

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR - 8 PM 4:53

No. 35753-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

WALLACE W. GILPIN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR 10 PM 1:49
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable David E. Foscue

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING THE
EVIDENCE OF THE PRIOR UNCHARGED
INCIDENT INVOLVING A KNIFE RENDERING MR.
GILPIN'S TRIAL CONSTITUTIONALLY UNFAIR

While arguably admissible as evidence of a lustful disposition, Mr. Gilpin contended admission of the evidence of a prior uncharged incident involving A.S. where Mr. Gilpin allegedly used a knife was erroneously admitted as it was more prejudicial than probative. Specifically, Mr. Gilpin contended that there was no other evidence of use of a knife, and the evidence of the use in this incident was scant at best. In response, the State contended initially that Mr. Gilpin failed to object and the issue was therefore waived. Secondly, the State contended the trial court properly admitted the evidence as evidence of lustful disposition. Glaringly omitted from the State's response is any mention of the knife. Further, the State failed in any way to address Mr. Gilpin's arguments concerning the knife, responding only generally to the admission of a prior uncharged sexual incident between Mr. Gilpin and A.S.

1. The trial court's ruling was not tentative but a final ruling on the *in limine* motion. The contended the trial court's ruling was not final but tentative in that the court left the door open to reconsideration. The trial court's ruling consisted of the following:

I am ruling it admissible. As I say, there may be something about it that I don't know that you might want to ask that I preclude, but I don't have any idea what that would be. Generally it's admissible.

1RP 147-50 (emphasis added).

There is nothing tentative about the court's ruling. The court was clear that the evidence was admissible, period.

But, to the extent this court finds defense counsel did fail to object, counsel was ineffective for the reasons stated in the Brief of Appellant. Had defense counsel objected to the prior incident involving the knife the court would have been compelled to exclude it. Although the evidence of the prior incident may have been relevant as evidence of lustful disposition, the evidence of the knife was irrelevant as the charged rape offenses did not involve the use of a knife by Mr. Gilpin. The resulting prejudice suffered by Mr. Gilpin from the admission of the knife evidence was substantial and outweighed any probative value. The evidence painted Mr. Gilpin as a violent man who could not help himself and therefore was less

credible than A.S. The error was compounded when the counsel failed to request a limiting instruction, and the court failed to so instruct the jury.

2. The evidence was more prejudicial than probative. To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court here found the evidence admissible but did not engage in the required balancing of the probative value of the evidence against its prejudice. While the failure to engage in the balancing is not necessarily reversible error, the trial court's failure here was critical as the admission of the evidence substantially prejudiced Mr. Gilpin to the point he was denied a fair trial.

As stated in the Brief of Appellant, testimony about weapons unrelated to the charged crime is irrelevant and unfairly prejudicial. *State v. Freeburg*, 105 Wn.App. 492, 20 P.3d 984 (2001). The State made no effort to distinguish *Freeburg* or even mention the

prejudice that was suffered from the admission of the evidence of the knife which was unrelated to the uncharged prior incident. See *State v. Oughton*, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980) (evidence of a knife totally unrelated to the murder knife found to be of highly questionable relevance; reversed and remanded on other grounds).

The prejudice suffered by Mr. Gilpin from the admission of the evidence concerning the knife was that there was no evidence that any of the charged incidents involved the use of a knife. The two charged incidents of second degree rape, one event occurring on February 25, 2005, for which Mr. Gilpin was acquitted, and one event occurring February 28, 2005, involved threats by Mr. Gilpin to bind A.S. unless she voluntarily acquiesced to intercourse. CP 2-3; 2RP 84-89.

Further, admission of the evidence was not harmless. Contrary to the State's argument, had the court fulfilled its mandatory on-the-record duty of weighing the prejudicial impact of this evidence regarding Mr. Gilpin's alleged use of the knife to the jury against its minimal probative value it would have excluded this evidence of the Thanksgiving 2003 incident. The evidence of the Thanksgiving 2003 incident was cumulative to the evidence

concerning the charged incidents as well as numerous other uncharged prior incidents of oral sex and intercourse by A.S. and Mr. Gilpin. 2RP 72-74, 76. Thus, the court erred in failing to perform the mandatory weighing under ER 403 and exclude evidence of the Thanksgiving 2003 incident.

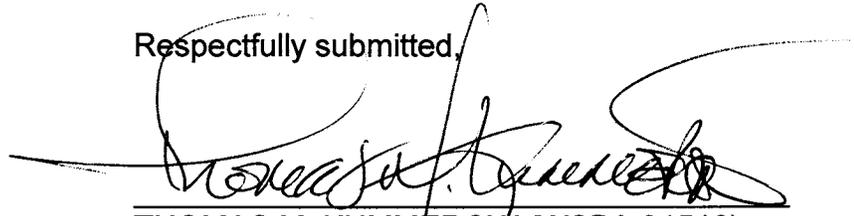
The critical issue in this case was the credibility of A.S. as there as no physical evidence regarding the charged rape incidents which were ultimately based solely on her testimony. The jury was clearly concerned about A.S.'s credibility as evidenced by its rejection of her claim that Mr. Gilpin raped her on February 25, 2005, as charged in count two. CP 2, 51-52. Given this concern on the jury's part, it is impossible for the State to prove beyond a reasonable doubt that the evidence of the prior incident involving the knife did not contribute to the jury's verdict regarding count three. *Freeburg*, 105 Wn.App. at 501. This is especially so given the court's failure to give a limiting instruction. *Id.* The error was not harmless and Mr. Gilpin's conviction for rape as charged in count three must be reversed.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and the instant reply brief, Mr. Gilpin submits this Court must reverse his convictions and remand for a new trial.

DATED this 8th day of April 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', written over a horizontal line.

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

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DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 8TH DAY OF APRIL, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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300970	()	HAND DELIVERY
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ABERDEEN, WA 98520		

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF APRIL, 2008.

X _____ 

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