

NO. 37374-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

OSADEBE ANENE,

Appellant.

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DIVISION II
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger A. Bennett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting prior misconduct evidence which failed to establish a common scheme or plan.

2. The trial court's failure to order a competency evaluation denied appellant due process.

Issues pertaining to assignments of error

1. Appellant was charged with raping and molesting his daughter. Over defense objection, the court admitted allegations from appellant's older daughter that he had molested her numerous times. The court also admitted allegations of domestic violence by appellant against his wife, to explain the older daughter's delay in reporting sexual abuse. Where the state failed to prove that the alleged prior misconduct was substantially similar to the charged conduct, did the trial court erroneously admit this propensity evidence?

2. On the third day of trial the court was informed that appellant had ingested an overdose of medication, he was comatose, and it was uncertain whether he would recover. In light of the apparent suicide attempt, defense counsel argued that appellant's competency to stand trial was in issue. Without addressing appellant's competency, the court found appellant was voluntarily absent and proceeded with the trial. Where there

was reason to question appellant's competency to stand trial, did the court's failure to order an evaluation deny appellant due process?

B. STATEMENT OF THE CASE

1. Procedural History

On November 22, 2006, the Clark County Prosecuting Attorney charged appellant Osadebe Anene with one count of first degree child molestation. CP 1; RCW 9A.44.083. The information was later amended to add one count of first degree rape of a child and a second count of first degree child molestation. CP 8-9; RCW 9A.44.073. The case proceeded to jury trial before the Honorable Roger A. Bennett, and the jury returned guilty verdicts. CP 98-100. The court imposed standard range sentences, and Anene filed this timely appeal. CP 119, 131.

2. Substantive Facts

a. Facts relating to the charged offenses

Osadebe Anene served in the United States Army for over 20 years, rising to the rank of Major. 7(A)RP¹ 545-46. Anene and his wife Louisa were married in 1985, and they have five children. 6(B)RP 471-72. Their fourth child C.A. was born on October 9, 2000. 6(A)RP 302.

¹ The Verbatim Report of Proceedings is contained in ten consecutively-paginated volumes, designated as follows: 1RP—8/16/07; 2RP—9/18/07; 3RP—9/20/07; 4RP—9/21/07; 5RP—9/24/07; 6(A)RP and 6(B)RP—9/25/07; 7(A)RP and 7(B)RP—9/26/07; 8RP—2/8/08.

Anene and Louisa separated in February 2005, while they were living in Germany. 6(B)RP 477. When they returned to the United States in June of that year, Anene moved to Vancouver, Washington, where he was assigned, and Louisa moved to Texas, where their two oldest sons were attending college. 6(A)RP 347-48. Both C.A. and her 15-year-old sister S.A. lived with Anene. 6(A)RP 347.

On June 10, 2005, the day before the family left Germany, C.A. told her mother that Anene had locked the door by putting a chair under the doorknob and rubbed lotion on her private parts. 6(B)RP 495. Because she was scheduled to fly to the United States within a few hours, Louisa did not act on C.A.'s allegations immediately. Instead, she contacted a social worker some time after moving to Texas. 6(B)RP 496.

In September 2005, Louisa Anene reported to Washington CPS that C.A. was being left home alone. 6(B)RP 501; 7(A)RP 550. CPS also had a report of possible sexual abuse and past domestic violence. 5RP 231. Cynthia Hostetler, a CPS investigator, responded to the referral. 5RP 230. She and another social worker went to Anene's home on October 21, 2005. Anene was not home at the time, and Hostetler spoke to S.A. while the other social worker spoke with C.A. 5RP 233. S.A. did not verify the information they had received in the referral, although her behavior led Hostetler to believe she was hiding something. 5RP 234.

The following Monday, Hostetler went to the girls' schools to speak with them again. 5RP 237, 241. Renada Rhodes, another investigator, conducted the interview with C.A. 5RP 276-77. C.A. told Rhodes that there were fights between her mom and dad, and she was not allowed to live with her mom. 5RP 282. When Rhodes asked C.A. about private parts, C.A. reported that she had touched her father's penis. She said the penis felt "squishy" and when you wiggle it, "slimy stuff like soap comes out and drops on the floor." 5RP 284-85. She said there was hair on one end, and the other end was "red and poky." RP 288. At Rhodes's request, C.A. drew a picture of the penis. 5RP 288. Rhodes reported C.A.'s statements to law enforcement, and the girls were placed in foster care. 5RP 243, 292-92.

A police officer interviewed C.A. at her foster home two days later. 6(B)RP 458. After initially denying that she had any problems with touching, C.A. told the officer that she had touched her father's penis one time. 6(B)RP 460-62. First she said it happened in the bedroom, then she said it happened in the bathroom while she was going potty. C.A. told the officer Anene was in the shower and soap came out of his penis. When he was brushing his teeth, she asked if she could touch his penis, and he said yes. 6(B)RP 463-64.

In March, 2006, C.A. told her foster mother that her father put lotion on her private parts. 7(A)RP 582. C.A. told the foster mother in June 2006 that her father made her suck on his “wiener.” She said it would get really big, and she made a sound effect and hand gesture to describe what happened. 7(A)RP 584.

A doctor who examined C.A. in March 2006 at the request of CPS observed a notch in her hymen, indicating some sort of penetration. 6(A)RP 428-29. He attempted to photograph the abnormality, but the pictures he took were out of focus. 6(A)RP 431-32. When the doctor interviewed C.A., however, she said she had never had problems with anyone touching her private places. 6(A)RP 434.

C.A. testified at trial that her father had touched her private parts when they lived in Vancouver, and she described three incidents. She said the first occurred in Anene’s bedroom, where he put his penis in her mouth while her sister was at school. 6(A)RP 315-16. The next touching incident occurred in the living room while C.A. was watching TV. She said Anene put his hand on her private part underneath her clothes and rubbed. 6(A)RP 318-19. Another incident occurred in the bathroom, when Anene was sitting on the toilet lid and she sat on his lap. C.A. said Anene put his hand in her pants and rubbed her vagina. 6(A)RP 320-21.

C.A. testified that Anene told her not to talk about any of these incidents and that there were no other incidents of touching. 6(A)RP 321-22.

b. Uncharged allegations

Prior to trial the defense moved to exclude allegations by Anene's older daughter, S.A., that he had molested her numerous times over the course of several years. CP 24-25. The prosecutor argued that the evidence was admissible under ER 404(b) to show a common scheme or plan. 5RP 186. Although he acknowledged that Anene was never convicted of the alleged conduct, the prosecutor informed the court that S.A. would testify that Anene touched her vaginal area. 5RP 189.

Defense counsel argued that the conduct S.A. alleged was not sufficiently similar to the charged conduct to establish a common scheme or plan. He explained that S.A. alleged the touching occurred when she was sleeping between her parents, a fact pattern never alleged by C.A. 5RP 190.

After reviewing State v. DeVincentis², the court stated, "It appears to me that under the authority of State v. DeVincentis the molestation of the older daughter would be admissible if the defense is to deny that a crime occurred." 5RP 193. Because that was Anene's defense, the court ruled the evidence admissible. 5RP 193.

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

The prosecutor also informed the court that since S.A. had initially refused to make a statement to authorities regarding the alleged abuse, the state would present evidence of domestic violence within the family to explain her delay in reporting. 5RP 194.

The court denied the defense motion to exclude evidence of prior misconduct regarding S.A. under ER 404(b). 5RP 217. When defense counsel asked the court to balance the probative value of the evidence against its prejudicial effect, the court responded as follows:

All right, well, the probative value has been determined already for this type of evidence, by the appellate courts, when they've held that it's proper to put in common scheme or plan evidence. Evidence Rule 404(b) itself establishes probative value and admissibility.

Prejudicial effect? Certainly it's prejudicial to the Defense – to a defendant if the jury believes that he's molested more than one daughter.

The test, though, is whether or not the probative value is greatly outweighed by the danger of undue prejudice. Undue prejudice means to use evidence for a purpose other than that for which it is admissible.

If a jury were to use this evidence to find a general propensity of the defendant to molest children and use that against him to find him guilty of the charges involving [C.A.], that would be undue – unduly prejudicial and it would be improper.

Therefore, we will eliminate the possibility of undue prejudice by giving a limiting instruction upon the request of the Defense. So if you want to submit an instruction, I'll be glad to consider giving it.

That deals with the issue of undue prejudice. The probative value is great, therefore I cannot say that the danger of undue prejudice substantially outweighs the probative value.

5RP 218-19.

S.A. testified at trial that she did not recall when Anene started sexually abusing her, but it was something she experienced her whole life. 6(A)RP 355-56. She used to get into her parents' bed at night because she was scared, and Anene would touch her while she was in bed between them. He touched her vagina and chest and placed her hand on his genitals. S.A. testified that she pretended to be asleep while this was happening, and Anene never said anything to her during these incidents. 6(A)RP 358-59. When S.A. was older and stopped sleeping with her parents, Anene would occasionally move to her bed during the night, saying her mattress was better for his back. S.A. testified that the same type of sexual contact occurred in her bed. 6(A)RP 360-61.

At trial, S.A. detailed not only her allegations of sexual abuse but also a pattern of domestic violence by Anene against his wife. She testified that Anene was unpredictable and very violent, and he had physically abused her mother. S.A. testified that Anene threatened to kill his wife numerous times, and having seen his temper and violence, S.A. believed the threats. 6(A)RP 365-66. S.A. testified that she was always afraid for her mother because she knew Anene would have no trouble hurting her. 6(A)RP 371.

S.A. testified that she did not tell anyone about the ongoing sexual abuse because she was afraid of Anene. 6(A)RP 365. Although she

reported the abuse to her grandmother and mother when they were living in Germany, S.A. refused to give a statement to police because she was afraid of Anene's reaction and what would happen to her family. 6(A)RP 367-68, 370-71.

Even after reporting this abuse to her mother, S.A. told her mother she wanted to live with Anene in Vancouver, rather than with Louisa in Texas. 6(A)RP 393. S.A. testified that there were a lot of death threats involving where the children would live, and she moved with her father to keep the peace. 6(A)RP 372.

S.A. said that when the social worker came to her house and school in October, 2005, she denied any sexual abuse because she was afraid of what would happen if she made any disclosures. She was afraid of Anene's reaction and the potential for assault. 6(A)RP 374-76. When she heard that C.A. had disclosed sexual abuse, however, she decided she could not lie anymore. 6(A)RP 377.

Louisa Anene also testified that her marriage to Anene was very volatile, with lots of arguments, fights, disagreements, and several instances of domestic violence. 6(B)RP 476. She described an incident in Germany in 2005 during which S.A. was knocked down when she tried to intervene and testified that she obtained a restraining order against Anene after that incident. 6(B)RP 476-77. Louisa testified that she was assaulted

and her life was threatened several times in the presence of her children.

6(B)RP 481.

Louisa testified that in 2004, S.A. told her that Anene had been touching her when she slept in their bed, but because S.A. did not want to make a statement to authorities, no legal action was taken. 6(B)RP 482, 487. Louisa did not confront Anene with the information, either, because she was too afraid he would do something irrational. She surmised that if she had confronted him, she “probably wouldn’t be sitting here today.” 6(B)RP 488. Louisa repeated that she was afraid of Anene because he has a very explosive temper. 6(B)RP 489.

Louisa testified that she signed a separation agreement allowing her daughters to live with Anene when they returned to the United States because he threatened several times that their children would grow up as orphans if she did not sign the agreement. 6(B)RP 490-91. She did not want to sign the agreement but felt she had no alternative. 6(B)RP 492.

The state also called Anene’s oldest son as a witness. Farrakhan Anene testified that he had heard Anene threaten his mother’s life many times, and that was something he had always experienced. 7(A)RP 571. He recalled several incidents where a gun was displayed in conjunction with threats and several conversations in 2005 in which Anene threatened his wife if she refused to sign the separation agreement. 7(A)RP 572.

Farrakhan testified that he had had to deal with domestic violence as far back as he could remember, he was aware of Anene's explosive temper and rage, and he was afraid of his father. 7(A)RP 572.

c. The trial continued in Anene's absence

When court reconvened for the third day of trial, Anene was not present. An investigating officer was sent to Anene's home and learned that Anene had been taken to the hospital that morning after an apparent suicide attempt. 7(A)RP 521. The prosecutor informed the court that Anene had taken an overdose of an unknown substance and was found in bed, wearing his military uniform and holding a Bible to his chest. 7(A)RP 525. The court ruled that these facts indicated Anene voluntarily absented himself from the proceedings and that the trial would continue in his absence as authorized by CrR 3.4(b). 7(A)RP 527-29. The state then proceeded with its case.

Defense counsel moved for a mistrial on the ground that Anene was to be the only defense witness and proceeding without him was highly prejudicial to the defense. 7(B)RP 601-02. Counsel also argued that, since Anene apparently attempted suicide, his mental capacity to stand trial was in issue. 7(B)RP 602.

In response, the state presented an offer of proof that Anene had called 911 early that morning after an apparent suicide attempt, he was

taken to the hospital where he was currently intubated and comatose, and it would be three to five days before doctors could say whether he would recover. 7(B)RP 602-05. The court ruled that a mistrial was not appropriate because Anene voluntarily chose not to participate in the proceedings after being there for two days, and if his defense was prejudiced, it was by a choice he made. 7(B)RP 606-07. The court did not address Anene's competence to stand trial.

The defense rested without presenting evidence, and the jury returned guilty verdicts and findings of exceptional circumstances. CP 98-100, 107-08. Anene remained in a coma for several months. When he came to, he was partially blind and he suffered brain damage with a tremendous loss of memory. 8RP 657. Although the court permitted Anene to watch a video tape of the trial, he still had no recollection of those events. 8RP 654, 658. Eventually, the court entered an order of competency and proceeded with sentencing. CP 113. It found that Anene was no longer the man he was at trial, his handicap rendered him essentially harmless, and an exceptional sentence was inappropriate. It imposed sentences within the standard range. 8RP 667-68.

C. ARGUMENT

1. IMPROPER ADMISSION OF PROPENSITY EVIDENCE DENIED ANENE A FAIR TRIAL.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). While specific acts of misconduct may sometimes be introduced for other purposes, they can never be used to establish bad character. ER 404(b)³; State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence of other misconduct may not be admitted merely to show a defendant is a "criminal type." State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998).

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible," and the state must meet a substantial burden when attempting to bring in evidence under one of the

³ ER 404(b) provides:

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.

exceptions to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Before a trial court may admit evidence of other crimes or misconduct under ER 404(b), it must determine that the prior acts are “(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.” DeVincentis, 150 Wn.2d at 17 (quoting Lough, 125 Wn.2d at 852). The court’s analysis must appear on the record and is reviewed for an abuse of discretion. Lough, 125 Wn.2d at 862-63.

The trial court in this case ruled that S.A.’s allegations of abuse were admissible under the common scheme or plan exception to ER 404(b). Prior acts may be admissible as evidence of a single plan used repeatedly to commit separate but similar crimes, but only if the state establishes a sufficiently high level of similarity between the prior acts and the charged conduct. DeVincentis, 150 Wn.2d at 19.

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

Lough, 125 Wn.2d at 860. Thus, the state must prove “the defendant committed markedly similar acts of misconduct against similar victims

under similar circumstances.” Lough, 125 Wn.2d at 856. “The degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” DeVincentis, 150 Wn.2d at 20.

For example, in DeVincentis, the court found a common scheme where the defendant invited young girls whom he met through his daughter or a neighbor girl into his home and eventually molested them. DeVincentis, 150 Wn.2d at 22. When the girls were at his house, the defendant walked around dressed only in a g-string or bikini underwear, giving the impression that such conduct was normal and desensitizing them to his nudity. Id. at 16. The defendant eventually asked the girls for massages, directed them to remove their clothes, and had them masturbate him until he climaxed. He also told both girls not to tell. Id. at 16, 22. This bizarre pattern of behavior suggested a design to prey upon and molest young girls.

Similarly, prior conduct was held to demonstrate a common scheme or plan in State v. Baker, 89 Wn. App. 726, 950 P.2d 486 (1997), review denied, 135 Wn.2d 1011 (1998). There, the defendant was charged with molesting an eight year old girl based on allegations that while she was sleeping in the same bed with the defendant, he rubbed her back until she fell asleep, and she awoke to find him massaging her vagina through her clothing. Baker, 89 Wn. App. at 733. The state was permitted to

present evidence from the defendant's daughter that when she was around the same age as the victim, the defendant would sleep in bed with her, rub her back until she fell asleep, and touch her while she was sleeping. Id. at 730. The Court of Appeals held that the strong similarities in the relationships, the ages, the scenario, and the contacts indicated design rather than coincidence. Id. at 733-34.

The strong similarities found in DeVincentis and Baker are missing in this case. The alleged victims are similar in that they are both Anene's daughters. The similarity ends there, however. The time, place, circumstances, and type of contact alleged by Anene's daughters differed significantly. The trial court made no attempt to compare S.A.'s allegations to the charged conduct before admitting them as evidence of a common scheme or plan. A thoughtful analysis of the evidence, however, demonstrates that the substantial similarity necessary for admission under this exception to ER 404(b) does not exist.

The charges in this case were based on C.A.'s statements that Anene put his penis in her mouth, touched her vagina underneath her clothing, and allowed her to touch his penis. C.A. described these incidents as occurring in the bedroom, bathroom, and living room and said they all occurred during the day when she was alone with Anene. 6(A)RP 328-31.

S.A. testified, on the other hand, that all the incidents occurred at night when she was in bed with Anene, saying Anene would fondle her chest and vaginal area while she pretended to be asleep. 6(A)RP 358-59. S.A. said Anene would also hold her hand on his genitals while he masturbated. Unlike C.A., S.A. said there was never any oral sex. 6(A)RP 364.

S.A. said that from an early age she was in the habit of getting into bed with her parents when she was scared, and this abuse occurred when she was sleeping between them. 6(A)RP 355-56. Louisa Anene testified that C.A. used to get into bed with them as well, but, unlike S.A., C.A. said there was no touching at that time. 6(A)RP 323; 7(A)RP 533.

Likewise, while C.A. had told both her mother and foster mother that Anene rubbed lotion on her private parts, S.A. said Anene never applied lotion. 6(A)RP 363. While C.A. testified that Anene told her not to talk about the touching, S.A. said Anene never spoke to her about it. 6(A)RP 321, 359.

The state did not demonstrate that Anene's alleged prior conduct with S.A. and the charged conduct with C.A. involved "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." Lough, 125 Wn.2d at 856 (quoting People v. Ewoldt, 7

Cal. 4th 380, 402, 867 P.2d 757, 27 Cal.Rptr.2d 646 (1994)). Unlike DeVincentis and Baker, where the evidence showed the defendants contrived markedly similar situations to commit both the prior misconduct and the charged crimes, the prior conduct evidence here showed only a similarity in results. Such evidence is insufficient to establish a common scheme or plan. DeVincentis, 150 Wn.2d at 19; Lough, 125 Wn.2d at 860.

To be admissible under this exception to the general prohibition against propensity evidence, the prior misconduct must give a strong indication of a design, rather than merely a disposition, to commit the charged offense. Lough, 125 Wn.2d at 858-59; State v. Krause, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996) (evidence of prior misconduct showed not just a predisposition to molest children but a systematic scheme by which defendant gained access to young boys), review denied, 131 Wn.2d 1007 (1997). Here, because the time, place, circumstances and nature of the contacts were so dissimilar, evidence of Anene's alleged sexual abuse of S.A. shows at most a disposition to molest his daughters, not a design. The evidence therefore should have been excluded.

Moreover, the trial court's purported balancing of probative value and prejudicial effect of this evidence was flawed. Without addressing the specific allegations in this case, the court simply stated that "the probative

value has been determined already for this type of evidence, by the appellate courts, when they've held that it's proper to put in common scheme or plan evidence. Evidence Rule 404(b) itself establishes probative value and admissibility." 5RP 218.

The trial court is certainly correct that case law holds that substantially similar acts which establish a common scheme or plan can be relevant to prove a crime occurred. DeVincentis, 150 Wn.2d at 18-19; Lough, 125 Wn.2d at 852. What the court failed to recognize, however, is that before admitting evidence of prior acts under this rule, the court must determine whether the state has met the substantial threshold of proving the prior conduct is sufficiently similar to the charged events. See DeVincentis, 150 Wn.2d at 19.

The court below did not address the similarities, or lack of them, in its analysis. Had it done so, there would be no question that the evidence should have been excluded. When, as here, the prior acts are uncharged offenses, they must have substantial probative value. Lough, 125 Wn.2d at 863; Baker, 89 Wn. App. at 736. As discussed above, the conduct alleged by S.A. was not similar enough to increase the likelihood that C.A.'s accusations were true. The only effect S.A.'s testimony had was to create an inference that Anene acted in conformity with his criminal

propensity on this occasion. This type of character evidence is specifically forbidden under ER 404(b). Lough, 125 Wn.2d at 853.

The court's error in admitting this propensity evidence cannot be considered harmless. By admitting S.A.'s testimony, the court allowed the jury to infer that Anene is the type of person who molests his daughters. Instead of presuming Anene innocent, the jury likely began its deliberations with the presumption that he acted in conformity with this character trait. See State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987) (propensity evidence has the effect of stripping away the presumption of innocence). Although the court purported to limit the use of this evidence through an instruction, when the defendant is charged with child molestation, courts have often held that "the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696.

This is especially true here because, in addition to S.A.'s allegations, the state was permitted to present evidence of a pattern of domestic violence by Anene against his wife, in order to explain S.A.'s delay in reporting her allegations of sexual abuse. And S.A. was not the only witness to testify about domestic violence. Both Louisa and Farrakhan Anene described numerous threats and assaults by Anene. Thus, not only did the jury hear that Anene was a child molester who

preyed on his daughters, it heard that he was a wife beater who terrorized his family for years.

In fact, the prosecutor centered his closing argument on the evidence of domestic violence. He argued that the family was terrorized by Anene and that his actions had long lasting effects on every member of the family. 7(B)RP 609-10. The prosecutor argued that the children were terrified of their father and knew they had to go along with his custody arrangements or he would explode. 7(B)RP 612. He argued that Louisa knew that to confront Anene was to risk her life, and he described her as a battered woman, helpless to change the circumstances she was in. 7(B)RP 614. The prosecutor referred to Anene as a “vicious man” who abused C.A. as he had abused S.A. 7(B)RP 630.

The state’s case was not so strong that the jury would have reached the same result had the court not erroneously admitted propensity evidence. Although C.A. described three touching incidents at trial, she did not describe any of those incidents to the social worker and the police officer who interviewed her. She told them only that she had touched Anene’s penis, telling the officer that she had asked if she could touch it and Anene said yes. 5RP 284; 6(B)RP 463. She had told the doctor who examined her that she never had any problems with anyone touching her private parts. 6(A)RP 434. Because the outcome of the trial would have

been different but for the court's erroneous admission of propensity evidence, the error cannot be considered harmless. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). This Court should reverse Anene's convictions.

2. THE COURT'S FAILURE TO ORDER A COMPETENCY EVALUATION VIOLATED ANENE'S RIGHT TO DUE PROCESS.

The Due Process clause of the Fourteenth Amendment prohibits conviction of a person who is not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). The constitutional standard for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Washington law provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. To determine whether a criminal defendant is legally competent to stand trial, a trial court must ask (1) whether the defendant understands the nature of the charges, and (2) whether he is capable of assisting in his defense. In re Personal Restraint

of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986)).

Once there is a reason to doubt a defendant's competency, the court must follow the procedures set forth in the competency statute to determine whether the defendant may be tried. RCW 10.77.060⁴; City of

⁴ RCW 10.77.060 provides as follows:

(1) (a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled. Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the examination be conducted at the jail or other detention facility.

(b) When a defendant is ordered to be committed for inpatient examination under this subsection (1), the court may delay granting bail until the defendant has been evaluated for competency or sanity and appears before the court. Following the evaluation, in determining bail the court shall consider: (i) Recommendations of the expert or professional persons regarding the defendant's competency, sanity, or diminished capacity; (ii) whether the defendant has a recent history of one or more violent acts; (iii) whether the defendant has previously been acquitted by reason of insanity or found incompetent; (iv) whether it is reasonably likely the defendant will fail to appear for a future court hearing; and (v) whether the defendant is a threat to public safety.

Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). These procedures are mandatory, not merely directive. Fleming, 142 Wn.2d at 863 (citing State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982)). A court's failure to follow these procedures denies the defendant due process. State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570, (citing Drope, 420 U.S. at 162; Pate v.

(2) The court may direct that a qualified expert or professional person retained by or appointed for the defendant be permitted to witness the examination authorized by subsection (1) of this section, and that the defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional person shall have the right to file his or her own report following the guidelines of subsection (3) of this section. If the defendant is indigent, the court shall upon the request of the defendant assist him or her in obtaining an expert or professional person.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;

(d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;

(f) An opinion as to whether the defendant should be evaluated by a *county designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

(4) The secretary may execute such agreements as appropriate and necessary to implement this section.

Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)), review denied, 93 Wn.2d 1002 (1979).

The determination that there is a reason to doubt the defendant's competency lies within the discretion of the trial court. Fleming, 142 Wn.2d at 863. In determining whether to order a competency evaluation, the court may consider the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." Id.

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181. In Drope, the Supreme Court held that the trial court violated the defendant's right to a fair trial in failing to order a competency evaluation sua sponte after the defendant attempted suicide during the course of trial.

There the defendant was convicted of forcibly raping his wife. Prior to trial, defense counsel filed a motion for continuance to allow the defendant to undergo psychiatric examination and treatment. Counsel attached a psychiatric report to the motion, but the report did not include any explicit findings regarding the defendant's competency. Drope, 420 U.S. at 177. The trial court denied the motion. At trial, the defendant's

wife testified that, while she originally decided not to prosecute the case against her husband because she believed he was mentally ill, she changed her mind because he tried to kill her just prior to trial. Id. at 166. Later during trial, the defendant attempted suicide by shooting himself. Id.

The Supreme Court reversed the defendant's conviction, finding that there were sufficient indicia of incompetence to require the court to order an evaluation of the defendant's competency to stand trial. The Court pointed to notations in the psychiatric report attached to the motion that indicated that the defendant might have difficulty assisting in his defense. Id. at 175-76. It also relied on the wife's testimony at trial concerning her husband's history of strange behavior and his attempt to kill her prior to trial, at a time when she had decided not to press the prosecution. Id. at 179. Finally, the Court cited the defendant's mid-trial suicide attempt as indicative of his incompetence to stand trial, as it "suggested a rather substantial degree of mental instability contemporaneous with the trial." Id. at 181.

Although court did not rely solely on the suicide attempt, neither did it affirm the lower court's holding that a suicide attempt does not create a reasonable doubt as to competence as a matter of law. Id. at 180. Rather, the Court held that evidence of a defendant's irrational behavior, his demeanor at trial, and any medical opinion regarding his competence

to stand trial are all relevant considerations. And it noted that, in some circumstances, even one of these factors standing alone may be sufficient to require an inquiry into the defendant's competence. Id.; see also United States v. Mason, 52 F.3d 1286, 1292-93 (4th Cir. 1995) (defendant's suicide attempt after first phase of trial required court to hold competency hearing not only as to competence to continue trial but also as to competence at completed first phase).

In this case, the court was informed on the third day of trial that Anene was found in bed, dressed in full military uniform and holding a Bible, after ingesting an overdose of medication. He had to be resuscitated on the way to the hospital and was in a coma from which it was not clear he would recover. This suicide attempt raised a serious question regarding Anene's mental stability contemporaneous with the trial. See Drope, 420 U.S. at 181.

In addition, Anene had exhibited some erratic behavior on the first day of trial. During the direct examination of one of the state's witnesses, Anene bolted from the courtroom and had to be retrieved by defense counsel. 5RP 295. Although counsel explained at the time that he had found Anene in the bathroom, when considered in conjunction with the suicide attempt Anene's conduct suggests there was reason to doubt his competency to stand trial.

Finally, defense counsel informed the court after the suicide attempt that he had questions as to whether Anene was competent to stand trial. 7(B)RP 602. A doubt expressed by a lawyer in open court concerning the competence of his client to stand trial is unquestionably a factor to be considered in determining whether to hold a competency hearing. Drope, 420 U.S. at 177 n.13.

Under the circumstances here, there was reason to doubt Anene's competency, and the court's unwillingness to heed counsel's concerns and order a competency evaluation denied Anene due process. Anene's conviction should be reversed and the case remanded for a new trial. See Drope, 420 U.S. at 183.

D. CONCLUSION

The court's erroneous admission of propensity evidence denied Anene a fair trial, and its failure to order a competency evaluation denied him due process. Anene's convictions should be reversed and his case remanded for a new, fair trial.

DATED this 23rd day of June, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Brief of Appellant in
State v. Osadebe Anene, Cause No. 06-1-02202-5 directed to:

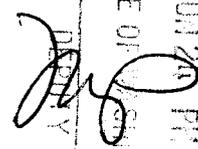
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I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
June 23, 2008

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