-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

WILLIAM L. MATTHEWS,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 03-1-04443-3
The Honorable Bryan Chushcoff, Presiding Judge

Reed Speir
WSBA No. 36270
Attorney for Appellant
3800 Bridgeport Way W., Ste. A #23
(253) 722-9767

ORIGINAL

TABLE OF CONTENTS

Page

A. **ASSIGNMENTS OF ERROR** 1

B. **ISSUES PRESENTED**

1. Is there sufficient evidence to support a conviction for first degree assault where the State failed to present evidence which proves beyond a reasonable doubt that the force used by the defendant was likely to produce great bodily harm or death? 1

2. Does a defendant receive a fair trial where a witness spontaneously gives inadmissible and highly prejudicial 404(b) evidence and the judge overrules defense counsel's objection to such testimony? 1

C. **STATEMENT OF THE CASE** 1

D. **ARGUMENT**

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Matthews assaulted Ms. Wilson with force or means likely to produce great bodily harm or death 8

2. Ms. Hicks' testimony that she threw Mr. Matthews out of the bar because she knew he had beat up Ms. Wilson previously deprived Mr. Matthews of his right to a fair trial 10

   a. Introduction of Ms. Hicks' statement is a serious irregularity 11

   b. Ms. Hicks' statement was not cumulative of other evidence 13

c. *Whether or not the irregularity could have been cured by an instruction to the jury is irrelevant because the trial court declined to give one* 13

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).....11

State v. Escalona, 49 Wn.App. 251, 742 P.2d 190 (1987) 10

State v. Freeburg, 105 Wn.App. 492, 20 P.3d 984 (2001) 11, 12

State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998).....12

State v. Post, 59 Wn.App. 389, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992).....10

State v. Zakel, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992).....8

Other Authorities

ER 404.....11

RCW 9A. 36.011 8

RCW 9A.04.110 9

Webster's New College Dictionary 9

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Matthews of committing first degree assault against Ms. Wilson.

2. A trial irregularity deprived Mr. Matthews of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is there sufficient evidence to support a conviction for first degree assault where the State failed to present evidence which proves beyond a reasonable doubt that the force used by the defendant was likely to produce great bodily harm or death?

2. Does a defendant receive a fair trial where a witness spontaneously gives inadmissible and highly prejudicial 404(b) evidence and the judge overrules defense counsel's objection to such testimony?

C. STATEMENT OF THE CASE

Factual and Procedural Background

Angela Hicks, the manager of the Goldenwest Saloon, was a friend of Ms. Wanda Wilson. RP 114-116. On an evening shortly prior to August 4, 2005, Mr. Matthews had gone to the Saloon looking for Ms. Wilson and Ms. Hicks refused to serve him and told him to leave because he was there to cause trouble. RP 119-120. Mr. Matthews became upset, swore at Ms. Hicks, insulted her, and left the bar. RP 120-121.

In August of 2005, Ms. Wilson was dating Mr. Matthews. RP 116. In the evening of August 4, 2005, Ms. Wilson was present at the Goldenwest Saloon. RP 117-118. After the bar closed, Ms. Wilson, Ms.

Hicks, and Erik Fanshier went back to Ms. Hicks' home to spend time with Mr. Fanshier before he caught an early morning flight on August 5, 2005. RP 121.

While at Ms. Hicks' house, Ms. Wilson received phone calls on Ms. Hicks' phone from Mr. Matthews. RP 123, 142. Mr. Matthews did not want Ms. Wilson to be at Ms. Hicks' home. RP 238. Mr. Matthews told Ms. Wilson that she should have been home already. RP 239. At one point Ms. Wilson gave the phone to Mr. Fanshier. RP 142. When Mr. Fanshier spoke to Mr. Matthews on the phone, Mr. Fanshier was the one talking and he "started cussing and just going off." RP 142. Mr. Fanshier was swearing at Mr. Matthews and "really pissed him off." RP 142. Shortly after Mr. Fanshier got off the phone with Mr. Matthews, Ms. Wilson left. RP 142-143. Ms. Wilson left about 30 minutes after she arrived. RP 124. After Ms. Wilson left, Mr. Matthews called Ms. Hicks' house several times during the night of August 4, 2005. RP 124-125. Mr. Matthews began yelling at Ms. Wilson and Mr. Fanshier also spoke to Mr. Matthews on the phone. RP 125. Mr. Matthews told Ms. Hicks that he was coming over to her house with a gun. RP 133.

When Ms. Wilson got back to her apartment, Mr. Matthews was waiting for her there. RP 241. Mr. Matthews was upset. RP 241. Mr.

Matthews pulled Ms. Wilson back to her car and made her show him where Ms. Hicks lived. RP 243-244.

Mr. Matthews drove while Ms. Wilson told him how to get to Ms. Hicks' house. RP 246. As the car approached Ms. Hicks' house Mr. Matthews turned the headlights off and drove slowly. RP 247. When the car was in front of Ms. Hicks' home, Mr. Matthews had Ms. Wilson call Ms. Hicks and Ms. Wilson told Ms. Hicks that she was outside the house. RP 250. Mr. Matthews pointed a gun up in the air and shot it. RP 248. Ms. Wilson did not know where Mr. Matthews got the gun prior to his shooting it, and did not even know he had a gun. RP 248, 311.

30-45 minutes after Ms. Wilson left Ms. Hicks' home, Ms. Wilson called Ms. Hicks crying and upset and said "we are outside." RP 127-128. Ms. Hicks went to her door, opened it, and saw Ms. Wilson's car driving around the corner with the headlights off. RP 128. Ms. Hicks could not see who was in the car but she heard two gunshots and fell down to the ground. RP 128. Ms. Hicks testified that when she fell to the ground she was afraid of being shot. RP 128. Ms. Hicks called the police. RP 128-129. Ms. Wilson heard Ms. Hicks heard Ms. Wilson's car drive away. RP 129. When the police were at Ms. Hicks' home, Mr. Matthews called on the telephone and asked Ms. Hicks, "Are you scared now, bitch?" RP 198.

Ms. Hicks had only ever heard gunshots on TV prior to that night. RP 131. At the time the shots were fired it was dark outside and it wasn't possible to see anything. RP 144. Ms. Hicks did not see who fired the shots, could not tell if the shots were fired from the driver's or passenger's side of the car, did not see a window rolled down in the car, and didn't see a flash from a gun. RP 132. Mr. Fanshier also never saw the gun that fired the shots or a flash from a gun. RP 155. No bullets hit Ms. Hicks' house. RP 133, 161.

After the shooting, Mr. Matthews and Ms. Wilson drove back to Ms. Wilson's apartment where Ms. Wilson got out and Mr. Matthews left. RP 251.

The police came to Ms. Wilson's apartment later. RP 252. Ms. Wilson told the police about the incident but she did not give the police Mr. Matthews' name. RP 253-254. Ms. Wilson told the police that the man who did the shooting was William Sanders. RP 254-255.

On August 11, 2005, Ms. Wilson went out with friends to bars and clubs in Tacoma and Federal Way. RP 261-262. Ms. Wilson returned home at 4:00 in the morning. RP 263. Mr. Matthews was at Ms. Wilson's apartment when she arrived. RP 263. Mr. Matthews and Ms. Wilson fought. RP 265. Mr. Matthews hit Ms. Wilson in the face with his hand and he hit her with the cord to a phone charger. RP 265-266. Ms. Wilson

was beaten for about an hour. RP 268. As Ms. Wilson was beaten, Mr. Matthews asked her if she "liked it." RP 268. Mr. Matthews hit Ms. Wilson in the head and caused damage to her eardrums and lacerations to her head. RP 272. Eventually Ms. Wilson was able to run out of the apartment and drove to her mother's house. RP 272.

One of Ms. Wilson's parents called Detective Miller and Detective Miller called 911 and an ambulance transported Ms. Wilson to St. Clare Hospital. RP 273-274, 503. Ms. Wilson told Det. Miller that Mr. Matthews had beaten her. RP 274-275, 502. After the beating on August 11, 2005, and at the time of trial on January 9, 2006, Ms. Wilson had trouble hearing out of her left ear. RP 276-277. The marks on Ms. Wilson's legs from the cord had almost fully healed by the time of trial, but Ms. Wilson still had some marks on her arms. RP 277. Ms. Wilson's injuries were not life threatening. RP 425.

On August 12, 2005, Det. Miller obtained Ms. Wilson's consent to search her apartment. RP 504-505. When Det. Miller searched the apartment he discovered Mr. Matthews asleep in the bedroom. RP 506.

On December 13, 2005, Mr. Matthews was charged with one count of assault in the second degree with a handgun against Ms. Hicks on August 5, 2005, one count of kidnapping in the first degree against Ms. Wilson on August 5, 2005, one count of unlawful possession of a firearm

on August 5, 2005, and one count of assault in the first degree against Ms. Wilson on August 11, 2005. CP 23-25.

On December 14, 2004, pre-trial, the court heard argument regarding the admissibility of evidence relating to prior acts of domestic violence by Mr. Matthews against Ms. Wilson. RP 18-38. The State sought to introduce evidence of Mr. Matthew's past abuse of Ms. Wilson in order to explain why Ms. Wilson initially gave police the wrong name in relation to the shooting outside of Ms. Hicks' home. RP 20-23. The trial court denied the State's motion to introduce the testimony, but held that should the door be opened by the defense, the State could introduce the evidence. RP 38.

On January 5, 2005, defense counsel brought a motion under ER 404(b) to bar testimony by Mr. Fanshier that he knew Mr. Matthews because he saw Mr. Matthews get thrown out of the Goldenwest Saloon. RP 79-80. As part of an offer of proof regarding this issue, the State presented the testimony of Ms. Hicks. RP 88-94. During the course of Ms. Hicks' testimony, she revealed for the first time that she had kicked Mr. Matthews out of the saloon because she knew he had beat up Ms. Wilson previously. RP 94, 101, 103. After Ms. Hicks was excused, the prosecutor informed the State that he was not seeking to introduce the fact that Ms. Wilson had told Ms. Hicks that Mr. Matthews had assaulted her

or that the reason Ms. Hicks asked Mr. Matthews to leave the saloon was because he had assaulted Ms. Wilson. RP 95. The prosecutor told the court that he was only going to seek to introduce the fact that Ms. Hicks asked Mr. Matthews to leave the bar as evidence of Mr. Matthews' motive. RP 95. Defense counsel objected to the introduction of Ms. Hicks' testimony that she knew Mr. Matthews had previously beat up Ms. Wilson on grounds that it violated ER 404(b). RP 95-98. The trial court ruled that the evidence was admissible because it explained the animosity between Ms. Hicks and Mr. Matthews. RP 104.

Defense counsel then made a motion to sever the charges involving Ms. Hicks from the other charges because Ms. Hicks' testimony regarding her knowledge that Mr. Matthews had previously assaulted Ms. Wilson would be inadmissible propensity evidence under ER 404(b). RP 104-105. The trial court denied the motion to sever and held that Ms. Hicks' statements were admissible under ER 404(b) as evidence of Mr. Matthews' motive for shooting outside of Ms. Hicks' home. RP 106-107.

Jury trial began on January 5, 2006. RP 114. When she testified, Ms. Hicks voluntarily informed the jury that the reason she had thrown Mr. Matthews out of the saloon was because he had previously assaulted Ms. Wilson. RP 120. Defense counsel objected but the trial court overruled the objection. RP 120.

On January 17, 2006, the jury found Mr. Matthews guilty of second degree assault against Ms. Hicks, guilty of unlawful imprisonment of Ms. Wilson, guilty of unlawful possession of a firearm, and guilty of first degree assault. CP 129-133. The jury also found that Mr. Matthews was armed with a firearm during the assault of Ms. Hicks and unlawful imprisonment of Ms. Wilson. CP 135-136.

Notice of appeal was timely filed on January 27, 2006.

D. ARGUMENT

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Matthews assaulted Ms. Wilson with force or means likely to produce great bodily harm or death

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

Mr. Matthews was charged with violating RCW 9A.36.011(1)(a). RCW 9A. 36.011(1)(a) states, in pertinent part: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily

harm...assaults another ... by any force or means *likely* to produce great bodily harm or death" (emphasis added).

RCW 9A.04.110(4)(c) defines "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

Counsel for Mr. Matthews was unable to find either a statutory definition or a dictionary definition set out in a Washington case. Webster's New College Dictionary defines "likely" as "probable" or "reasonably to be expected." *Webster's New College Dictionary*, p. 831 (Wiley Publishing, Inc., Cleveland, Ohio 2005).

The State argued that the force or means used by Mr. Matthews in assaulting Ms. Wilson which was likely to produce great bodily harm or death was his hitting her in the head with his fist or foot and whipping her with an electrical cord. RP 608-609. However, the only evidence presented by the State regarding the likelihood that the force used by Mr. Matthews was likely to cause great bodily harm or death was the testimony of Dr. Cowan that a properly placed blow to the head *can* cause life threatening injuries or death. RP 415. No evidence was presented which might lead to an inference that a blow to the head could reasonably be expected to cause great bodily harm or death.

The fact that a blow to the head *can* produce great bodily harm is does not mean not that a blow to the head is *likely* to produce great bodily harm. In fact, Dr. Cowan testified that the injuries suffered by Ms. Wilson were not life threatening injuries. RP 425. Neither the direct nor the circumstantial evidence presented by the State was sufficient to establish beyond a reasonable doubt that Mr. Matthews assaulted Ms. Wilson using force or means likely to produce great bodily harm or death.

2. Ms. Hicks' testimony that she threw Mr. Matthews out of the bar because she knew he had previously beat up Ms. Wilson deprived Mr. Matthews of his right to a fair trial

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing examine the following factors:

> (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

Here, the trial irregularity was Ms. Hicks' spontaneous revelation on the witness stand that she had thrown Mr. Matthews out of the saloon because he had previously assaulted Ms. Wilson. RP 120. This irregularity was compounded by the trial court's denial of defense counsel's objection following Ms. Hicks' statement. RP 120.

a. Introduction of Ms. Hicks' statement is a serious irregularity

ER 404(b)provides,

> (b) Other Crimes, Wrongs, or Acts. Evidence 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.

The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition: the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Admissibility of evidence under ER 404(b) requires a three-part analysis. *State v. Freeburg*, 105 Wn.App. 492, 497, 20 P.3d 984 (2001).

The court must identify the purpose for which the evidence will be admitted; the evidence must be materially relevant to that purpose; and the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. *Freeburg*, 105 Wn.App. at 497 (citing *State v. Saltarelli*, 98 Wn.2d 358, 362-66, 655 P.2d 697 (1982)). A trial court must balance the probative and prejudicial value of the evidence on the record. *State v. Acosta*, 123 Wn.App. 424, 433, 98 P.3d 503 (2004). Where ER 404(b) is implicated, the trial court must identify on the record the purpose for which other crimes or misconduct are admitted. *State v. Acosta*, 123 Wn.App. 424, 433, 98 P.3d 503 (2004).

The State must establish the existence of the prior act and the defendant's connection with that act by a preponderance of the evidence. *State v. Norlin*, 134 Wn.2d 570, 577-78, 951 P.2d 1131 (1998).

Here, evidence of a prior bad act of Mr. Matthews was admitted without any of the necessary and required legal procedural safeguards. No balancing was performed by the court, the purpose for the admission of the evidence was not identified, and the state never proved by a preponderance that Mr. Matthews had previously assaulted Ms. Wilson. Further, this error was compounded by the trial court overruling defense counsel's timely objection to this testimony.

The evidence that Mr. Matthews had previously assaulted Ms. Wilson is highly prejudicial because it would lead the jury to draw the inference that Mr. Matthews is a violent man and therefore more likely to have committed all the crimes charged,

b. Ms. Hicks' statement was not cumulative of other evidence

No other evidence was offered regarding any previous assaults by Mr. Matthews on Ms. Wilson. Ms. Wilson testified that she lied to the police "out of fear probably," but she never identified what she was afraid of. RP 253-254. Ms. Wilson testified that she lied to police because she didn't want to get Mr. Matthews in trouble because she was in love with Mr. Matthews. RP 254. Ms. Hicks was the only source of any evidence that Mr. Matthews had assaulted Ms. Wilson on any date other than August 5 or 11, 2004.

c. Whether or not the irregularity could have been cured by an instruction to the jury is irrelevant because the trial court declined to give one

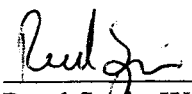
When defense counsel objected to Ms. Hicks' testimony the trial court overruled the objection. No opportunity was presented for defense counsel to request an instruction, rendering the question of whether or not this irregularity could have been cured by an instruction moot.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Matthew's convictions and remand for a new trial without evidence relating to any prior assaults by Mr. Matthews against Ms. Wilson. Alternatively, this court should vacate Mr. Matthews' conviction for first degree assault.

DATED this 24th day of July, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of July, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. William Matthews DOC# 851004
Clallam Bay Corrections Ctr.
1830 Eagle Crest Way
Clallam bay, WA 98326-9723

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 24th day of July, 2006.

Reed Speir, WSBA No. 36270

FILED
COURT OF APPEALS
06 JUL 24 PM 1:24
STATE OF WASHINGTON
BY
DEPUTY