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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31849-4-III

STATE OF WASHINGTON, Respondent,

v.

RICHARD MONROE HARDING, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Richard Monroe Harding was charged with second degree assault, domestic violence for assaulting his girlfriend. Before trial, the trial court continued and reset Harding's trial date privately in chambers. In addition, the trial court allowed evidence of prior bad acts to be presented to the jury. The jury found Harding guilty and he was ultimately sentenced to 12 months.

On appeal, Harding contends that his constitutional public trial rights were violated when the trial court continued and reset his trial date privately in chambers without him having the opportunity to contest or object. Because the continuance of Harding's trial date implicated his public trial right, the trial court was required to conduct a *Bone-Club* analysis on the record, which it failed to do so. In addition, Harding contends that the trial court abused its discretion by admitting evidence of prior bad acts of domestic violence under ER 404(b) because it failed to follow the requirements for admitting such evidence. These prior bad acts were unfairly prejudicial, which likely affected the outcome of the trial. As a result of these errors, Harding's conviction should be reversed and vacated, and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court violated Harding's constitutional right to a public trial by continuing and resetting the trial date in privately in chambers.

ASSIGNMENT OF ERROR 2: The trial court erred in admitting evidence of prior bad acts of domestic violence under ER 404(b) when it failed to follow the requirements for admitting such evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Whether the trial court's continuance and resetting of Harding's trial date implicates the public trial right under the Supreme Court's two-part "experience and logic" test.

ISSUE 2: Whether the trial court is required to do a *Bone-Club* analysis on the record before closing the court proceedings.

ISSUE 3: Whether the trial court's continuing and resetting the defendant's trial date and entering a scheduling order privately in chambers is a closure that requires consideration of the *Bone-Club* criteria.

ISSUE 4: Whether the trial court's closure of the courtroom was error de minimus.

ISSUE 5: Whether the trial court's violation of Harding's public trial right is structural error which requires reversal.

ISSUE 6: Whether the trial court abused its discretion because it failed to find that the State established the prior misconduct by a preponderance of the evidence.

ISSUE 7: Whether the trial court abused its discretion because it did not clearly identify the purpose for which the evidence would be admitted or whether the evidence is relevant to prove an element of the crime with which the defendant is charged.

ISSUE 8: Whether the trial court abused its discretion in admitting the prior misconduct because it failed to balance its probative value against its prejudicial effect on the record.

ISSUE 9: Whether the evidence of prior misconduct was unfairly prejudicial.

ISSUE 10: Whether it is reasonably probable that wrongful admission of the ER 404(b) evidence affected the outcome of the trial.

IV. STATEMENT OF THE CASE

Harding was charged by amended information with one count of second degree assault – domestic violence under alternate theories. CP 33. Specifically, the State alleged that on May 19, 2013, Harding intentionally assaulted Julie Hall by strangulation or suffocation; or alternatively, Harding intentionally assaulted Julie Hall and recklessly inflicted substantially bodily harm. CP 33.

On June 3, 2014, Harding was arraigned on the information. RP 2-4. The case was set for a pretrial/status hearing on July 8, 2013 and trial was set on July 9, 2013. CP 82. The court determined speedy trial was to expire on August 2, 2013. RP 10; CP 82. At the pretrial/status hearing on July 8, 2014, the State sought a continuance of the trial date. RP 16, CP 28. Harding objected to the continuance and the court maintained the scheduled trial date on July 9, 2014, but noted that another case had priority and that Harding's case was to trail that case. RP 16, CP 28. On July 9, 2014, because the other case that had priority did go to trial, the court continued the case and entered a scheduling order setting Harding's trial on July 30, 2014. CP 23, 28, 83. Harding was not present and there was not a hearing on the record. CP 83.

Before trial on July 30, 2014, the State sought to offer evidence of prior bad acts of domestic violence under ER 404(b). RP 31-36. Specifically, the State wanted to admit evidence of two prior incidents involving the same alleged victim, Hall: One incident in July 2012 in which Harding was ultimately convicted of Fourth Degree Assault, domestic violence, and another incident in March 2013. RP 31, 33.

During the ER 404(b) hearing, the State claimed the following regarding the incidents:

... Going back to July 2012 law enforcement gets a call of domestic violence issues. What is reported is that the party swerves a vehicle, she gets her head slammed into a vehicle while Mr. Harding is driving. She ultimately loses – her tooth gets chipped. He hits her in the face and head multiple occasions inside the vehicle. They go to the residence. At the residence his residence just like this case, before entering the residence he knocked her down. He then tells her you know, you can come inside as long as you're quiet and civil and peaceful. She comes inside and he pushed her down multiple times. They argue. He then this is in 2012 strangled her using both hands to grab her throat. She states she could not breathe but it was difficult to breathe. He pushed her down. He then ejected her from the residence by pushing her down the stairs. This is from July of 2012. In the interim she tries to call a taxi to leave and is outside when law enforcement arrived. In March 2013 another report of a domestic incident law enforcement arrive. She's sitting on the back porch, no shoes, no coat. We asked her what happened. She told her Rick had thrown her lap top, gotten on top of her body, pushed her head to the headboard and covered her mouth and nose with his hand. Throws items at her windows. Throws a lap top at her from the top of the steps then pushed her from the inside outside the particular residence, pushed her on the porch, locks the door and takes off.

RP 35-36. The State argued that this evidence was admissible to rebut the defense claim of fabrication, to demonstrate the credibility of the victim's complaints, and establishes the defendant's modus operandi. RP 32, 36. Defense counsel objected to the admissibility of the ER 404(b) evidence and argued that this evidence would be highly prejudicial and not probative to the State's case. RP 36.

The court allowed the evidence and stated the following:

THE COURT: Thank you. During the recess I have reviewed State v. [Nelson] 131 Wn. App. 108 and State v. [Baker]

162 Wn. App. 468 concerning the issue of admission of the alleged prior assault one of which apparently is not alleged as he has been convicted of that. Under the [Baker] case the issue is whether or not the evidence was relevant and probative as to the motive and also as to credibility. Under the [Nelson] case the issue is because there was recanting in that particular case issue is whether or not the evidence was admissible to demonstrate a reason for recanting and credibility of the witness in this particular matter. I think under either theory in this particular case the evidence is admissible and Court will allow the evidence. I know the evidence is potentially prejudicial but I think it's also probative to those particular issues. Under the modus operandi theory I would not allow it under that theory.

RP 40-41. In addition, the court allowed Sergeant Weed to testify about the prior incidents, but did not allow the admission of the prior Judgment and Sentence. RP 41. The court did not file any written findings of fact and conclusions of law.

During trial, in its case-in-chief, the State presented the testimony of the following witnesses: (1) Julie Hall, the alleged victim; (2) Sergeant James Weed of the Ellensburg Police Department; (3) Timothy Potter, desk clerk at Nites Inn Motel; (4) Corporal Jason Brunk of the Ellensburg Police Department; (5) Joan Dangeli, guest in Room 209 at Nites Inn Motel; (6) and James Repsher, physician's assistant at Kittitas Valley Community Hospital. The State also entered into evidence several photos of the scene at the Nites Inn Motel and photos of Hall's injuries of her head and neck. The defense presented the following witnesses: (1)

William Harding, defendant's father; (2) Shannon Geehan, defendant's friend; (3) and Harding, who testified on his own behalf.

Hall testified that in May 2013, Harding was staying in a motor home that was parked behind the Nites Inn Motel in Ellensburg, Washington. RP 50. Harding was Hall's boyfriend and they were in an on again off again relationship during the past two years. RP 49. They had previously lived together on and off. RP 49. Hall had been diagnosed with bi-polar disorder and severe depression in the past and was taking prescribed medication for treatment. RP 46. Hall had tried to commit suicide several times in the past, usually by overdosing on prescription medication. RP 71. Hall also had prior criminal convictions of Residential Burglary in July 2010 for breaking into her parents' house. RP 73.

On May 19, 2013, around noon, Hall was visiting Harding at the motor home and they started arguing about money problems. RP 50, 63. Hall said Harding started screaming at her and calling her horrible names. RP 51. According to Hall, Harding was sitting next to her on the couch and he was in her face pointing at her telling her to, "Shut the fuck up. You stupid fucking cunt." RP 51-52. Hall said Harding leaned forward to choke her and grabbed her neck with both hands, had his thumbs on her throat, shook her neck and was screaming, "I want to knock your fucking

head off.” RP 53. Hall said Harding restricted her breathing for a few seconds. RP 54-55. At one point when Harding was in her face, Hall reached out and scratched him. RP 100, 139. Hall said after this happened she called a taxi to pick her up. RP 56. The taxi would take around 20 minutes to arrive. RP 56. According to Hall she went back inside to wait because Harding said she could come back in if she kept her mouth shut. RP 56. Harding started raging again and was getting frustrated and angry and started throwing things. RP 57. Hall said she got up to leave and Harding came up behind her and had one hand on her shoulder and another on her hip and pushed her very hard down three steps out of the motor home. RP 57, 59. She had turned to look back and she landed on the cement, hitting the back of her head on the cement. RP 58-59.

After giving her statement to the police on May 19, 2013, Hall was exhausted and went home and slept for 17 hours. RP 63. That night, a friend checked on Hall around 7:30 and tried to wake her up, but she could not wake her up. RP 63. The next morning on May 20, 2013, Hall’s head was hurting so bad that she went to the emergency room to have an MRI. RP 64.

Joan Dangeli was staying at Nites Inn Motel with her son on May 19, 2013 in Room 209 on the second floor. Dangeli heard some

hammering and yelling and looked out her window. RP 146-48. In between the hammering and yelling, she saw a man coming in and out of the motor home approximately 150 feet away. RP 148. He was walking around angrily and yelling, "Bitch" and "get out of my life." RP 150. Dangeli also saw items being thrown out of the motor home. RP 150-51. Dangeli then saw a woman come out of the motor home and begin to pick up a few things and then return back inside to the motor home. RP 151. Later the man and woman appeared at the door and he grasped the back of her neck and somewhere below and threw her out of the motor home onto the ground. RP 152. As she fell, the woman twisted and fell and the back of her head hit the ground really hard on the rocks. RP 154.

When Dengali first heard the yelling she did not want to get involved in the incident, but when she saw the woman being pushed out the door, she called the front desk at the Nites Inn Motel and reported it. RP 155. After the woman banged her head, Dangeli saw the woman get up and slowly stumble a few steps and then fall face down on the grass, lying there still and motionless. RP 156. Dengali thought she was unconscious. RP 157. After she called the front desk, Dengali watched the woman get up slowly, walk over and sit at the corner of the picnic table near the motor home. RP 158. Dengali said after the man pushed

the woman, the man went back inside and did not come out to check on the woman. RP 158.

Timothy Potter, the desk clerk at the Nites Inn Motel said he received a phone call from a guest in Room 209 who had information of a domestic violence she wanted to report and she wanted him to do something about it. RP 113. Potter walked outside and saw a woman he recognized from previous contacts sitting at the picnic table crouched over. RP 113. Potter said the woman seemed delirious, out of it, like not herself. RP 117, 124. Potter heard Harding yelling, “whore” and “slut.” RP 115. Potter walked toward the RV and loudly called out to Harding, “Hey, the police have been called and you’re here.” RP 114. According to Potter, Harding came out of the motor home and said that it was the woman’s fault, and then he put on his shirt and walked away. RP 118-19. Potter also said from Room 209, you could very clearly see the door and window of Harding’s motor home with no obstruction. RP 127. After Harding left the motor home, Potter went back to the front desk and Dengali approached the woman at the picnic table. RP 160.

Corporal Jason Brunk with the Ellensburg Police Department responded to a domestic violence duty call at the Nites Inn Motel. RP 131. Brunk observed Hall sitting at the bench outside and she appeared upset. RP 131-32. She was crying, got up, started walking around and

seemed very restless. RP 134. Hall said that Harding, her boyfriend, just left. RP 135. As Hall told Brunk what happened, she reached up and felt the back of her head and indicated that she had a lump on her head. RP 136. Brunk observed what appeared to be a lump on her head, which was red and had some scratches on it. RP 136. Hall also indicated that something happened to her neck, and Brunk observed her neck to check for injuries. RP 138. He saw redness that looked like the skin had been rubbed on or grabbed. RP 138.

After receiving information from Corporal Brunk regarding this incident, Sergeant James Weed of the Ellensburg Police Department believed they had probable cause to believe that Harding had committed an assault. RP 96. Weed contacted Harding at the Horse Shoe Tavern, took him into custody and walked him outside. RP 97. After advising Harding of his *Miranda* rights, Harding agreed to speak with Weed. RP 98. Harding told Weed he did not touch Hall, that she was hitting herself, she had thrown her own stuff out and had struck herself with the tool case kit. RP 99. Harding denied assaulting Hall and said Hall scratched his head. RP 100. Weed observed scratches on Harding's scalp. RP 103. Harding told Weed that he gave Hall money for a cab and that he locked the trailer up and walked away. RP 100. Harding told Weed they both walked away together. RP 101.

Weed testified that he had come into contact with Harding and Hall on two prior occasions. RP 101. The first incident was in July 2012 involving a fight between them, where Hall said Harding knocked her tooth out, pulled her hair, pushed her down stairs, and knocked a cupboard down, and choked her. RP 66, 102. Weed initially got the call from the neighbors, but no one answered the door when they went to the home. The officers kept going back to try and get someone to respond. RP 102. According to Hall, Harding told her, "If you say anything, I'm going to kill you if you say anything." RP 66.

The second incident was in March 2013 when officers received a "911 hang up." RP 102. Weed arrived at the house on Pine Street and Hall was on the back porch crying. RP 102. Hall said there was screaming and cussing, breaking lamps, breaking dresser, and hit her head against the headboard. RP 67. Hall said she hid behind a chair, under a bed, and finally got down stairs and called the police. RP 67. Hall said that Harding came and hung up the phone and would not let her have her phone. RP 67. Hall told Weed that Harding pushed her out the door in her T-shirt and jeans in the snow and locked up the house and left. RP 102.

James Repsher, a physician's assistant at Kittitas Valley Community Hospital examined Hall in the emergency room for a possible

head injury, concussion. RP 193. According to Repsher, some signs and symptoms of a concussion are primarily a blow to the head and then usually a history of altered level of consciousness afterward that can be as bad as being knocked out cold to just being dazed and confused for a while. RP 190. Repsher also described altered levels of consciousness such as someone who is completely unresponsive, could be comatose, or someone who says the same thing over and over or someone who may not be sure of where they are or even just a gap in memory. RP 190.

Hall told Repsher that the night before she was involved in an altercation and was thrown down some stairs and on the back on some jagged rocks and concrete. RP 195. Hall stated that she believed she was knocked out a while and remembers the police arriving and ambulance crew arriving and at that time refused further care by them and then went home later that night. RP 195. Hall also told Repsher that after she slept an extended period of time, according to her mother was hard to wake up. RP 195. They contacted her primary care provider who thought she should go to the emergency department. RP 195. Based on what Hall told him, Repsher diagnosed a concussion. RP 195. According to Repsher, Hall's history of being knocked out followed by being hard to arouse afterwards was enough to make diagnosis of a concussion alone. RP 195.

Defense counsel called William Harding, defendant's father, to testify. William testified that he visited the motor home the day after Harding was arrested to get pick up some tapes and clean out the refrigerator. RP 143-44. When asked about the condition of the motor home, William responded that it was great, and that everything was put away, and it looked in order. RP 144-45. It did not look like a scuffle had taken place, there was nothing lying on the floor, there were no clothing or items thrown around the floor. RP 144. The tool box was up by the front seat. RP 144. The seat had to be moved to get the tool box out. RP 145.

Harding's friend, Shannon Geehan, testified that she stopped by to visit Harding and Hall sometime in April 2013, after Hall had been released from the hospital after another suicide attempt. RP 173. Hall whispered to Geehan and told her that while she was in the hospital Harding robbed her house in Roslyn and drained her debit card of all the money. RP 175-76. When Geehan asked why Hall was still with Harding, Hall responded, "Why do you think? To pay him back." RP 176.

Harding denied assaulting Hall and testified that on May 19, he did not hit Hall at any point, or put his hands on her neck, or strangle her, or push her out the door or scream at her. RP 200. Harding explained that Hall told him she was diagnosed with the mental disorders of bipolar and

paranoid schizophrenia. RP 202. When Hall is off of her medication, she acts very erratic and fidgety, and starts hurting herself. RP 203-04.

Harding testified that the day before this incident on May 18, Hall ran out of her medication. RP 212. That morning on May 19, things were going well, then she starting acting erratic and paranoid. RP 217. Harding told her if she would not calm down, she would have to go home. RP 217. He gave Hall money to call a cab. RP 217. Hall then starting hitting herself and grabbing her neck, saying "I'll kill myself, I just don't want to live." RP 219. Things were getting heated, and Hall started throwing stuff out the door. RP 220. Harding admitted to yelling at Hall to "get the fuck out." RP 227.

In addition, Harding explained the July 24, 2012 incident. Hall and Harding had been to a barbeque with friends, and Hall started "flipping out" and trying to jump out of a moving car. RP 233. They got to the house, and she ran upstairs in the loft where they were staying. RP 235. Hall was throwing stuff all over. RP 235. Harding told her she needed to calm down or she needed to go. RP 235. Hall pushed Harding and started heading down the stairs and she stumbled down the stairs. RP 235. The cops came by, but nobody answered the door. RP 236.

Harding explained that in March 2013, Hall was calling for him to come and get her. When Harding went to pick her up, Hall seemed really

out of it and Harding suggested she go to Comprehensive Mental Health, just to talk to somebody. RP 238. Hall tried jumping out of the truck going down the freeway on I-90. RP 239. They got back to his house and she had some friends come over. RP 240. He left for a while, and when he came back, Hall was throwing things all over. RP 240. He told her he was tired of going to jail for her and called 911. RP 240. She slapped the phone out his hand. RP 241. He did not know if the call went through or not. RP 241. He was arrested and in jail for 30 days, and ended up pleading guilty to Fourth Degree Assault. RP 230, 241.

After hearing all of the evidence, and having “unanimously agreed” that Harding “intentionally assaulted Julie Hall and thereby recklessly inflicted substantial bodily harm,” the jury found Harding guilty of Assault in the Second Degree. CP 59. The jury also answered “Yes” to the special verdict question of whether Harding and Hall were members of the same family or household. CP 61. At the sentencing hearing, the court determined that Harding’s standard range was 6-12 months, and the court sentenced Harding to the high end of the range, 12 months. CP 62-73.

Harding timely appeals.

V. ARGUMENT

A. THE TRIAL COURT VIOLATED HARDING'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL BY CONTINUING AND RESETTING THE TRIAL DATE PRIVATELY IN CHAMBERS

Whether a criminal accused's constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Such a claim may be raised for the first time on appeal. *Id.* The presumptive remedy for a public trial right violation is reversal and remand for a new trial. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *Easterling*, 157 Wn.2d at 174; U.S. Const. amend. VI; Wash. Const. art. I, § 22 (“[T]he accused shall have the right...to have a speedy public trial”). The right of a public trial is also vested more broadly with the public. Wash. Const. art. I, § 10 (“Justice in all cases shall be administered openly”). This latter provision gives the public and the press a right to open and accessible court proceedings. *Easterling*, 157 Wn.2d at 174.

1. The trial court's continuance and resetting of Harding's trial date implicates the public trial right under the Supreme Court's two-part "experience and logic" test.

The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." *Id.* In *Sublett*, our Supreme Court adopted a two-part "experience and logic" test to address this issue: (1) whether the place and process historically have been open to the press and general public (experience prong) and (2) whether public access plays a significant positive role in the functioning of the particular process in question (logic prong). *Id.* at 72–73. If the answer to both questions is yes, the public trial right attaches and the *Bone-Club* factors must be considered before the proceeding may be closed to the public. *Id.* at 73; *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).

Under the "experience" prong, the public trial right is implicated when the trial court continues and resets a defendant's trial date. For instance, historically, the public trial right extends beyond the taking of a witness's testimony at trial, it extends to pretrial proceedings. *Easterling*, 157 Wn.2d at 174 (public trial rights extends to co-defendant's motion to

sever with courtroom closed to defendant and his counsel); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)(public trial rights extends to preliminary hearing); *Orange*, 152 Wn.2d at 814 (public trial rights extends to voir dire); *Bone-Club*, 128 Wn.2d at 257 (public trial rights extends to pretrial suppression hearing); *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) (trial court’s denial of access to hearing and records violated article I, section 10).

Recently, the Court of Appeals in Division I in *Rainey*, found that under the “experience and logic” test, a witness’s assertion of the Fifth Amendment privilege against self-incrimination in an evidentiary hearing must occur on the witness stand in open court, unless the court has conducted a *Bone-Club* analysis and made suitable findings. *State v. Rainey*, -- Wn.App.--, 319 P.3d 86, 88 (2014). Because that did not happen, both Rainey’s right to a public trial and the public’s right to open proceedings were violated and Rainey was entitled to a new hearing on his motion for a new trial. *Id.*

Because the court’s historical experience dictates the public trial rights extends to pretrial hearings, those hearings, such as the trial court’s continuance and resetting of the trial date as in this case, must be in open court.

Moreover, the “logic” prong requires that the assertion of the privilege happen in open court because it implicates the values served by the public trial right. *Id.* In *State v. Wise*, decided the same day as *Sublett*, our Supreme Court explained:

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities.

Wise, 176 Wn.2d at 5-6; *Press-Enterprise Co.*, 478 U.S. at 10-13 (noting that the logic prong counseled toward a finding of openness).

Here, the purpose of the public trial is at the very heart of this case; that is, to serve as a check on the judicial system and watch over the administration of justice, providing for accountability and transparency. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. *Bone-Club*, 128 Wn.2d at 259.

In this case, the record reflects that the scheduling of the trial setting was contested and adversarial in nature between parties. For instance, at a status/pretrial hearing on July 8, 2014, the prosecution was seeking a continuance of the trial date scheduled on July 9, 2014. Harding objected to continuing the trial date and the trial court denied the State's motion and maintained the trial scheduled that same day on July 9, but noted that another trial had priority before Harding's case. On July 9, 2014, the trial court reset Harding's trial and entered a scheduling order for the trial to be set July 30. There was no hearing on the record and this order was entered privately in chambers, without the presence of Harding or his counsel, or any input by the defendant whatsoever regarding his trial date. In fact, the record reflects that Harding was unaware of what actually happened regarding the setting of his trial date, demonstrated in a series of letters to the Clerk's office and their written responses to him regarding the proceeding. CP 16-28. Harding did in fact object to his trial date in the letters he wrote to the Clerk's office while he was awaiting trial. CP 16-28.

Continuing a trial date requires a showing of good cause with the reasons for the continuance stated on the record or in writing. CrR 3.3(f). When the primary reason for the continuance is based upon courtroom congestion, the court must also make specific findings concerning the

availability of other courtrooms and/or judges pro tempore to preside over the trial. *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009).

The types of facts required to support the trial court's finding of grounds for a continuance based on the apparent unavailability of a courtroom are the same types of facts about the sufficiency of court resources and administration that interested members of the public would seek to inform themselves about the adequacy of the criminal justice system.

As such, because pretrial hearings, such as continuing and resetting Harding's trial date, have historically been open to the press and general public and because the public access plays a significant positive role in the function, the public trial right is implicated in this case under both the "experience" and "logic" prongs.

2. The trial court is required to do a *Bone-Club* analysis on the record before closing the court proceedings.

Because a public trial right in this case is implicated, the trial court must consider on the record five criteria enumerated in *Bone-Club* in order to close trial proceedings to the public. *Wise*, 176 Wn.2d at 10. In order to protect the accused's constitutional public trial right, a trial court may not close a courtroom without first, applying and weighing five requirements as set forth in *Bone-Club* and second, entering specific findings justifying the closure order. *Easterling*, 157 Wn.2d at 175; *State*

v. Bone-Club, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). The requirements are: (1) the proponent of closure...must make some showing [of a compelling interest], and where that need is based on a right other than the accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Bone-Club*, 128 Wn.2d at 258-59.

A trial court must consider alternatives to closure. *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010); *Wise*, 176 Wn.2d at 11. Though a trial court may close part of a trial upon rigorous analysis, protection of this basic constitutional right to a public trial clearly calls for the trial court to resist closure except under the most unusual circumstances. *Wise*, 176 Wn.2d at 11; *Bone-Club*, 128 Wn.2d at 259.

3. The trial court’s continuing and resetting the defendant’s trial date and entering a scheduling order privately in chambers is a closure that requires consideration of the *Bone-Club* criteria.

The public trial right applies to pretrial hearings. *Wise*, 176 Wn.2d at 11 (public trial right extends to voir dire); *Easterling*, 157 Wn.2d at 174 (public trial rights extends to co-defendant's motion to sever with courtroom closed to defendant and his counsel); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)(public trial rights extends to preliminary hearing); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004)(public trial rights extends to voir dire); *Bone-Club*, 128 Wn.2d at 257 (public trial rights extends to pretrial suppression hearing). A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public. *Wise*, 176 Wn.2d at 12; *Easterling*, 157 Wn.2d at 174-75; *Bone-Club*, 128 Wn.2d at 261; *see Presley*, 130 S.Ct. at 724 (“[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties.”).

In *Wise*, the trial court did not consider any of the *Bone-Club* factors on the record prior to removing the questioning of prospective jurors to chambers. 176 Wn.2d at 12. There was no opportunity for objection by the State, defense, or public; there was no articulation of a compelling interest for closure; there was no balancing of whatever that interest might have been against the public trial right; and there was no consideration of alternatives to closure. *Id.* The Washington Supreme

Court found that the trial court's failure to consider and apply *Bone-Club* before closing part of a trial to the public was error that required reversal on appeal. *Id.* at 13.

In *Easterling*, the court found that the defendant's public trial right was violated when trial court closed the courtroom on the co-defendant's motion to sever and dismiss. *Easterling*, 157 Wn.2d at 177-78. The trial court's decision to close the courtroom to hear the co-defendant's motion did not comport with the *Bone-Club* requirements and was not accompanied by specific findings. *Id.* at 175. The Washington Supreme Court held that the trial court committed reversible error by fully closing the courtroom to Easterling and the public. *Id.* at 177. The Court also held the following:

Our holding is further dictated by our interest in protecting the transparency and fairness of criminal trials by ensuring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure. The record here demonstrates that the trial court closed the courtroom to consider Jackson's pretrial motions without identifying any interest justifying closure of the courtroom. This action undermines the fairness of the proceeding by precluding Easterling from arguing for or against the motion to sever during the subsequent closed proceeding. We conclude that this impact upon the posture of Easterling's case warrants our holding that Jackson's motions and proceedings relating to them were a part of Easterling's trial thereby implicating his public trial rights.

Id. at 178.

Similarly to *Wise*, there was no opportunity for objection by Harding, the State, or public; there was no articulation of a compelling interest for closure; there was no balancing of whatever that interest might have been against the public trial right; and there was no consideration of alternatives to closure. Like *Easterling*, the record demonstrates in this case that the trial court closed the courtroom to continue and reset Harding's trial date without identifying any interest justifying closure of the courtroom. Here, the trial court simply decided to privately continue and reschedule Harding's trial date without any hearing on the record. As such, the trial court's failure to consider and apply *Bone-Club* before closing the pretrial hearing to the public is reversible error. *Wise*, 176 Wn.2d at 13; *Easterling*, 157 Wn.2d at 177.

4. The trial court's closure of the courtroom was not error de minimus.

Washington courts have repeatedly declined to find violations of public trial rights to be trivial or de minimus. *State v. Strode*, 167 Wn.2d 222, 230, 217 P.3d 310 (2009); *Easterling*, 157 Wn.2d at 180 (observing that "a majority of this court has never found a public trial right to be de minimus."); *State v. Leyerle*, 158 Wn.App. 474, 485, 242 P.3d 921 (2010).

5. The trial court's violation of Harding's public trial right is structural error which requires reversal.

The violation of the public trial right is structural error and not subject to harmless error analysis. *Wise*, 176 Wn.2d at 13-14; *Strode*, 167 Wn.2d at 231; *Easterling*, 157 Wn.2d at 181. A defendant should not be required to prove specific prejudice in order to obtain relief. *Wise*, 176 Wn.2d at 14. Accordingly, unless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial. *Wise*, 176 Wn.2d at 14; *Easterling*, 157 Wn.2d at 181; *Bone-Club*, 128 Wn.2d at 261-62.

In addition, a defendant does not waive his right to a public trial by failing to object to a closure at trial. *Wise*, 176 Wn.2d at 15. In this case, however, the record reflects that Harding did in fact object to the trial court's continuance and resetting of his trial date in the letters he sent to the clerk's office while he was in jail awaiting trial. CP 16-28. The record is simply devoid of any hearing on Harding's objections to his trial date.

Moreover, prejudice is presumed where there is a public trial right violation. *Wise*, 176 Wn.2d at 16; *Easterling*, 157 Wn.2d at 181; *Bone-Club*, 128 Wn.2d at 261-62. As such, because the trial court violated Harding's public trial rights by the closure of the pretrial proceedings without the requisite consideration of the *Bone-Club* factors, the court should vacate his conviction had remand this case for a new trial that is

fully open to the public. *Wise*, 176 Wn.2d at 19; *Easterling*, 157 Wn.2d at 181; *Bone-Club*, 128 Wn.2d at 261-62.

B. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR BAD ACTS OF DOMESTIC VIOLENCE UNDER ER 404(B) EVIDENCE WHEN IT FAILED TO FOLLOW THE REQUIREMENTS FOR ADMITTING SUCH EVIDENCE.

ER 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of the 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).

To admit evidence of a defendant's other wrongs, the trial court must (1) find by a preponderance of the evidence that the wrongs 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 with which the defendant is charged; and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The analysis must be conducted on the record. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). "We cannot overemphasize the importance of making such a record . . . [T]he absence of a record precluded effective appellate review." *State v. Jackson*, 102 Wn.2d 689,

694, 689 P.2d 76 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue. *Id.*

The appellate court review's the trial court's interpretation of ER 404(b) de novo as a matter of law. *Foxhoven*, 161 Wn.2d at 174. If the trial court interprets ER 404(b) correctly, the appellate court reviews the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* Failure to adhere to the requirements of an evidentiary rule is an abuse of discretion. *Id.*

The party seeking to introduce evidence has the burden of establishing the first, second, and third elements. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Thus, a trial court should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. *Thang*, 145 Wn.2d at 642.

1. The trial court abused its discretion because it failed to find that the State established the prior misconduct by a preponderance of the evidence.

The trial court failed to find the State had established the prior misconduct—the alleged incidents in July 2012 and March 2013—by a preponderance of the evidence. RP 40-41. The trial court did not analyze or find that the July 2012 or March 2013 incidents occurred. The trial

court failed to find by a preponderance of the evidence that the prior misconduct occurred. Accordingly, the trial court's failure to comply with the rule is an abuse of discretion.

In *Asaeli*, the Court held that the trial court erred in admitting gang association evidence where the State attempted but failed to prove by a preponderance of the evidence that Kushmen Block was a gang. *State v. Asaeli*, 150 Wn.App. 543, 576, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009). On the other hand, in *Mee*, the Court affirmed the trial court's admission of evidence where "The trial court noted that the State's offer of proof, if supported by the evidence at trial, would establish Mee's gang status and other gang evidence by a preponderance of the evidence, thus supporting admission." *State v. Mee*, 168 Wn.App. 144, 152-54, 275 P.3d 1192 (2012).

Unlike either *Asaeli* or *Mee*, here the State made no offer of proof to support its admission under ER 404(b). The State simply made statements regarding the July 2012 and March 2013 incidents. The record does not reflect that the State proffered a probable cause statement or conviction to the court, or proffered any testimony of the law enforcement officer, although the State does say that they gave copies of the probable cause statement to counsel. RP 36. Thus, the trial court erred in admitting evidence of the prior July 2012 and March 2013 incidents because the

prior misconduct was not established by a preponderance of the evidence and the court made no related finding.

2. The trial court abused its discretion because it did not clearly identify the purpose for which the evidence would be admitted or whether the evidence is relevant to prove an element of the crime with which the defendant is charged.

If evidence is admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Powell*, 126 Wn.2d 244, 258–59, 893 P.2d 615 (1995). The trial court must find that the evidence is logically relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting prior bad acts in a criminal prosecution. *Powell*, 126 Wn.2d at 258; *State v. Nelson*, 131 Wn.App. 108, 115, 125 P.3d 1008 (2006).

Here, the trial court failed to clearly identify the purpose for which the evidence would be admitted or determine whether it was logically relevant. The trial court referred *State v. Nelson*, 131 Wn.App. 108, 125 P.3d 1008 (2006) and *State v. Baker*, 162 Wn.App. 468 (2011) in making its ruling on admissibility of alleged prior misconduct. For instance, after the court referred to both cases in *Nelson* and *Baker*, the court generally stated, “I think under either theory in this particular case the evidence is

admissible and the Court will allow the evidence.” However, neither theory in *Baker* or *Nelson* was the theory under which the State proffered the evidence – namely, to show modus operandi, to buttress the credibility of the victim, or to rebut a defense claim of fabrication. Certainly, two of the state’s proffered grounds – the victim’s credibility and rebutting a defense claim of fabrication – might justifiably render the evidence relevant in rebuttal, after the defense has presented such theories. But there is no support for a finding that such evidence would be relevant in the State’s case in chief on the grounds asserted by the State, and the authorities cited by the trial court do not support its ruling.

Furthermore, the analysis was not conducted on the record. *Foxhoven*, 161 Wn.2d at 175. The court does not make any findings as to the specific purpose for admitting the evidence in this case nor does the court make any finding as to why this evidence is materially relevant to that purpose. As such, whether effective appellate review of the issue can be had is questionable. At a minimum, the case should be remanded for the trial court to enter appropriate findings of fact and conclusions of law sufficient to permit appellate review.

3. The trial court abused its discretion in admitting the prior misconduct because it failed to balance its probative value against its prejudicial effect on the record.

In determining the admissibility of evidence of defendant's prior bad acts, the court balances the probative value of the evidence against its potential for prejudice. *Nelson*, 131 Wn.App. at 115-16. The Supreme Court held long ago that "[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

Here, the court failed to make a conscious determination on the record. After the court allowed the evidence, the court simply stated, "I know the evidence is potentially prejudicial but I think it's also probative as to those particular issues." RP 41. The court should not have permitted testimony about any prior misconduct without weighing the probative value of this evidence against its prejudicial effect on the record. *State v. Venegas*, 155 Wn.App. 507, 525-26, 228 P.3d 813, *review denied*, 170 Wn.2d 1003, 245 P.3d 226 (2010); *State v. Thach*, 126 Wn.App. 297, 310-11, 106 P.3d 782 (2005).

4. The evidence of prior misconduct was unfairly prejudicial.

Even if the record could fairly be read to show the trial court conducted the requisite balancing analysis, the evidence would still be inadmissible because its prejudicial effect outweighed its probative value. Evidence causes unfair prejudice when it is more likely to arouse

an emotional response than a rational decision by the jury, or an undue tendency to suggest a decision on an improper basis, commonly an emotional one. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence that Harding previously hit and strangled Hall and pushed her down the stairs fits squarely into this category. Regardless of relevance to Hall's state of mind, no juror could be expected to view such evidence dispassionately. Evidence of prior acts of physical violence and threats not only made Harding look like a bad person, but also likely to elicit an emotional response of extreme sympathy for Hall.

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn.App. 187, 195, 738 P.2d 316 (1987). Evidence of other bad acts "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." *Bowen*, 48 Wn.App. at 195. The presumption of innocence is the bedrock upon which the criminal justice system stands. *State v. Warren*, 165 Wn.2d 17, 26 195 P.3d 940 (2008).

The presumption of innocence should not cede to evidence that undermines it, regardless of the relevancy of that evidence. Any doubt

about the admissibility of ER 404(b) evidence must be resolved in favor of the defendant. *Thang*, 145 Wn.2d at 642.

5. It is reasonably probable that wrongful admission of the ER 404(b) evidence affected the outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. *State v. Oswald*, 62 Wn.2d 118, 122, 381 p.2d 617 (1963).

Reversal of convictions is required because there is reasonable probability that juror consideration of the ER 404(b) evidence influenced deliberation on whether the State proved Harding committed the charged crime beyond a reasonable doubt. This evidence made Harding look like a bad boyfriend and a bad person. It showed he was the type of person who would commit the acts for which he was charged, the very inference ER 404(b) is designed to prohibit. The jury's consideration of evidence cannot be considered trivial because such evidence stripped the presumption of innocence from Harding. *Bowen*, 48 Wn.App. at 195. It

also likely elicited an emotional rather than rational response from jurors as deliberated on Harding's fate. *Cronin*, 142 Wn.2d at 584.

A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. *State v. Bacotgarcia*, 59 Wn.App. 815, 822, 801 P.2d 993 (1990). The admission of the ER 404(b) evidence in this case allowed the jury to follow its natural inclination and infer Harding acted in conformity with his character and therefore likely committed the criminal acts charged by the State.

Here, the jury heard different stories regarding the alleged assault. Hall said Harding threw her out of the motor home. RP 57. Harding said he did not push Hall, and that she was off of her medication and acting erratic, stepped out the door and fell out on the ground. RP 200, 211, 222. Although Dangeli testified that a man threw a woman out to the ground, yet she was unable to recognize or identify the defendant, even during trial, because she was so far away. RP 152, 169. There is reasonable probability that the ER 404(b) evidence caused the jury to credit Hall's version of the story.

Accordingly, because the trial court abused its discretion in admitting the ER 404(b) evidence, and that admission was unfairly prejudicial and likely affected the outcome of the trial, reversal is required.

VI. CONCLUSION

Harding respectfully requests that the court find that prejudicial errors were committed below such that his conviction ought to be reversed and his case remanded for a new trial. Harding's constitutional public trial rights were violated when the trial court continued and reset his trial date privately in chambers without first conducting a *Bone-Club* analysis on the record. Moreover, the trial court abused its discretion by improperly admitting unfairly prejudicial ER 404(b) evidence during trial which likely affected the outcome of Harding's trial. Harding's judgment and sentence should be vacated, and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 14th day of April,
2014.



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DECLARATION OF SERVICE

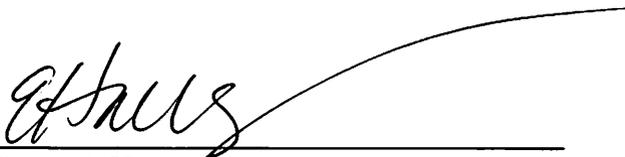
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 14th day of April, 2014 in Walla Walla, Washington.



Elizabeth Halls