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No. 39870-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Dow,

Appellant.

Lewis County Superior Court Cause No. 08-1-00704-3

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

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CORRECTED ASSIGNMENT OF ERROR

Respondent correctly points out that Mr. Dow's first Assignment of Error erroneously referred to a conviction for felony harassment. Brief of Respondent, p. 1. The first Assignment of Error should have read:

1. Mr. Dow's conviction for Burglary in the First Degree infringed his Fourteenth Amendment right to due process because it was based in part on propensity evidence.

ARGUMENT

I. MR. DOW'S PRIOR CONVICTIONS WERE AVAILABLE FOR THE JURY TO USE AS PROPENSITY EVIDENCE.

In the absence of a limiting instruction, "evidence admitted as relevant for one purpose is deemed relevant for others." *State v. Myers*, 133 Wn. 2d 26, 36, 941 P.2d 1102 (1997). Failure to request a limiting instruction may waive any instructional error;¹ however, an appellant can still challenge the improper use of propensity evidence to prove guilt for the first time on appeal as a manifest error affecting the right to due process.^{2,3} RAP 2.5(a)(3).

In Mr. Dow's burglary trial, the state introduced evidence of Mr. Dow's prior burglary conviction (as well as a prior TMVOP conviction),

¹ *But see State v. Russell*, 154 Wn. App. 775, 784, 225 P.3d 478 (2010) *review granted*, 169 Wash. 2d 1006, 234 P.3d 1172 (2010) (Burden is on the trial court to give a limiting instruction under ER 404(b), whether requested or not).

² Due process prohibits conviction based on propensity evidence. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

³ In addition, counsel's failure to request a limiting instruction may be challenged as ineffective assistance.

and the court did not limit the jury's consideration of that evidence.⁴ RP (9/23/09) 179. Accordingly, the prior burglary conviction was available for use as substantive proof of guilt (in addition to any appropriate purpose for which it may have been admitted). *Myers*, at 36. Without citation to authority, Respondent claims the evidence was properly introduced "for impeachment purposes only." Brief of Respondent, p. 2, 6.

This is incorrect. Without a limiting instruction, the jury could correctly consider the evidence for any purpose.⁵ *Id.* Furthermore, the jury was specifically required to consider all of the evidence to decide whether or not each fact had been proved. CP 29 - 31. *See also Russell*, at 786 (addressing the impact of a similar instruction). The error was particularly egregious, because one prior conviction was for the same crime Mr. Dow was charged with in the present case. *See State v. Newton*, 109 Wn.2d 69, 76-77, 743 P.2d 254 (1987).

The admission of Mr. Dow's prior convictions without limitation resulted in a verdict based in part on propensity evidence. *Garceau*, *supra*. This manifest error affected Mr. Dow's Fourteenth Amendment

⁴ Such an instruction is required when a prior conviction is introduced to impeach an accused person's testimony. *Seattle v. Patu*, 108 Wn.App. 364, 375-377, 30 P.3d 522 (2001); *see also Russell*, *supra* (addressing limiting instructions in the context of ER 404(b)).

⁵ The court and counsel may have understood the evidence to be admitted solely for impeachment. *See* RP (9/23/09) 133. This does not mean that the jury understood or was restricted in its consideration of the evidence.

right to due process. *Id.* Accordingly, the error may be challenged for the first time on review under RAP 2.5(a)(3). Mr. Dow's burglary conviction must be reversed and the case remanded for a new trial. *Id.*

II. MR. DOW WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Dow was entitled to an instruction limiting consideration of his prior convictions for impeachment purposes only. ER 105; ER 609; *Seattle v. Patu*, 108 Wn.App. 364, 375-377, 30 P.3d 522 (2001). Such instructions are "of critical importance. *State v. Brown*, 113 Wn. 2d 520, 529-530, 782 P.2d 1013 (1989) *opinion corrected*, 787 P.2d 906 (1990) (*Brown II*). Absent an appropriate limiting instruction, the jury was actually *required* (by the court's introductory instruction) to consider the prior convictions as substantive evidence of guilt. CP 29 - 31; *Russell*, at 786.

Defense counsel should have requested a limiting instruction, and his failure to do so deprived Mr. Dow of the effective assistance of counsel. First, there is no indication that counsel made a strategic decision to forgo a limiting instruction. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (requiring some indication in the record that counsel made a tactical decision).

Second, any such tactical decision would have been objectively unreasonable. *See, e.g., State v. Breitung*, 155 Wn. App. 606, 615, 230 P.3d 614 (2010) (“[D]efense counsel can be ineffective where his tactical decision... is objectively unreasonable.”). The introduction of a prior conviction “by its very nature is highly prejudicial because of its inherent implication that ‘once a criminal, always a criminal.’” *State v. Burton*, 101 Wn. 2d 1, 9, 676 P.2d 975 (1984) *overruled on other grounds by State v. Brown*, 111 Wn. 2d 124, 761 P.2d 588 (1988) (*Brown I*) and by *State v. Ray*, 116 Wn. 2d 531, 806 P.2d 1220 (1991). Without a limiting instruction, the jury was permitted to consider Mr. Dow’s prior convictions as substantive evidence of guilt. *Myers, supra*.

Third, defense counsel’s failure to request a limiting instruction prejudiced Mr. Dow because there is a reasonable possibility that the error affected the outcome of trial. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The prior convictions undoubtedly influenced the jury to disregard Mr. Dow’s duress defense, not only because of any impact on his credibility, but also because the prior convictions proved criminal propensity: “‘once a criminal, always a criminal.’” *Burton, at 9*.

The attorney’s deficient performance prejudiced Mr. Dow and deprived him of his constitutional right to effective assistance of counsel. U.S. Const. Amend. VI; XIV; *Reichenbach, supra*. Accordingly, Mr.

Dow's burglary conviction must be reversed, and the case remanded for a new trial. *Id.*

III. MR. DOW'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS IMPERMISSIBLY LOWERED THE STATE'S BURDEN TO PROVE MR. DOW'S INTENT TO COMMIT A CRIME WITHIN BLAIR'S TRAILER.

Mr. Dow rests on the arguments set forth in his Opening Brief.

CONCLUSION

Mr. Dow's burglary conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on August 13, 2010.

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