

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
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No. 40693-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Troy Rayment,

Appellant.

Thurston County Superior Court Cause No. 08-1-01943-1

The Honorable Judge Gary Tabor

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Rayment's two convictions for Tampering with a Witness violated his constitutional right not to be twice put in jeopardy for the same offense.
2. Mr. Rayment was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
3. Defense counsel was ineffective for failing to object to the admission of facts relating to Mr. Rayment's malicious mischief charge.
4. Defense counsel was ineffective for failing to object to Armstrong's testimony that she felt afraid when Mr. Rayment confronted her in a bar, prior to the alleged malicious mischief.
5. Defense counsel was ineffective for failing to request an instruction limiting the jury's consideration of evidence relating to the malicious mischief charge.
6. The trial court erred by excluding evidence that Mr. Rayment's malicious mischief charge had been dismissed.
7. Mr. Rayment's convictions were obtained in violation of his constitutional right to a jury trial under the Sixth and Fourteenth Amendments.
8. Mr. Rayment's convictions were obtained in violation of his constitutional right to a jury trial under Article I, Sections 21 and 22 of the Washington Constitution.
9. The trial court erred by admitting Estes's testimony that she believed Mr. Rayment "was attempting to coerce [Armstrong] into getting the charges dropped."
10. Estes invaded the province of the jury by expressing an opinion on Mr. Rayment's guilt when she testified that she believed Mr. Rayment "was attempting to coerce [Armstrong] into getting the charges dropped."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person may not receive multiple convictions for the same offense. In this case, Mr. Rayment received two convictions for ongoing conduct that was (allegedly) directed at inducing Armstrong not to testify against him. Did the entry of two tampering convictions violate Mr. Rayment's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel unreasonably failed to object to prejudicial testimony detailing the facts leading up to the malicious mischief. Was Mr. Rayment denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. A "nearly explicit" opinion on an ultimate issue violates an accused person's constitutional right to a jury trial. Here, over Mr. Rayment's objection, Estes was permitted to tell the jury she believed Mr. Rayment "was attempting to coerce [Armstrong] into getting the charges dropped." Did the opinion testimony invade the province of the jury and violate Mr. Rayment's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Troy Rayment and Destiny Armstrong began dating in June of 2000. RP (3/24/10) 39. They had a child together in 2004, and their relationship ended in 2007. RP (3/24/10) 40-41. In 2008, they went to court to resolve the issue over their daughter's custody. RP (3/24/20) 42. In April of 2008, while the custody matter was pending, they ran into each other at a bar. They argued, and she pushed him. RP (3/24/10) 42-44, 73. The next morning, he texted her that she would be in trouble for assaulting him. RP (3/24/10) 45.

She texted back, telling him that her car windows had been broken the night before. RP (3/24/10) 45. He replied by text, saying:

Are u serious. im going to take you to small claim court why would i
break your window
Exhibit 1, Supp. CP.

They exchanged a series of texts, and Armstrong saved some of his messages (but not her own). RP (3/24/10) 46-47, 53, 85-86. When they spoke and texted over the next month, Armstrong brought up the broken car windows. RP (3/24/10) 46. She was upset, having spent \$500 to repair the damage, and wanted him to pay for it. RP (3/24/10) 46. She talked to him about pressing charges for malicious mischief. RP (3/24/10) 48. He offered to pay her deductible, sign the car over to her, and settle

their ongoing child custody dispute if she would “just drop the charges on him.” RP (3/24/10) 48-49. The couple both believed that charges would be dropped if she did not show up in court, or if she called the prosecutor and explained that the car belonged to both of them. RP (3/24/10) 49-50.

The two continued to negotiate about the charges, the car, and the child custody dispute. RP (3/24/10) 52. Exhibits 2-6, Supp. CP. On May 2, Armstrong gave a taped statement to the police. RP (3/25/10) 7-8; *see also* Exhibit 16, Supp. CP. Mr. Rayment was interviewed on May 6; at that time he told the officer that he and Armstrong had already worked out a deal. RP (3/25/10) 10-11. On May 10, he texted Armstrong that he was on his way to see his attorney, and needed to know what she planned. Exhibits 7-14, Supp. CP. On May 21, Mr. Rayment was charged with Malicious Mischief. Exhibit 17, Supp. CP. The charge was subsequently dismissed. RP (3/24/10) 5, 68.

In October of 2008, Mr. Rayment was charged with two counts of Tampering with a Witness. Amended Information, Supp. CP. The case was tried to a jury in March of 2010. RP (3/24/10).

At trial, Armstrong testified about the incident that gave rise to the malicious mischief charge. RP (3/24/10) 42-44. She also testified that she was afraid during their argument in the bar. RP (3/24/10) 87. Defense counsel did not object to any of this testimony. RP (3/24/10) 34-93.

Defense counsel did seek permission to introduce evidence that the Malicious Mischief charge had been dismissed. The trial court denied the request, and instead instructed the jury that the disposition of that charge was of no consequence to the trial. RP (3/24/10) 5, 68; Instruction No. 9, Supp. CP.

The prosecution introduced the testimony of Armstrong's aunt, Judy Estes. RP (3/24/10) 94. Over Mr. Rayment's objection, Estes was permitted to testify that she "believe[d], based on everything that [she] saw, that the defendant was attempting to coerce [Armstrong] into getting the charges dropped." RP (3/24/10) 106.

In her closing, the prosecutor argued that the jury could convict on two counts of tampering if jurors agreed on any two text messages that met the elements of the charge. RP (3/25/10) 42-43. Mr. Rayment was convicted of both counts, and he timely appealed. CP 2, 10.

ARGUMENT

I. MR. RAYMENT’S TWO TAMPERING CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).¹ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

- B. The state and federal constitutions prohibit entry of multiple convictions for the same offense.

The Fifth Amendment² provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. An accused person may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010).

Whether or not a defendant faces multiple convictions for the same offense turns on the unit of prosecution. *Id.* The Supreme Court recently decided the unit of prosecution for Tampering with a Witness. *Id.* In *Hall*, the Court agreed with the appellant that the evil addressed by the legislature

is the attempt to “induce a witness” not to testify or to testify falsely. The *number* of attempts to “induce a witness” is secondary to that statutory aim, which centers on interference with “a witness” in “any official proceeding” (or investigation). RCW 9A.72.120(1). The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days.

² The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

Id., at 731. Accordingly, multiple attempts to induce a single witness not to testify (or to testify falsely) constitute only one offense.³ *Id.*, at 738.

C. Mr. Rayment committed (at most) one unit of Tampering with a Witness.

Like the defendant in the *Hall*, Mr. Rayment committed (at most) a single unit of witness tampering. As in *Hall*, his statements and texts were all (allegedly) aimed at inducing Armstrong not to testify. Accordingly, as in *Hall*, he committed only one offense, and should not have been convicted of two counts of tampering. *Id.* His second tampering conviction must be vacated and the charge dismissed with prejudice. *Id.*

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

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

³ The Court left open the possibility that additional attempts to induce could be a separate crime if they “are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or... [otherwise] demonstrate a different course of conduct.” *Id.*, at 738. In this case, however, the prosecution proceeded on the theory that any two texts would support conviction. RP (3/25/10) 42-43.

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984)); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, which is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel provided ineffective assistance by failing to object to inadmissible and prejudicial testimony.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91

Wash.App. 575, 578, 958 P.2d 364 (1998). In this case, defense counsel unreasonably failed to object to prejudicial details relating to the malicious mischief charge. This included Armstrong's testimony that she was frightened when Mr. Rayment aggressively confronted her in the bar, and that her car windows were broken shortly thereafter. RP (3/24/10) 42-44; 87. The problem was exacerbated by the trial judge's refusal to allow testimony that the Malicious Mischief charge had been dismissed. RP (3/24/10) 5, 68.

There was no legitimate strategic reason for this prejudicial evidence to be presented to the jury. The evidence was irrelevant under ER 401, and thus should have been excluded under ER 402. Even if it had some minimal relevance, it was highly prejudicial, and should have been excluded under ER 403. Furthermore, the evidence might have suggested a propensity to commit crimes, and thus was inadmissible under ER 404(b). If the prosecution had identified a proper purpose for admitting it, the trial court would have been obliged to instruct the jury to consider it only for that purpose. *State v. Russell*, 154 Wash. App. 775, 784, 225 P.3d 478 (2010) *review granted*, 169 Wash. 2d 1006, 234 P.3d 1172 (2010).

Without such an objection, the jury was permitted to consider the evidence for any purpose, including as propensity evidence.⁴ *See State v. Myers*, 133 Wash. 2d 26, 36, 941 P.2d 1102 (1997) (In the absence of a limiting instruction, “evidence admitted as relevant for one purpose is deemed relevant for others.”) In fact, the court’s instructions actually *required* the jury to consider the evidence as proof of guilt. Instruction No. 1, Supp. CP; *Russell*, at 786.

Thus defense counsel’s failure to object prejudiced Mr. Rayment. It painted him in a bad light, and encouraged the jury to convict based on propensity evidence. Without the improper evidence, a reasonable juror might have voted to acquit. Accordingly, Mr. Rayment was denied the effective assistance of counsel. *Saunders*, *supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

III. MR. RAYMENT’S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 21 AND 22 OF THE WASHINGTON CONSTITUTION.

A. Standard of Review

⁴ The use of propensity evidence to establish guilt violates ER 404(b); it may also violate the Fourteenth Amendment’s due process clause. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds*, 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).

Constitutional violations are reviewed *de novo*. *Schaler*, at 282. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *Kirwin*, *supra*; *Walsh*, *supra*; *Nguyen*, *supra*.

B. Mr. Rayment's convictions violated his constitutional right to a jury trial because they were based in part on impermissible opinion testimony.

Under Article I, Section 21 of the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Article I, Section 22 provides that "the accused shall have the right . . . to have a speedy public trial by an impartial jury." Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person's guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937.

Here, the court should have sustained Mr. Rayment's objection to Estes's testimony that she believed Mr. Rayment "was attempting to coerce [Armstrong] into getting the charges dropped." RP (3/24/10) 106. This testimony amounted to a "nearly explicit" or "almost explicit" statement that she believed Mr. Rayment to be guilty. *Id.* at 937. The improper admission of this testimony created a manifest error affecting Mr. Rayment's Sixth and Fourteenth amendment right to a jury trial.⁵ Review is therefore appropriate under RAP 2.5(a)(3).

- C. The violation of Mr. Rayment's constitutional right to a jury trial was not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000).

Reversal is required unless the state can prove that any reasonable factfinder would reach the same result absent the error and that the untainted

⁵ Defense counsel did object, arguing that the prosecutor's question improperly called for a legal conclusion. RP (3/24/10) 106. If this objection was insufficiently specific, the issue may nonetheless be reviewed under RAP 2.5(a)(3).

evidence is so overwhelming it necessarily leads to a finding of guilt.

State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Mr. Rayment sought to raise a reasonable doubt about his guilt by suggesting to the jury that he was engaged in a legitimate negotiation with Armstrong to resolve outstanding issues between them. *See* RP (3/25/10) 49-55. Estes's opinion testimony directly undermined the defense theory of the case.

Under these circumstances, the error was not trivial, formal, or merely academic; it prejudiced Mr. Rayment and likely affected the final outcome of the case. *Lorang*, at 32. A rational juror could have entertained a reasonable doubt about Mr. Rayment's guilt. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Rayment's convictions must be reversed. Count II must be dismissed with prejudice; Count I must be remanded to the trial court for a new trial.

Respectfully submitted on December 11, 2010.

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COURT OF APPEALS
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STATE OF WASHINGTON

DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 13, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 13, 2010.



Jodi R. Backlund, WSBA No. 22917
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