

FILED
2020
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

29234-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANITA S. WOLF, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF KLICKITAT COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

2021 APR 15 10:11 AM
COURT CLERK
DIVISION III
STATE OF WASHINGTON

29234-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANITA S. WOLF, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF KLICKITAT COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....8

 1. ADMITTING IRRELEVANT EVIDENCE OF A
 PRIOR ASSAULT WAS HIGHLY PREJUDICIAL
 ERROR8

 2. THE UNANIMITY INSTRUCTION AS TO THE
 SPECIAL VERDICT VIOLATED THE RIGHT TO
 A JURY TRIAL.....11

 3. THE COMMUNITY CUSTODY SENTENCING
 PROVISION IS NOT AUTHORIZED BY THE
 STATUTE.....13

E. CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BACOTGARCIA, 59 Wn. App. 815, 801 P.2d 993 (1990).....	10
STATE V. BASHAW, 144 Wn. App. 196, 182 P.3d 451 (2008).....	12
STATE V. BASHAW, 169 Wn.2d 133, 234 P.3d 195 (2010).....	11
STATE V. BOORGAARD, 90 Wn.2d 733, 585 P.2d 789 (1978).....	13
STATE V. COOK, 131 Wn. App. 845, 129 P.3d 834 (2006).....	9
STATE V. DAVIS, 141 Wn.2d 798, 10 P.3d 977 (2000).....	12
STATE V. DEAL, 128 Wn.2d 693, 911 P.2d 996 (1996).....	12
STATE V. DeVRIES, 149 Wn.2d 842, 72 P.3d 748 (2003).....	8
STATE V. FISHER, 165 Wn.2d 727, 202 P.3d 937 (2009).....	8
STATE V. GOLDBERG, 149 Wn.2d 888, 72 P.3d 1083 (2003).....	11
STATE V. GRANT, 83 Wn. App. 98, 920 P.2d 609 (1996).....	9
STATE V. HARDY, 133 Wn.2d 701, 946 P.2d 1175 (1997).....	10

STATE V. HOLMES, 43 Wn. App. 397, 717 P.2d 766 (1986).....	8
STATE V. JACKSON, 102 Wn.2d 689, 689 P.2d 76 (1984).....	10
STATE V. JONES, 97 Wn.2d 159, 641 P.2d 708 (1982).....	13
STATE V. LOUGH, 125 Wn.2d 847, 889 P.2d 487 (1995).....	8
STATE V. MAGERS, 164 Wn.2d 174, 189 P.3d 126 (2008).....	8, 9
STATE V. McDONALD, 138 Wn.2d 680, 981 P.2d 443 (1999).....	12
STATE V. ROBTOY, 98 Wn.2d 30, 653 P.2d 284 (1982).....	10
STATE V. THACH, 126 Wn. App. 297, 106 P.3d 782 (2005).....	10
STATE V. WADE, 98 Wn. App. 328, 989 P.2d 576 (1999).....	10
STATE V. WWJ CORP., 138 Wn.2d 595, 980 P.2d 1257 (1999).....	12

CONSTITUTIONAL PROVISIONS

CONST. ART. 1, § 21	1, 13
---------------------------	-------

STATUTES

Former RCW 9.94A.712.....	1, 14
LAWS OF 2008, ch. 231, § 56	14
RCW 9.94A.507.....	14
RCW 9.94A.712.....	13

RCW 9A.20.021(1)(a) 13
RCW 9A.32.050(2)..... 13

COURT RULES

ER 401 9
ER 404(b)..... 1
RAP 2.5(a)(3)..... 12

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting irrelevant evidence of a prior bad act.
2. The court erred in instructing the jury that unanimity was required to answer the special verdict.
3. The court erred in imposing community custody for life.

B. ISSUES

1. Anita Wolf claimed that shooting her fiancé was an accident. As evidence of a pattern of behavior, the State sought to introduce evidence that she had bumped her fiancée with her truck during an argument several months earlier. Did the court abuse its discretion under ER 404(b) by ruling this evidence admissible?
2. The court instructed the jury that in order to answer “no” to the special firearm enhancement verdict, all jurors must agree unanimously. Did this coercive instruction violate the defendant’s right to a jury trial under Const. Art. 1, § 21?
3. The court imposed a term of community custody for life under former RCW 9.94A.712, which applies only to sex

offenses. There was no charge or evidence that the defendant committed a sex offense. Did the court err in imposing the community custody term?

C. STATEMENT OF THE CASE

Anita Wolf and Mike White were engaged to be married. (RP 632, 635) They lived together on Rustic Road up in Timber Valley. (RP 633) Ms. Wolf said she loved him and he was the only man she ever trusted. (RP 287) She and his sister had begun planning and preparing for the wedding. (RP 643)

On the morning of June 25, Ms. Wolf drove to the home of her neighbor Charlotte Dehne. (RP 143) Ms. Dehne's son, Jeff Roza, was standing outside the house. (RP 140-43) He saw that Ms. Wolf was distraught and disheveled. (RP 145) He asked where Mr. White was, and she responded "I'm sorry, I'm sorry. I didn't mean to." (RP 146) When Mr. Roza asked what she was talking about, she told him "I shot Mike." (RP 147) Mr. Roza asked if Mr. White was okay, she told him, "He's dead. He's dead. I'm sure." (RP 147) Mr. Roza asked her how it happened and she told him "she turned and Mike was shutting the door, she hit the window and the gun went off." (RP 170)

Mr. Roza told Ms. Wolf to go back to her house; he would meet her there with his mother. (RP 147)

When Mr. Roza and Ms. Dehne arrived at Ms. Wolf's home, she was hysterical, babbling, and unable to unlock her own gate. (RP 152, 264) After Mr. Roza unlocked the gate, Ms. Wolf led them to a shed where she said her dog had gotten out. (RP 153, 267)

Mr. Roza started towards Ms. Wolf's house, followed slowly by his mother and Ms. Wolf. (RP 154-55) As they were walking toward the house, Ms. Wolf told Ms. Dehne that the shooting had occurred four days earlier. (RP 268) She said it had been an accident. (RP 265) She told Ms. Dehne that she and Mr. White were going to catch the dog, which had gotten loose (RP 268) Mr. White had handed her the gun and gone back inside the house, and came back out as she was going in. She said "I -- I went to go back in the house and he was coming out and the gun went off." (RP 268)

Mr. Roza arrived at the house first, entered through the unlocked sliding glass door, and almost immediately saw what appeared to be a pile of blankets to the left of the door. (RP 156) He lifted a corner of the blanket and saw Mr. White's face. (RP 157) He realized Mr. White was dead. (RP 157)

Moments later, Ms. Dehne and Ms. Wolf came through the door. (RP 158) After she had looked at Mr. White, Ms. Dehne asked Ms. Wolf where the gun was. (RP 167) Ms. Wolf responded by holding out a plastic bag in which Mr. Roza saw Mr. White's handgun. (RP 168)

They returned to the gate and, after Mr. Roza had put the gun in Ms. Dehne's vehicle, they all returned to Ms. Dehne's home where Ms. Dehne's companion, Gary Gerner, helped Ms. Wolf call the police. (RP 172, 318)

The State charged Ms. Wolf with second degree murder while armed with a firearm. (CP 24)

The State sought to show that Ms. Wolf had acted with intent by presenting evidence that she had unreasonably delayed reporting the shooting; testimony showing that she had given inconsistent explanations for how the shooting occurred; physical evidence that was inconsistent with any of her descriptions of the shooting; and evidence that she had attempted to conceal the crime.

Neighbor Alexia Dragoo testified that she had heard a gunshot at nine o'clock in the morning on June 23. (RP 268) Ms. Wolf had claimed she failed to call 911 because she could not get cell phone service, although records showed that she had called her voicemail number on June 23 at 10:00 a.m.

Ms. Wolf's cousin, Stephen Smith, testified that he spoke with her by telephone and then went to her home. (RP 336) As he walked through the door he saw Mr. White lying on the floor, partially covered by a blanket, and realized he was dead. (RP 341-42) He saw Ms. Wolf holding a handgun, and she told him that she and Mr. White had been fighting and the gun had gone off accidentally. (RP 349-50) She mentioned something about a dog, and then said "something about the door jammed and the gun going off and something like that nature." (RP 351) Mr. Smith later told law enforcement that she had said "when he came through the door there was like a struggle and the gun went off." (RP 351-52) Johan Shuman testified that the gun would only fire if the trigger were pulled. (RP 664-65) He also stated that the shot was fired at a distance of between six inches and three feet from the entry wound. (RP 672)

Detective Jim Leininger testified that he had stretched a string along the presumed path of the bullet from a hole where it had entered the wall to the location of the body inside the door. (RP 539-40) Forensic scientist Kari O'Neill testified to the location of the bullet hole, about 28 inches above the floor, and a graze in the adjacent drywall that angled slightly downward from the hole. (RP 569-72) The distance from the bullet hole to Mr. White's feet was 173 ½ inches. (RP 579-80)

Mr. Roza testified that when he entered the house through the sliding door he saw that a piece of plywood had been placed across the other door to the house. (RP 159-60)

The State also sought to present evidence that Ms. Wolf had exhibited a pattern of assaultive behavior. (RP 113) Before trial, over defense counsel's objection that the evidence was not relevant, the court ruled it was admissible:

THE COURT: Okay. I'll allow testimony that -- there was an act of domestic violence. I think within two months it -- goes to the -- although it's -- a -- it's a bad act, but it's also -- I presume being offered for a -- a motive, state of mind of the -- of the defendant -- prior acts of domestic violence, I believe, are admissible under the cases which I have read. So I will allow that.

(RP 113-14)

Near the end of the State's case, Elizabeth Porritt, Mr. White's sister, testified that during the winter before the shooting she observed an argument between her brother and Ms. Wolf. (RP 631-34) Ms. Wolf was driving a truck and Mr. White was yelling at her and jumping out of the truck. (RP 634-35) According to Ms. Porritt, "he was walking in front of her and he turned towards the front of the truck and was yelling at her that she's gonna shut her mouth bitch and so she hit the gas." (RP 636) Asked whether Ms. Wolf had struck her brother with the truck she said "Yeah. A

little bit. Not enough to stop him from going to the window and yell at her.” (RP 636)

During closing argument, the deputy prosecutor contrasted Ms. Wolf’s claim that the shooting was an accident with what he referred to as “what we heard as a - - the behavior.” He then referred to Ms. Porritt’s testimony as “this incident with the truck where there was an argument. She tried to hit Mr. White with the truck.” (RP 768)

The court gave the jury a special verdict form for the firearm enhancement along with an instruction:

Because this is a criminal case all twelve of you must agree in order to answer the Special Verdict Form.

In order to answer the Special Verdict Form yes you must unanimously be satisfied beyond a reasonable doubt that yes is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer no.

(RP 757)

The jury found Ms. Wolf guilty of second degree murder. (RP 809)
The jury had failed to complete the Special Verdict, and was instructed to return to the jury room and fill out the special verdict form. (RP 809) The jury returned after answering yes as to the special verdict. (RP 810)

At sentencing, the court imposed a standard range sentence of 232 months, including the 60-month firearm enhancement, plus community custody to the expiration of the maximum sentence. (CP 141,145-46)

D. ARGUMENT

1. ADMITTING IRRELEVANT EVIDENCE OF A PRIOR ASSAULT WAS HIGHLY PREJUDICIAL ERROR.

Under ER 404(b), “prior misconduct is not admissible to show that a defendant is a ‘criminal type’, and is thus likely to have committed the crime for which he or she is presently charged.” *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *see State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). ER 404(b) allows evidence of prior misconduct that has “some additional relevancy beyond mere propensity.” *State v. Holmes*, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986). Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b) If “the evidence is offered for a legitimate purpose, then the exclusion provision of rule 404(b) does not apply.” *Lough*, 125 Wn.2d at 853.

“To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect.” *State v. Magers*, 164 Wn.2d 174, 184, 189 P.3d 126 (2008) (*citing State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003)).

“Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” *Magers*, 164 Wn.2d at 184 (*citing* ER 401). The State argued that the evidence was relevant because “it goes to her pattern of behavior.” (RP 113) The court suggested the evidence would be relevant because it was evidence of domestic violence offered to show the defendant’s state of mind or motive. (RP 113)

Evidence of prior incidence of domestic violence has been held admissible under ER 404(b) to explain the why the victim of such violence has changed his or her story or recanted. *See Magers*, 164 Wn.2d at 184-85, *citing State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006), *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996). But Mr. White did not testify or recant; the evidence has no relevance under the theory described in *Magers*.

Nor did the evidence tend to show a motive for second degree murder. The evidence regarding the prior incident showed that Ms. Wolf was motivated to commit what amounted to a fourth degree assault by being told to “shut up bitch.” (RP 637)

The relevance suggested by the State is even less helpful. Evidence of a “pattern of behavior” is evidence of propensity, the forbidden purpose under ER 404(b).

The prejudicial effect of such evidence is well recognized. *See State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) (evidence of two prior instances of drug dealing demonstrated intent only through an inference of propensity); *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (jurors naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended). The prejudicial effect is even greater if the prior crimes are similar to the current offenses. *State v. Hardy*, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997).

The court abused its discretion in ruling the evidence admissible at trial.

Admission of this irrelevant, highly prejudicial evidence was not harmless. Evidentiary errors under ER 404 are not of constitutional magnitude; they require reversal if the trial outcome would have differed if the error had not occurred. *State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005); *citing State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982); *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984).

The central issue was whether Ms. Wolf acted with intent to kill when she shot Mr. White. Evidence that she had assaulted him on a prior occasion when provoked to anger is perhaps the only evidence of intent that the State presented to the jury. The error was not harmless.

2. THE UNANIMITY INSTRUCTION AS TO THE SPECIAL VERDICT VIOLATED THE RIGHT TO A JURY TRIAL.

A jury must be unanimous in order to answer “yes” to a special verdict question about the grounds for a sentence enhancement, but need not be unanimous to answer “no.” *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). *Bashaw* expressly disapproved a jury instruction that required unanimity in order to answer “no” to the special verdict question. The instruction in *Bashaw* stated: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The instruction to Ms. Wolf’s jury similarly required unanimity to answer “no.”

In *Bashaw*, as here, the jury answered “yes” to the special verdict questions. 169 Wn. 2d at 147. But there is no way to determine whether the jury instruction may have had a coercive effect; thus the erroneous

instruction cannot be found harmless beyond a reasonable doubt. *Id.* at 147-48.

This error may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). “An error is ‘manifest’ if it had ‘practical and identifiable consequences in the trial of the case.’” *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

It is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” *Davis*, 141 Wn.2d at 866 (citing *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)). Moreover, the *Bashaw* court apparently regarded this issue as a constitutional one. In *Bashaw*, as here, no one objected to the erroneous instruction at trial. *State v. Bashaw*, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008). And while the court in *Bashaw* expressly noted that double jeopardy considerations did not compel its holding, it did not exclude the possibility that an erroneous jury instruction affects other constitutional rights, such as a defendant’s right to the due process of law. *Bashaw*, 169 Wn.2d at 146 n. 7.

As the *Bashaw* court noted, the harm resulting from giving the erroneous special verdict instruction is that it may serve to coerce a juror

to abandon his or her opinion in order to reach the unanimous verdict apparently required by the instruction.

“The right of trial by jury shall remain inviolate” Const. Art. 1, § 21. The right to a jury trial embodies the right to a jury verdict uninfluenced by factors outside the evidence, the court’s instructions, and the arguments of counsel. *State v. Boorgaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). This right prohibits a judge from bringing coercive pressure to bear upon jury deliberations. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). A jury instruction invades this right by suggesting that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict. *Boorgaard*, 90 Wn.2d at 736.

The coercive instruction given in this case violated Ms. Wolf’s constitutionally guaranteed right to a jury trial and the resulting firearm enhancement should be vacated.

3. THE COMMUNITY CUSTODY SENTENCING PROVISION IS NOT AUTHORIZED BY THE STATUTE.

Second degree murder is a Class A felony, for which the maximum term of imprisonment is life. RCW 9A.20.021(1)(a) and 9A.32.050(2). The court imposed a term of community custody under RCW 9.94A.712

“for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.” (CP 146) Former RCW 9.94A.712 governs the trial court’s sentencing authority for certain enumerated sex offenses.¹

Ms. Wolf was not charged with any of the sex offenses enumerated in Former RCW 9.94A.712. (CP 24-25) The State presented no evidence that the alleged murderer was committed with sexual motivation. This statute has no application here, and was improperly relied upon by the court in imposing sentence. The community custody provision should be vacated.

¹ Former RCW 9.94A.712 provides in relevant part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a)

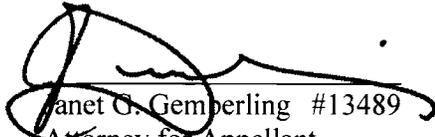
The statute was recodified in 2008 as RCW 9.94A.507. Laws of 2008, ch. 231, § 56.

E. CONCLUSION

The conviction should be reversed and remanded for a new trial in conformity with the rules of evidence. The firearm enhancement should be vacated. The community custody term should be vacated.

Dated this 23rd day of February, 2011.

GEMBERLING & DOORIS, P.S.


Janet G. Gemberling #13489
Attorney for Appellant