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Court of Appeals
Division III
State of Washington

31483-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY A. HAYS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding that evidence of Mr. Hays's domestic violence convictions was admissible.
2. The court erred in giving the following limiting instruction during testimony and again in the written jury instructions:

Instruction No. 5. Evidence has been presented in this trial that the defendant has been convicted of certain crimes. You may consider this evidence only for the purpose of giving possible context to the events described in this case, for evaluating possible motives of the defendant, to determine whether the alleged threats were true threats, and to determine whether a reasonable person would have felt threatened under the circumstances presented in evidence. You must not consider the evidence for any other purpose.

(RP 194)

3. The court's limiting instruction was an unconstitutional comment on the evidence.
4. Defense counsel failed to provide effective assistance by failing to object to the admission of irrelevant evidence, to the giving of an erroneous instruction and to the prosecutor's misleading argument.

B. ISSUES

1. When the accused is charged with intimidating a judge because of her rulings in a trial on an obstruction charge, are his convictions on guilty pleas before the same judge relevant because:

- a) knowledge of these crimes and their underlying facts may assist the jury in determining whether statements by the accused to the judge could reasonably be viewed as “true threats” by the accused;
 - b) knowledge of these crimes and their underlying facts may assist the jury in determining whether statements by the accused to the judge could reasonably be viewed as “true threats” by the judge;
 - c) the existence of these cases may be relevant in impeaching the defendant’s testimony that he felt unfairly treated by the judge; or
 - d) The existence and handling of these cases would be generally relevant to the issue of *mens rea*?
2. When the accused is charged with intimidating a judge, is the question of whether the statements of the accused actually caused the judge to believe she might be physically injured an issue to be decided by the jury?
3. When the accused is charged with intimidating a judge because of her rulings in an earlier trial on an obstruction charge, should the jury be instructed to consider the defendant’s guilty pleas on unrelated charges before the same judge in determining whether a reasonable person would have felt threatened under the circumstances?
4. When the judge instructs the jury that it may consider evidence for an improper purpose, is the instruction an unconstitutional comment on the evidence?

5. Does defense counsel provide ineffective assistance when he fails to object to highly prejudicial character evidence, improper limiting instruction, and improper prosecutorial comments?

C. STATEMENT OF THE CASE

A law enforcement officer detained Mr. Hays for questioning in the spring of 2011. (RP 158-59) The officer placed Mr. Hays in handcuffs and, according to Mr. Hays, assaulted him, causing serious injuries. (RP 158) Mr. Hays was charged with obstructing an officer. (RP 158) Because of the injuries he suffered at the hands of the officer, Mr. Hays felt he had done nothing wrong. (RP 158-59)

The obstructing charge was tried about a year later before Judge Michelle Szambelan. (RP 159) Defense sought to admit into evidence photographs depicting the injuries Mr. Hays suffered after being handcuffed when he was being detained. (RP 159-60) According to Mr. Hays, these photographs would have supported his testimony and cast doubt on the testimony of the officer who had detained him. (RP 160) Judge Szambelan ruled that the photographs were inadmissible. (RP 159) A jury found Mr. Hays guilty of a misdemeanor, obstructing the officer. (RP 34, 37-38, 160)

Mr. Hays is a 50-year-old day laborer with a 10th grade education. (RP 156-57) At the trial of the obstructing charge, Mr. Hays was represented by retained counsel. (RP 161) A city public defender represented him in an appeal

from his conviction. (RP 161) Appointed counsel never provided Mr. Hays with any information about the appeal except to tell him that he had lost. (RP 161-62) After that, Mr. Hays tried to continue challenging his conviction, but had no idea how to go about it and he could not find a lawyer who would help him. (RP 162)

A year after his conviction on the obstructing charge, Mr. Hays went to the courthouse annex to leave some papers with the public defender's office on unrelated business. (RP 162-63) He had been drinking, and it occurred to him to pay a visit to Judge Szambelan and tell her how angry he was and how unfairly he felt he had been treated in her courtroom. (RP 163, 166) He knocked on her door, she opened it, and he proceeded to share his thoughts and feelings with her in what appeared to her to be a forceful and intimidating manner. (RP 164-65) He told her he felt she had taken the police officer's side against him, that he had been the victim, and that she was wrong to withhold the proffered photographs to the jury. (RP 165)

This occurred late in the day on a Friday in September. (RP 53) Judge Szambelan was working in chambers when Mr. Hays knocked on her door. (RP 53-56) When she opened the door, she recognized Mr. Hays. (RP 58) She told him she could not talk to him because it would be inappropriate for her to have ex parte communication with him because she thought he might have some

matters ongoing in her courtroom. (RP 58) Nevertheless, he went on to tell her he was angry and said to her “I’m going to cut you down.” (RP 59-60)

Judge Mary Logan was working in her office nearby when her administrative assistant told her Judge Szambelan was in the hallway talking with a man. (RP 111) Judge Logan told her assistant to call security, then went to her office door and saw Judge Logan and Mr. Hays. (RP 113-116) She saw him reach towards Judge Szambelan and she shouted “Shut the door, Shelley.” (RP 117)

Judge Szambelan closed the door to her chambers and Mr. Hays began walking slowly down the hallway muttering to himself. (RP 119) At one point he turned his head and looked at her, so she said “You need to keep going.” (RP 119-120) He continued walking down the hall and turned the corner toward the stairwell. (RP 120)

Corrections Officer Thomas Staudinger responded to the radio call regarding an upset man in Judge Szambelan’s courtroom. (RP 146) He saw Mr. Hays standing in front of the elevator, and after verifying with Judge Szambelan that this was the man in question, he and another officer escorted Mr. Hays from the building. (RP 147-47) He returned to the judges’ chambers to report that he had done so, and Judge Logan told him she wanted Mr. Hays arrested for threatening a judge. (RP 148) Sheriff’s Deputy Kenneth Scott found Mr. Hays in

the courtyard between the main courthouse and the Public Safety Building and took him into custody. (RP 138-42)

The State charged Mr. Hays with intimidating a judge, RCW 9A.72.160. (CP 1)

The first trial of the charge of intimidating a judge ended in a mistrial. (11/27/2012 RP 7) During its deliberations, the jury had sent two inquiries to the judge:

Regarding Instruction #11:

In the second paragraph regarding the clarification of threat, does “the reasonable person in the position of the speaker” refer to Mr. Hays as “the forseeer of the interpretation of serious expression?”

(CP 47)

Is it sufficient that Judge Szambelan feel threatened with bodily injury for a threat to be communicated?

(CP 48) The court responded to both inquiries: “Please continue deliberations. You are to consider only the testimony of the witnesses and the instructions of the court.” (CP 47-48) Ultimately the jury concluded that it could not “reach a unified decision.” (RP 49)

After he had been convicted of obstruction, but before the events that gave rise to the present matter, Mr. Hays had pleaded guilty to two domestic violence misdemeanor charges. (CP 57-58) Following the mistrial, and prior to the retrial by another judge, the first trial judge reduced to writing the findings and

conclusions supporting her ruling that evidence of Mr. Hays's prior convictions was admissible:

The fact of Hays' charges, convictions and appearances before Judge Szambelan are relevant in the State's case-in-chief for several reasons: first, they show that Hays knew Judge Szambelan was in fact a judge and that she was working in her official capacity and in relation to official court business when she was presiding over Hays' cases; second Judge Szambelan's handling of the Obstructing charge is allegedly the motive for Hays' anger toward her; third, knowledge of these crimes and their underlying facts may assist the jury in determining whether Hays' statements to Judge Szambelan could reasonably be viewed as "true threats" by Hays as he made them and interpreted as such by Judge Szambelan as she heard them; fourth, the existence of these cases may be relevant in impeaching Hays' testimony that he felt unfairly treated by Judge Szambelan; finally, the existence and handling of these cases is relevant generally to the issue of mens rea;

(CP 57-59) Defense counsel objected to the decision to admit evidence of the prior domestic violence convictions. (RP 7)

At the second trial, Judge Szambelan told the jury that her job as a municipal court judge was to hear adult misdemeanors committed within the City of Spokane. (RP 29-30) She had applied to become a judge when the municipal court was created and out of about twenty-six applicants, she was one of three recommended by a blue ribbon panel and selected and confirmed by the mayor in 2009. (RP 30-31) She noted that she was subsequently reelected. (RP 31)

Although she recalled Mr. Hays's trial on the obstructing charge, Judge Szambelan testified that she did not remember anything unusual about his conduct or demeanor during the trial or at sentencing. (RP 33, 38, 41-42) She testified

that Mr. Hays never complained about her handling of the case during the obstruction trial. (RP 38) The jury found Mr. Hays guilty of obstructing and Judge Szambelan imposed a sentence of 30 days. (RP 40) She told the jury that she could have imposed a maximum sentence of 364 days and a \$5000 fine. (RP 40-41)

Judge Szambelan testified that Mr. Hays's conviction was upheld by the higher court, and that there were more layers of appeals available to him including moving for discretionary review in the Court of Appeals and even in the Supreme Court. (RP 45) She never had any notice that Mr. Hays was dissatisfied with the way she handled the obstructing case. (RP 44)

Judge Szambelan told the jury that she had seen Mr. Hays in court subsequent to the obstructing conviction. (RP 45) At that point the court gave a "limiting instruction" explaining to the jury that the evidence of Mr. Hays's prior convictions could only be considered for the purpose of giving possible context to the events described in this case, for evaluating possible motives of the defendant, to determine whether the alleged threats were true threats, and to determine whether a reasonable person would have felt threatened under the circumstances presented in evidence. You may not consider this evidence for any other purpose. (RP 46)

Judge Szambelan then testified that following his obstruction conviction, Mr. Hays appeared in her court and pleaded guilty to a domestic violence assault,

and a few months after that he pleaded guilty to violating a no-contact order. (RP 47-53) She testified that he did not file an affidavit of prejudice against her in these cases, although he had every right to do so, his conduct was very ordinary, and he did not make any complaints about her at allocution. (RP 47-53)

Judge Szambelan explained to the jury that when she heard Mr. Hays knock on her door that Friday afternoon in September, she had no security system and couldn't see him through the peephole in her door. (RP 56-57) She felt it was "kind of weird" to have people there on a Friday afternoon. (RP 57)

According to Judge Szambelan, when she opened the door, she saw who it was and that he appeared red in the face and she smelled the odor of intoxicants. (RP 58) He was only a foot-and-a-half away, which was closer than she would have preferred. (RP 60) He said "I want to talk to you" and "I'm very angry." (RP 58-59) Judge Szambelan told the jury that he said these things in a mean voice, a "growly" voice like Dirty Harry. (RP 58-59) He told her she had screwed up his life and withheld evidence in his case. (RP 60) And he said "I'm going to cut you down" in a slow, measured voice. (RP 60) She felt he was saying these things in a menacing manner; he kept saying he was mad; she was scared. (RP 61-62) She told him he needed to leave or he would be escorted out. (RP 62)

Judge Szambelan testified that Mr. Hays reached through the door towards her and that she then shut the door. (RP 62-63)

Judge Logan told the jury that, before becoming a judge, she had worked as a public defender. (RP 106) She said she had a good professional relationship with Judge Szambelan before they became judges, and that since they came to the bench they had developed a more personal relationship and had become “comrades in arms.” (RP 108)

As presiding judge, Judge Logan had taken the opportunity to observe Judge Szambelan in the court room. (RP 108) She told the jury that Judge Szambelan “has a very straight-forward, professional but folksy demeanor on the bench” and “has a very good capacity for trying to calm people down.” (RP 108) She testified that Judge Szambelan was not prone to overreact to things in her professional capacity, has an even temperament and a great empathy for individuals. (RP 109)

When, on the afternoon of September 7, Judge Logan’s assistant told her that Judge Szambelan was in the hallway talking to a defendant, the assistant expressed a level of concern that caused Judge Logan to be “on alert.” (RP 111) The assistant was wide-eyed and her emotions were elevated. (RP 113) Judge Logan was upset that security had not yet been called, and instructed the assistant to call security, transport and 911. (RP 112-13)

According to Mr. Hays, when he told the judge he was “going to cut her down” he was not intending to threaten her with any physical injury but, rather, to let her know that she had violated his right to a fair trial and “this wasn’t over with and I want justice done.” (RP 165)

During closing arguments, the prosecutor encouraged the jury to consider Judge Szambelan’s character for reasonableness and look at the evidence from her point of view:

You’ve heard that Judge Szambelan was an even-tempered even-keel person, not prone to overreact, not prone to make specious complaints or call security in for no reason. On the contrary, it’s her practice to try to get people to calm down and relax in her own court so she doesn’t have to do this. But Judge Logan explained that to you a little bit and explained to you one of the key reasons why in this case it might be more threatening in terms of the context of how everything happened, because Judge Logan talked to you about the difference she feels as a judge, being in her robe on the stand in court performing her role, recognized as a figure of the justice system, versus when she’s more of a regular person in her street clothes back in her chambers just doing her work.

(RP 210-11) He pointed to evidence tending to show Judge Szambelan was frightened by Mr. Hays’s conduct:

You know from the police that when they came and they saw her, the jail guards told you that she was pale and looked upset. You know from her friend, Commissioner Caniglia, who had known her for 17 years, that she was acting in a way that was different. And you know from all the judges that the -- that the charge or

allegation of intimidating a judge is not something any of them have had to deal with in their years of being judges.

(CP 111) Finally he argued at some length that Judge Szambelan's knowledge of Mr. Hays's criminal history, coupled with his conduct on the day of the incident, had indeed intimidated her as it would any reasonable person:

On the contrary, these are the circumstances known to Judge Szambelan about Mr. Hays. She knew he had been in some sort of involvement with a police officer that resulted in him being convicted of obstruction. She knew, as Mr. Hays testified, that there was alcohol involved in that incident, just as there was alcohol involved on September 7th. She knew after this conviction that disrupted his life so much that he didn't quit his behavior; instead, he got convicted of domestic violence assault. So now the judge knows he's a convicted assailant. That's something else she knows about him, and that this wasn't even the end of Mr. Hays's road. Mr. Hays then went and broke the law by violating Judge Szambelan's own order of no-contact. So she knows that he's a person willing to ignore court orders. These are the things that she knows about Mr. Hays. Add that to the fact that he came to her office, that he was within inches of her, that he was drunk, that he was angry, and then the language that he used to deliver his threat, and any person would have been intimidated, as Judge Szambelan indeed showed that she was.

(RP 125-26)

The jury found Mr. Hays guilty and he appealed. (CP 84, 96-97)

D. ARGUMENT

1. ADMITTING EVIDENCE OF MR. HAYS'S DOMESTIC VIOLENCE CONVICTIONS WAS PREJUDICIAL ERROR.

The trial court permitted Judge Szambelan to testify in detail about the facts of Mr. Hays's domestic violence convictions, including her recollection of his conduct at the related guilty plea and sentencing hearings. Evidence of misconduct is not admissible to show that a defendant is a "criminal type," and has a propensity to commit criminal acts. ER 404(b)¹, *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002); *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).

The correct interpretation of an evidentiary rule is reviewed *de novo* as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1969)). "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *DeVincentis*, 150 Wn.2d at 17 (citing *State v. Lough*, 125 Wn.2d at 856). A trial court's ruling under ER 404(b) amounts to a manifest abuse of discretion if no reasonable judge would have ruled

¹ 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.

ER 404(b).

as the trial court did. *State v. Sublett*, 156 Wn. App. 160, 194-95, 231 P.3d 231 (2010) *rev. granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010) (*citing State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007)).

Because ER 404(b) explicitly prohibits admission of evidence to prove a defendant has a criminal propensity, a trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (*citing Carson v. Fine*, 123 Wn.2d 206, 221, 867 P.2d 610 (1994)). Evidence of prior misconduct may be admissible, if it has “some additional relevancy beyond mere propensity” “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). *State v. Holmes*, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986); *Lough*, 125 Wn.2d at 853. Such evidence is admissible where it is “logically relevant to a material issue before the jury” and the probative value outweighs the prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The Supreme Court recently reiterated the trial court’s duties with respect to the admission of evidence of misconduct:

Before admitting ER 404(b) evidence, a trial court “must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” This analysis must be conducted on the record. If the evidence is admitted, a limiting instruction must be given to the jury.

State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007) (citations omitted).

Here, the trial court implicitly found that Mr. Hays had been convicted of the three prior offenses, and the trial court record amply supports those findings. (CP 57-58) The written findings do not identify with any specificity the purpose for which the domestic violence convictions were sought to be admitted, but those purposes may be inferred from the court's specific findings as to relevance. Unfortunately, the written findings do not distinguish between the relevancy of the prior obstructing charge and the domestic violence convictions.

In assessing the trial court's relevancy findings it may be helpful to have in mind the essential elements of intimidating a judge: "[T]he elements required to be proven under RCW 9A.72.160(1) are: (1) that a person directs a threat, either directly or indirectly; (2) to a judge; and (3) because of a ruling or decision by that judge in any official proceeding." *State v. Hansen*, 122 Wn.2d 712, 719, 862 P.2d 117 (1993)

Evidence as to the obstructing charge would obviously be admissible for several of the reasons cited in the findings: to establish that Judge Szambelan was the judge when that charge was tried, that her decisions at that trial were the basis for Mr. Hays's anger, and thus as some evidence of his mental state on the date of the alleged intimidation.

The domestic violence convictions are significantly more problematic. Assuming that the obstruction conviction would be admissible, these two unrelated convictions are unnecessary to show that Mr. Hays knew Judge Szambelan was a judge.

The court found “knowledge of these crimes and their underlying facts may assist the jury in determining whether Hays’ statements to Judge Szambelan could reasonably be viewed as ‘true threats’ by Hays as he made them and interpreted as such by Judge Szambelan as she heard them.” (CP 57) “A ‘true’ threat exists if the speaker would reasonably foresee under the circumstances that the listener would believe he or she will be subject to physical violence.” *State v. King*, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006).

How Judge Szambelan would have interpreted Mr. Hays’s allegedly threatening statements has no relevance in determining whether the alleged statements were “true threats.” What the listener would actually believe is not relevant to determining whether a statement is a “true threat.” The issue is solely whether Mr. Hays would reasonably foresee that his statements would cause the judge to believe she would be subject to violence. His prior convictions for a misdemeanor domestic assault and violation of a “no contact” order are irrelevant except to the extent that prior assaults evidence criminal propensity.

The court found that the domestic violence convictions “may be relevant in impeaching Hays’ testimony that he felt unfairly treated by Judge Szambelan.”

(CP 59) The court’s reasoning is incomprehensible. An essential element of the charged offense is that the threat should be “because of a ruling or decision by that judge in any official proceeding.” *State v. Hansen*, 122 Wn.2d at 719. The State’s case rested on the assertion that Mr. Hays felt unfairly treated by Judge Szambelan, the State presented substantial evidence of that fact, through the testimony of both Judge Szambelan and Judge Logan, and Mr. Hays admitted that this was the cause of his anger. Evidence that Mr. Hays appeared to feel he was being treated fairly in two other cases, along with evidence that he failed to express his dissatisfaction with Judge Szambelan’s ruling prior to the statements made on September 7, has no relevance whatsoever to any issue in this case.

The court also found the evidence of prior convictions was “relevant generally to the issue of mens rea.” The court did not identify what the *mens rea* issue might be. The statute does not specify any mental state as an element of intimidation, and none has been found by the courts. RCW 9A.72.160; *see Hansen*, 122 Wn. 2d at 717-18; *State v. Kepiro*, 61 Wn. App. 116, 122, 810 P.2d 19 (1991).

The probative value of the evidence of Mr. Hays’s domestic violence convictions is negligible. The prejudicial effect is far more evident. The prejudicial effect of “other misconduct” evidence lies in the inference that any criminal behavior shows that the defendant has a propensity for criminal conduct such as the crime with which he is charged. *See State v. Everybodytalksabout*,

145 Wn.2d at 466. The most obvious inference to be drawn from the evidence would be that Mr. Hays has a propensity for violence and that this makes it more probable that he did intend to harm the judge or, at the very least, to make her fear that he would do so. That is precisely the reasoning the ER 404(b) is intended to preclude.

The only other arguably probative value of the prior convictions would be to support Judge Szambelan's claim that she was extremely frightened by Mr. Hays's statements, but since her state of mind is not a material issue, that cannot be a basis for admitting the evidence.

A trial court's ruling under ER 404(b) amounts to a manifest abuse of discretion if no reasonable judge would have ruled as the trial court did. *State v. Sublett*, 156 Wn. App. at 194-95 (citing *State v. Mason*, 160 Wn.2d at 933-34). In weighing the probative value and prejudicial effect of the prior convictions, the trial judge failed to distinguish between the highly probative value of evidence relating to Mr. Hays's obstruction conviction and the irrelevance and prejudicial effect of the totally unrelated domestic violence convictions. No reasonable judge who recognized this significant distinction would have ruled as the judge did in the present case.

The prejudicial effect of the evidence outweighed any slight probative value it may have had, and its admission at trial was an abuse of discretion.

2. THE LIMITING INSTRUCTION MISREPRESENTED THE LAW.

Immediately before Judge Szambelan testified about Mr. Hays's prior domestic violence convictions, the court instructed the jury that it could only consider this evidence "for the purpose of giving possible context to the events described in this case, for evaluating possible motives of the defendant, to determine whether the alleged threats were true threats, and to determine whether a reasonable person would have felt threatened under the circumstances presented in evidence." (RP 46)

Whether the person threatened actually is placed in reasonable fear is not an element of intimidation. *See State v. Hansen*, 122 Wn.2d at 718. Whether the defendant actually intends to cause harm is not an element of intimidation. *State v. Kepiro*, 61 Wn. App. at 121. "All that is required is that the defendant direct a threat to a judge in which he [or she] communicates the intent to do so." *Id.* Whether the person threatened even learns of the threat is "irrelevant with regards to the commission of the crime." *State v. Hansen*, 122 Wn.2d at 718; *State v. J.M.*, 144 Wn.2d 472, 487, 28 P.3d 720 (2001).

The trial court may have confused the elements of intimidation with the elements of harassment. The elements of intimidation differ from the elements of felony harassment. *See State v. J.M.*, 144 Wn.2d at 487; *State v. Fuentes*, 150 Wn. App. 444, 452, 208 P.3d 1196, 1200 (2009). The difference is significant.

One of the essential elements of felony harassment is that “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(b); *State v. Johnson*, 172 Wn. App. 112, 120, 297 P.3d 710 (2012), as modified on denial of reconsideration (Feb. 13, 2013), *review granted in part*, 88683-1, 2013 WL 4766705 (Wash. Sept. 4, 2013) In a harassment case “Washington courts allow evidence of prior misconduct to show that the victim’s fear was reasonable.” *State v. Johnson*, 172 Wn. App. at 120; *see State v. Ragin*, 94 Wn. App. 407, 412, 972 P.2d 519 (1999).

But that “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out” is not an element of intimidation. RCW 9A.72.160. Whether a reasonable person in Judge Szambelan’s position would have felt threatened by Mr. Hays’s statements is not an issue in this case, and it was improper to instruct the jury that it could consider evidence for that purpose.

3. THE LIMITING INSTRUCTION REGARDING PRIOR DOMESTIC VIOLENCE CONVICTIONS WAS A JUDICIAL COMMENT ON THE EVIDENCE.

Const. Article IV, § 16 prohibits a judge from “conveying to the jury his or her personal attitudes toward the merits of the case.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). “Moreover, the court’s personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied.” *State v. Levy*, 156 Wn.2d 709, 721,

132 P.3d 1076 (2006) citing *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

Under RAP 2.5(a), an issue not raised at the trial court is generally waived on appeal. *State v. Powell*, 166 Wn.2d at 82. CrR 6.15(c) requires timely and well-stated objections to jury instructions. *State v. Scott*, 110 Wn.2d 682, 685–86, 757 P.2d 492 (1988). Under RAP 2.5(a)(3), however, a party may raise for the first time on appeal a manifest error affecting a constitutional right.

The Washington Constitution explicitly prohibits judicial comments on the evidence. Washington Constitution, Article IV, § 16. A jury instruction that constitutes an impermissible comment on the evidence is a manifest error affecting a constitutional right. *State v. Levy*, 156 Wn.2d at 719-20.

Mr. Hays’s claim that the limiting instruction was an impermissible comment on the evidence is reviewable for the first time on appeal. *Levy*, 156 Wn.2d at 719–20.

The jury would reasonably have understood the limiting instruction as implying that the judge considered Judge Szambelan’s fear or apprehension as a factor that is important in determining whether Mr. Hays was guilty of intimidating the judge. Since the evidence was irrelevant, this suggestion was highly improper. Thus, that part of the limiting instruction was an unconstitutional comment on the evidence.

4. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE IMPROPER LIMITING INSTRUCTION, INADMISSIBLE CHARACTER EVIDENCE AND PROSECUTORIAL MISCONDUCT.

Under the rules of evidence, the State may not offer evidence of a victim's character trait except to rebut evidence offered by the accused:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

...

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

ER 404. "In particular, evidence of specific acts of conduct is inadmissible if it is offered to prove the character of the person, and that the person acted in conformity with that character." *State v. Bell*, 60 Wn. App. 561, 564, 805 P.2d 815 (1991); ER 405(a). "Even if the evidence [has] some probative value on a fact of consequence, the trial court" must determine whether "its value was outweighed by its prejudicial effect." 60 Wn. App. at 565. ER 403.

Similarly, evidence of a witness's character is admissible only for purposes of attacking or supporting credibility and evidence of truthfulness is admissible only after the character of the witness has been attacked. ER 608;²

² (a) **Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the

State v. Smith, 67 Wn. App. 838, 842-43, 841 P.2d 76 (1992). Character evidence that is not relevant to the witness's truthfulness has no legitimate evidentiary purpose.

Judge Logan testified that she had personally observed Judge Szambelan's conduct on the bench and testified to her character traits of reasonableness and fairness. She testified that Judge Szambelan "was not prone to overreact to things in her professional capacity, has an even temperament and a great empathy for individuals." (RP 109) Relying on this evidence, the prosecutor argued that Judge Szambelan would not have been frightened unless she had truly believed that Mr. Hays would harm her. (RP 211)

Evidence of a witness's experience and training may be relevant to qualify the witness as an expert, but evidence of commendations is not relevant for that purpose. 67 Wn. App. at 843. Such evidence may represent an effort to improperly elevate the character of the witness. *Id.* at 844-45. Judge Szambelan nevertheless told the jury that she had been selected by a blue ribbon panel, as well as having been reelected.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86,

character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

ER 608.

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must satisfy the following two-prong test:

(1) [D]efense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Defense counsel made no objection to the admission of evidence designed to emphasize irrelevant aspects of Judge Szambelan's excellent character. Defense counsel acceded to the admission of evidence, limiting instructions and prosecutorial argument encouraging the jury to focus on the irrelevant issue of whether Judge Szambelan was frightened by Mr. Hays's comments.

In order to secure a conviction, the State was required to prove that Mr. Hays directed a threat to Judge Szambelan because of her ruling in his obstruction trial. *See State v. Hansen*, 122 Wn. 2d at 719. Judge Szambelan testified that she was a judge in Mr. Hays's obstruction case and he told her he was angry because he felt that her ruling excluding evidence of his injuries constituted a wrongful withholding of evidence.

The only issue for the jury was whether a reasonable person in the position of Mr. Hays would foresee that the statement "I'm gonna cut you down" would cause Judge Szambelan to believe that she would be subject to physical violence.

The questions posed by the jury at the end of the first trial disclose that this could be a difficult determination for a lay person. That jury had difficulty determining whether, in the context defining a threat, the words “reasonable person” referred to Mr. Hays or Judge Szambelan, and whether Judge Szambelan’s fear was sufficient evidence that Mr. Hays had directed a threat to her. (CP 47-48)

A reasonably competent defense attorney would have made every effort to ensure that at the second trial the jury would understand that the judge’s subjective fear was not relevant to the issue of whether a reasonable person in Mr. Hays’s position would expect the judge to believe she was in danger of physical violence. The only plausible explanation is that defense counsel failed to recognize that all of the evidence, instructions, and arguments relating to whether Judge Szambelan was frightened were irrelevant to the charge of intimidating the judge.

Defense counsel’s theory of the case was, in effect, that the phrase “I’m gonna cut you down” was not a threat of physical injury. By permitting the entire trial to focus on how Judge Szambelan understood the phrase, instead of how Mr. Hays would reasonably expect her to understand it, defense counsel failed to adequately present a defense.

E. CONCLUSION

The admission of a great deal of irrelevant character evidence and inadmissible evidence of the alleged victim's state of mind, the giving of an erroneous and prejudicial limiting instruction, and defense counsel's failure to be aware of the applicable law or to ensure that the court and jury were aware it, combined to deprive Mr. Hays of the fair trial to which he was entitled. His conviction should be reversed.

You can run on for a long time
Run on for a long time
Run on for a long time
Sooner or later God'll cut you down
Sooner or later God'll cut you down

Go tell that long tongue liar
Go and tell that midnight rider
Tell the rambler, the gambler, the back biter
Tell 'em that God's gonna cut 'em down
Tell 'em that God's gonna cut 'em down

Johnny Cash, "God's Gonna Cut You Down," *American V: A Hundred Highways*, Audio CD (2006).

Dated this 3rd day of October, 2013.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

JANET GEMBERLING, PS

October 03, 2013 - 1:41 PM

Transmittal Letter

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Case Name: Timothy A. Hays

Court of Appeals Case Number: 31483-9

Party Represented: Timothy A. Hays

Is This a Personal Restraint Petition? Yes No

Trial Court County: Spokane - Superior Court # 12-1-03174-7

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Comments:

No Comments were entered.

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