

NO. 45376-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS EUGENE RINEHART,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state over defense objection to elicit propensity evidence under ER404(b) which was more prejudicial than probative.

2. Trial counsel's failure to object when the state argued substantively from propensity evidence ostensibly admitted solely for rebuttal purposes denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. In a case in which the defendant is charged with strangling his girlfriend and with unlawful imprisonment, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state over defense objection to elicit evidence from the complaining witness that the defendant strangled her in the past?

2. Does a trial counsel's failure to object when the state argues substantively from propensity evidence ostensibly admitted solely for rebuttal purposes deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

As of June 21, 2013, Suzanne McKee was living in a small apartment at 213 Pine Street near the Maltese Tavern in Kelso. RP 24-25.¹ A few days previous she had traveled to Westport to visit with her long-term, on-again, off-again boyfriend of five years: the defendant Travis Rinehart. RP 24-25, 134-135. The two had then traveled by bus back to Kelso and the defendant was staying a few days with Ms. McKee. *Id.* At some point earlier in the day both Ms McKee and the defendant had gone to the supermarket where the defendant used his food stamps to purchase groceries for Ms McKee. RP 136-137. He then traded some of the food with another person for a bag of tobacco. *Id.* At some point later in the evening the couple had sexual intercourse after which the defendant fell asleep on the couch without putting on any clothes. RP 40-41. Ms McKee then took her laptop computer down to the Maltese Tavern where she drank a Pepsi and used the Tavern's unsecured wi-fi. RP 26-27.

Ms McKee later came back to her apartment, put on her pajamas and went into the kitchen to wash the dishes. RP 28-29. At some point the

¹The record on appeal includes two continuously numbered volumes of verbatim reports of the trial and sentencing in this case, referred to herein as RP [page #].

defendant woke up and started arguing with her about her leaving, saying “Don’t ever leave the house when I’m sleeping again.” *Id.* This made her mad so she put her pants back on and went to find a shirt to put on while telling him she was going to leave. *Id.* The defendant asked if she was going to take the tobacco and she responded that he had not bought it. RP 31. According to Ms McKee the defendant responded to her comment by jumping off the bed, running across the room, grabbing her by the neck, throwing her down to the ground, pinning her arms down with his legs, putting his left hand over her mouth and nose so she couldn’t breathe, and struck her multiple times in her ribs with his right fist as he was sitting astride her, giving her a bloody nose, causing her bruises to her right side, and causing her to involuntarily urinate. RP 33-36. Ms McKee also stated that just before he threw her to the floor she yelled out for help. RP 31-36. Finally, Ms McKee claimed that when the defendant was hitting her and holding his hand over her mouth so she couldn’t breathe he said: “How do you like that? Do you want some more? I don’t want to go to jail, you better shut up, you Bitch.” RP 34-36.

The defendant’s version of what happened when Ms McKee returned from the Maltese Tavern was as follows. RP 133-140. Once Ms McKee came back from the Maltese she said she was going to leave again and take the tobacco with her. RP 136-137. She then started dressing, grabbed the

tobacco and started yelling and screaming that he was assaulting her although he was not. RP 138-140. She also began spitting on him. *Id.* He responded by trying to put his hand up to her mouth to keep her from spitting and from screaming as he did not want the police called because he believed he had an outstanding warrant. *Id.* When he did this she bit him on his hand drawing blood. *Id.* As she bit him he pushed her to the ground and then started looking for his clothes so he could leave. RP 142-143. The defendant claimed that he did not in any way obstruct her breathing. RP 149-150.

Just before Ms McKee began screaming the downstairs neighbor Stephanie Cox and her boyfriend Jack Wohl heard a loud thump come from Ms McKee's apartment. RP 52-53, 61-62. Mr. Wohl then ran outside where he could hear Ms McKee screaming for someone to call 911. RP 63-64. Upon hearing this Mr. Wohl ran upstairs to Ms McKee's apartment with a neighbor by the name of Christopher Jeanette close behind. RP 66, 87-89. Once they got to the door they began hitting and kicking it while demanding that it be opened. RP 67-69, 91-93. At this point the defendant opened the door but then closed it because he was naked. *Id.* He then opened it a second time after putting on some pants. RP 71-73, 91-93. As he did, Mr. Wohl and Mr. Jeanette grabbed him, pulled him out into the hall and physically restrained him until the police arrived, which only took a couple of minutes. *Id.*

According to Mr. Jeanette he told the defendant a couple of times that he was making a citizen's arrest. RP 91-93. In addition, Mr. Jeanette claimed that the defendant kicked him while the three of them were struggling. RP 92-93. Once the police arrived they placed the defendant under arrest and took statements from Ms McKee and the witnesses. RP 104-123, 123-132. They described Ms McKee as being very upset, having urinated in her jeans, having a bloody nose, and complaining of bruises to her right side where she said the defendant repeatedly hit her. RP 111.

Procedural History

By information filed June 26, 2013, the Cowlitz County Prosecutor charged the defendant Travis Eugene Rinehart with one count of Second Degree Assault by strangulation or suffocation against Suzanne McKee, one count of Unlawful imprisonment against Suzanne McKee, and one count of Third Degree Assault for allegedly kicking Christopher Jeanette "with intent to prevent or resist the lawful apprehension or detention of himself." CP 1-2. The case later came on for trial before a jury with the state calling seven witnesses, including Suzanne McKee, Stephanie Cox, Jack Wohl, Christopher Jeanette, Helen Severn (another neighbor) and two Kelso Police Officers. RP 23, 50, 61, 84, 98, 104 and 123. The defendant then took the stand as the sole witness for the defense. CP 133. These witnesses testified to the facts set out in the preceding factual history. *See Factual History.*

Following the close of the defendant's case the state sought permission to recall Suzanne McKee in rebuttal to testify of two alleged incidents of strangulation and suffocation. RP 174-191. In the first, Ms McKee claimed that while living in Westport a couple years previous the defendant had thrown her down on her bed, grabbed her around the throat strangling her and then intentionally placed his hand over her mouth to cut off her breathing. RP 192-202. In the second she claimed that prior to this incident and while living at another location in Westport the defendant had grabbed her around the throat and strangled her. *Id.*

In its argument the state claimed that this evidence rebutted the defendant's testimony that while he had put his hand up to Ms McKee's mouth to keep her from screaming he did not do so to block her breathing and that he did not block her breathing. RP 174-191, 203-213. The defense responded that this was mere propensity evidence and was much more prejudicial than probative. *Id.* Following argument the court granted the state's request as to the first incident and allowed its admission for the sole purpose of rebutting the defendant's claim that he didn't intentionally block Ms McKee's breathing. RP 213-216. Ms. McKee then retook the stand and testified concerning the first incident. RP 214-217. At this point the state closed its case in rebuttal and the court instructed the jury without objection from either party. RP 221-223.

During closing argument the prosecutor made the following comment about the defendant having previously strangled and suffocated Ms McKee.

And then, in addition to that, he had to intend to obstruct the other person's ability to breathe. And, he explained – he's – he's denying he put his hands over her mouth and nose. He's denying that. He's saying he just held them up. But, he admits that if you block someone's ability to make noise and put your hands over their mouth, you're also going to be obstructing their ability to breathe. It doesn't say that you end their life or absolutely obstruct their ability to breathe at all. It just says, "Obstructs it." And, he doesn't get to put his hands over her mouth. He doesn't get to obstruct her ability to breathe. Really what right does he have to stop her from yelling? I mean, that's not self-defense, that's just blocking a person from, you know, expressing themselves and there's no legal authority to do that that you will find in these instructions. So, yeah, he had the intent. *And, you know, we also heard that this isn't the first time this has happened. There was a prior incident. And, that tells us a lot about his intent and his claim that he didn't do this.*

RP 257-258.

The defense did not object and claim that this argument was (1) improperly arguing substantively from rebuttal evidence, and (2) improperly arguing that the defendant was guilty because he had a propensity to commit the crime. RP 259.

Following the remainder of the argument the jury retired for deliberation. RP 197. The jury eventually returned the following verdicts: (1) "guilty" on the charge of Second Degree Assault, (2) "guilty" on the charge of Unlawful Imprisonment, and (3) "not guilty" on the charge of Third Degree Assault. RP 301-304; CP 47-49. The jury also returned a special

verdict finding that the state had failed to prove that the defendant and Suzanne McKee were members of the same family or household. CP 50. The court later sentenced the defendant within the standard range after which the defendant filed timely notice of appeal. CP 52-64.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO ELICIT PROPENSITY EVIDENCE UNDER ER404(b) WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham’s treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), “[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the

right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (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 the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the

statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar the state did not seek to admit Ms. McKee's claims of a prior incident of strangulation as substantive evidence. Rather, the state claimed that it was admissible to rebut the defendant's claim that he had not blocked Ms McKee's breathing. Eventually the court granted the state's motion without performing any meaningful balancing of the prejudicial effect verses its probative value. In fact such an analysis indicates that the evidence was only marginally probative. However, just as in *Pogue*, *Acosta* and *Escalona* the evidence was grossly prejudicial particularly in light of the weakness of the state's case. The following outlines those weaknesses.

The first weakness in this case lies in the fact that Ms McKee claimed

that the defendant blocked her mouth for two or three minutes to the point that she could not breath or cry out. However, this claim was contradicted by the testimony of the neighbors who repeatedly heard her call out. The second weakness in the case lies in Ms McKee's claims that the defendant sat astride her, held his left hand over her mouth and nose to the point she could not breathe and continually used his right fist to pummel her in her ribs. This claim was contradicted by her own testimony that the pummeling gave her a number of bruises on the ribs of her right side. If her claim about how the assault occurred were to be believed then the bruises would have been to the ribs on her left side not her right. Even at that her claims on this matter were dubious because it strains credibility to believe that he could sit on top of her with her back to the floor, pin her arms to the floor with his legs and then somehow have access to her side so he could repeatedly hit her. The third weakness in Ms McKee's claims comes from the fact that she made a false claim of sexual assault to the first officer who arrived and apparently made the same false claim to the neighbors who arrived before the police. However, by the time of trial she had abandoned this false claim.

Given the inconsistencies in Ms McKee's claims and her lack of credibility, it is highly likely that the trial court's admission of the improper propensity evidence compelled the jury to return guilty verdicts which it would not have returned but for the admission of this improper evidence. As

a result, this court should reverse the defendant's conviction and remand for new trial in which the state is prohibited from eliciting the improper propensity evidence.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ARGUED SUBSTANTIVELY FROM PROPENSITY EVIDENCE OSTENSIBLY ADMITTED SOLELY FOR REBUTTAL PURPOSES DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a

reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state argued substantively that the defendant must be guilty of the claimed suffocation in this case because he was guilty of it in the past. This argument came during the following portion of the state's closing:

And then, in addition to that, he had to intend to obstruct the other person's ability to breathe. And, he explained – he's – he's denying he put his hands over her mouth and nose. He's denying that. He's saying he just held them up. But, he admits that if you block someone's ability to make noise and put your hands over their mouth, you're also going to be obstructing their ability to breathe. It doesn't say that you end their life or absolutely obstruct their ability to breathe at all. It just says, "Obstructs it." And, he doesn't get to put his hands over her mouth. He doesn't get to obstruct her ability to breathe. Really what right does he have to stop her from yelling? I mean, that's not self-defense, that's just blocking a person from, you know, expressing themselves and there's no legal authority to do that that you will find in these instructions. So, yeah, he had the intent.

And, you know, we also heard that this isn't the first time this has happened. There was a prior incident. And, that tells us a lot about his intent and his claim that he didn't do this.

RP 257-258.

Although clothed in language of “intent” the substance of this argument was that the defendant must be guilty of the charge in this case because he did it in the past. In the prosecutor’s own words: “this isn’t the first time this has happened. There was a prior incident.” This argument was improper and went to the crux of the defendant’s prior objections to the admission of the claimed other incident as inadmissible propensity evidence.

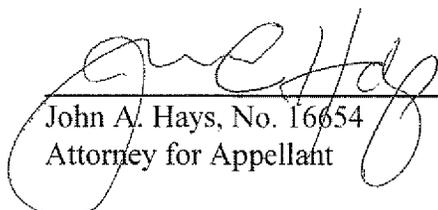
Given the defendant’s prior arguments there was no conceivable tactical reason for counsel to refrain from objecting to this evidence. As a result the failure to object fell below the standard of a reasonably prudent attorney and meets the first criteria under *Strickland*. In addition, as set out in the previous argument, a critical review of the state’s case reveals contradictory, weak evidence. Thus there is a high likelihood that but for this improper argument the jury would have returned “not guilty” verdicts. Thus trial counsel’s failure to object in this case caused prejudice and denied the defendant his right effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

CONCLUSION

The trial court's ruling allowing the state to elicit improper propensity evidence denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. In addition, trial counsel's failure to object when the state improperly argued from that propensity evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result this court should reverse the defendant's convictions and remand for a new trial.

DATED this 11th day of February, 2014.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**TRAVIS EUGENE RINEHART,
Appellant.**

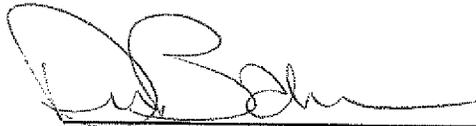
NO. 45376-2-II

**AFFIRMATION OF
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. First Avenue
Kelso, WA 98626
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2. Travis Rinehart, No. 766787
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

Dated this 11th day of February, 2014, at Longview, Washington.



DONNA BAKER

HAYS LAW OFFICE

February 11, 2014 - 12:18 PM

Transmittal Letter

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Case Name: State vs Travis E. Rinehart

Court of Appeals Case Number: 45376-2

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

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