

64056-9

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No. 64056-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HARRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted Mr. Harris's prior homicide conviction to impeach his credibility under ER 609(a) and the constitutional right to due process.

2. The trial court erred when it admitted Mr. Harris's prior homicide conviction to impeach his credibility under ER 404(b).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of a testifying defendant's prior criminal convictions may be admitted only if they are relevant to the defendant's veracity. ER 609(a). The State has the burden of proving prior convictions are relevant for impeachment purposes, and the trial court must weigh numerous factors in making its decision. Where the trial court admitted Mr. Harris's 1982 homicide conviction without weighing the appropriate factors, was Mr. Harris deprived of due process? (Assignment of Error 1)

2. Before prior acts of an accused are introduced at trial pursuant to ER 404(b), the trial court must conduct a full evidentiary hearing on the record, and must make a determination that the evidence is relevant and more probative than prejudicial. Here, where the court admitted prior acts which did not satisfy the criteria of ER 404(b), and in the absence of such determinations, was Mr. Harris deprived of his right to a fair trial? (Assignment of Error 2)

3. The constitutional right to trial by jury includes a fair determination of the evidence. The 27 year-old homicide conviction was minimally relevant and extraordinarily prejudicial, compromising Mr. Harris's right to a fair trial by jury. U.S. Const. Amend. VI, XIV, Wash. Const. Art. I, §§ 3, 21, 22. (Assignment of Error 1, 2)

C. STATEMENT OF THE CASE

William Harris, a longtime resident of Washington, lived at a clean and sober house in Lake City in July 2008, in order to manage his lifelong battle with alcohol abuse. 7/13/09 RP 173.¹ On July 30, 2008, however, he relapsed and rented a room at the Night's Inn on Aurora Avenue in Seattle, where he could drink freely. Id. at 177. Rather than break the house rules concerning the consumption of alcohol on the premises, Mr. Harris decided to stay at the Night's Inn until he was sober enough to return home. Id. at 177-78.

While he was staying at the motel, Mr. Harris noticed a group of men gathered around an old Trans Am with Missouri license plates parked in the motel parking lot. 7/13/09 RP 181. He observed at least three men – not boys or teenagers – who were smoking cigarettes, drinking beer out of long-neck bottles, and listening to music from the radio of this “muscle car.” Id. at 182-84. Mr. Harris decided to

¹ The verbatim report of proceedings consists of five volumes of transcripts from July 7, 2009, through July 14, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. “7/07/09 RP ___.”

proposition one of these men for sex, and proceeded to write a note promising oral sex for money, which he left on the railing near the third-floor room he had seen them exiting earlier. Id. at 187-89. Mr. Harris had not seen the complainant, Robert Haislip, the younger brother of the car's owner, and had not intended that note for him. Id. at 173, 189.

Mr. Harris was involved in an intimate relationship with a man named Jeremy Neal, whom he had met through a personal ad on Craigslist. 7/13/09 RP 175. On July 31, 2008, Mr. Harris drove to Mr. Neal's apartment in Beacon Hill, where they had sex and drank together. Id. at 190-92. After Mr. Harris returned to the motel, he noticed the men he had seen earlier standing around in the parking lot downstairs from his room. Id. 197-98. This time, some of the men were smoking cigarettes, and others were playing with what appeared to be a large knife. Id. Mr. Harris left a second note for the men on their railing, similar in content to the first, offering oral sex for money. Id. at 199. Being uncertain as to whether the men were interested in a same-sex liaison, Mr. Harris left the second note propositioning the men on their balcony, instead of speaking with them directly. Id. at 200. He never saw the minor with the men, nor did he leave either note for the complainant to see. Id. at 201.

The notes written by Mr. Harris were apparently found, however, by twelve year-old Robert Haislip, the younger brother of one of the men hanging out near the “muscle car” with the Missouri plates in the parking lot. 7/13/09 RP 79-85. Robert’s family had driven a U-Haul to Seattle during the summer of 2008 from Missouri, so that Robert’s father and older brother Shane could study commercial diving. Id. at 23-25; 73. Shane Huskey, Robert’s older brother, was 20 years old that summer, and drove his own black Trans Am with Missouri plates, in which he spent many evenings listening to the radio in the parking lot. Id. at 55. When Robert found the first note, intended for his older brother, he laughed, told his 19 year-old brother Steven, and left the note on his nightstand. Id. at 55-61; 79-86. On July 31, 2008, when Robert found the second note, he told his mother. She informed the motel manager, who encouraged her to report the notes to the police. Id. at 62-67; 86-92.

Shortly after leaving the notes, Mr. Harris was stopped by police as he drove to the grocery store. 7/13/09 RP 205. When asked by police whether he had written a suggestive note to a child, Mr. Harris panicked and started to run away from the officer. 7/14/09 RP 11. He was ultimately restrained, arrested, and charged with communication with a minor for immoral purposes. CP 1-4.

On December 1, 2008, and again on December 24, 2008, the court ordered a competency examination to determine whether Mr. Harris was mentally competent to stand trial. CP 5-8; 9-12. Following a forensic mental health evaluation at Western State Hospital, Mr. Harris was deemed competent to stand trial on March 4, 2009. CP 13-14.

In describing how “Kafkaesque” this accusation of communicating with a minor felt to him, Mr. Harris told the jury that after making bail, he began a four-month drinking binge, essentially walking away from his entire life. Id. at 17. He testified that at the time of the competency exam, “I couldn’t even remember my own phone number or that I had a brother or where I lived. So I was in pretty bad shape.” Id.

Based upon this portion of Mr. Harris’s direct examination, the prosecutor made an application to introduce evidence of Mr. Harris’s 27 year-old conviction for felony murder, stating that Mr. Harris had opened the door by testifying that he did not remember that he had a brother (who the prosecutor asserted had apparently been his accomplice in the murder), or where he lived (which the prosecutor stated was prison for almost 25 years). 7/14/09 RP 26-27. Prior to trial, the court had asked whether the State had any intention of introducing the murder conviction under ER 404(b), and the prosecutor

had assured the court and defense counsel that he did not. 7/7/09 RP 50.²

Defense counsel objected based on relevance and prejudice, arguing that no limiting instruction could be sufficient to cure the extreme prejudice resulting from the introduction of such evidence. 7/14/09 RP 62. The trial court permitted the prosecutor to cross-examine Mr. Harris concerning the 1982 murder conviction. Id. at 65. The court also allowed Mr. Harris to be cross-examined with the results of his own competency examination, which was administered while he was being heavily medicated at Western State Hospital. Id. 105-06. The trial court gave a limiting instruction regarding the prior conviction. Id. at 113-14.

Mr. Harris was convicted of communication with a minor for immoral purposes pursuant to RCW 9.68A.90. CP 60-64. He timely appeals. CP 59.

² During pre-trial motions, the prosecutor specifically stated as to introduction of the murder conviction: "No. And I don't have any intention to introduce frankly the statement that he's made that I'm an old crook. I don't see how that bears on our case absent the defendant getting up and saying he's a saint. And all bets are off." 7/7/09 RP 50.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MR. HARRIS'S PRIOR MURDER CONVICTION UNDER EVIDENCE RULE 609.

a. The admission of Mr. Harris's 1982 murder

conviction for purposes of impeachment under ER 609 was improper.

A defendant's prior felony convictions are generally inadmissible against him because prior convictions are highly prejudicial and not relevant to guilt or innocence. State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). ER 609 permits the use of prior convictions to impeach the credibility of a witness, including a testifying defendant, thus creating a narrow exception to this rule. Hardy, 133 Wn.2d at 706. Crimes of dishonesty or false statement are per se admissible under ER 609, as they are relevant to the jury's determination of a witness's truthfulness. ER 609(a)(2); State v. Jones, 101 Wn.2d 113, 117-18, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988), adhered to on rehearing, 113 Wn.2d 520, 554, 782 P.2d 1013, 787 P.2d 906 (1989).

However, when the defendant's prior conviction is not a crime of dishonesty or false statement, as here, the court may permit the opposing party to use the conviction only if it is relevant to the witness's truthfulness. Hardy, 133 Wn.2d at 707-08; Jones, 101 Wn.2d at 18-19. ER 609(a)(1) permits the introduction of felony

convictions that are less than 10 years old if the probative value of admitting the conviction outweighs the prejudice to the party offering the witness. ER 609(a)(1) (emphasis added). See, e.g., U.S. v. Portillo, 633 F.2d 461 (9th Cir. 1980), cert. denied, 450 U.S. 1043, 101 S.Ct. 1763, 68 L.Ed.2d 261 (1981) (district court must make specific findings to justify introduction of “stale” convictions more than ten years old); U.S. v. Mahler, 579 F.2d 730 (2d Cir. 1978), cert. denied, 439 U.S. 872, 99 S.Ct. 205, 58 L.Ed.2d 184 (1978) (district judge must find on the record that probative value of convictions over ten years old outweigh danger of prejudicial effect).

When the State seeks to impeach a witness under ER 609(a)(1), it bears the difficult burden of demonstrating the probative value of the evidence outweighs its prejudicial effect. State v. Calegar, 133 Wn.2d 718, 722, 947 P.3d 235 (1997); Jones, 101 Wn.2d at 120. In deciding the issues, the trial court must weigh the importance that the jury hears the defendant's side and whether the defendant is the only one who can testify in his defense. Normally, the court should err on the side of excluding a challenged conviction. Jones, 101 Wn.2d at 121. Other factors to be weighed include (1) the length of the defendant's criminal record; (2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility

issue; and (6) the impeachment value of the prior conviction.

Calegar, 133 Wn.2d at 722; State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). In addition, the court should consider whether the defendant testified at the trial for the prior conviction, in that the conviction has less bearing on veracity if the defendant did not testify. Jones, 101 Wn.2d at 121.

In making this determination, the trial court “must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant’s credibility as a witness.” Calegar, 133 Wn.2d at 723 (quoting Jones, 101 Wn.2d at 118). The prior conviction must be relevant to the defendant’s ability to testify truthfully; the fact a defendant has a prior conviction does not mean he will lie when testifying. Jones, 101 Wn.2d at 119-20.

b. The trial court did not utilize the Alexis and Jones factors in admitting Mr. Harris’s prior conviction. In deciding if the State may utilize a defendant’s prior convictions to impeach his credibility, the trial court must weigh the factors set forth in Jones and Alexis and state, on the record, which factors favor admission and exclusion of the evidence. Jones, 101 Wn.2d at 122. In Mr. Harris’s case, the trial court did not weigh any of the factors, however, looking only at the State’s desire to impeach his testimony. 7/14/09 RP 29.

The State sought to introduce Mr. Harris's 1982 conviction for murder in order to impeach his credibility; however, the statements Mr. Harris made during direct examination concerning his memory loss concerned his state of mind during a competency examination administered at Western State Hospital a full five months after the incident for which he was on trial. This should have alerted the court to several of the Jones and Alexis factors. Jones, 101 Wn.2d at 122. First, the conviction was far too remote; Mr. Harris was sentenced for the homicide on September 23, 1982 – almost 27 years before the trial. 7/14/09 RP 65. Second, the nature of the prior crime – a homicide -- made it far too prejudicial to be introduced at a misdemeanor trial.

Third, the centrality of the impeachment issue clearly was ripe for consideration by the trial court. Mr. Harris never put at issue a lack of memory of the incident in which he was charged. In fact, he took full responsibility for writing both notes soliciting sex on July 30 and 31, 2008, and explained to the jury that he wrote them to the adult men at the motel who were standing by the black Trans Am in the parking lot. 7/13/09 RP 187-89, 199. Mr. Harris testified that only five months later, when he was sent to Western State Hospital, against his will, for a competency examination, that he suffered from a lack of memory. 7/14/09 RP 123. At the time of his competency

examination, while he was being medicated, he told the evaluator that he had been on a four-month drinking binge and found himself unable to remember many things, including his phone number, where he lived, or that he had a brother. 7/14/09 RP 17, 105.

Without explanation, the trial court admitted evidence of the prior murder conviction, finding it relevant to the instant communication with a minor charge. Despite the court's ruling, the prior conviction had no plausible nexus to the charge before the jury.

The court here failed to carefully consider the relevance of the prior conviction to the issue of Mr. Harris's credibility, instead ruling:

Well, I think it is certainly highly prejudicial, but his testimony has now made it relevant. I wish this hadn't happened, but I think that he so testified on direct about his interview with a State employee whose [sic] named Danner, who apparently is employed at Western State Hospital. And he did make reference to his brother and whether he knew that he had a brother, and he made a reference that he didn't know where he lived. So now we are stuck with this situation. It certainly is highly prejudicial, but it's legitimate in this case because of credibility, and I will entertain a proposal for a limine [sic] instruction, but I don't know what good it's going to do, frankly.

7/14/09 RP 29 (emphasis added).

The trial court implicitly conceded that the admission of Mr. Harris's prior murder conviction was likely to be so prejudicial that no limiting instruction would be sufficient to cure the prejudice caused by its introduction. The trial court's failure to exclude the prior conviction

-- despite stating that the evidence would so taint the jury that a limiting instruction would be unlikely to help -- is instructive, and should have alerted the trial court to the fact that the prior conviction should have been excluded. The court's failure to do so, or to make specific findings on the record, was an abuse of discretion.

Mr. Harris's credibility during a competency exam with a state psychiatrist five months after the incident was clearly a collateral issue, because his capacity at the time of the incident was not at issue. Thus, the relevance of any impeachment on this issue was minimal at best. Likewise, as to the final factor under Jones and Alexis, the impeachment value was insignificant for the same reason. Jones, 101 Wn.2d at 122.

c. The trial court abused its discretion by admitting Mr. Harris's 1982 homicide conviction. The decision to admit a prior conviction under ER 609(a)(1) is reviewed for an abuse of discretion. State v. Wilson, 83 Wn. App. 546, 549, 922 P.2d 188 (1996), rev. denied, 130 Wn.2d 1024 (1997). In announcing its decision, the trial court "must" state the factors which favor admission or exclusion of prior conviction evidence for the record. Jones, 101 Wn.2d at 122. Failure to do so is an abuse of discretion. Wilson, 83 Wn. App. at 550. "[T]he court must consider whether the State has demonstrated that the specific nature of the felony has probative value." Id.

The trial court failed to undergo the analysis required to determine if a defendant's prior criminal conviction is so relevant to his veracity that it should be presented to the jury. Jones, 101 Wn.2d at 19. Instead, the only factor considered by the court was the State's desire to introduce evidence of the homicide, and the court's opinion that Mr. Harris had "made it relevant." 7/14/09 RP 29. The trial court did not mention other factors, such as the type or heinousness of the crime, the remoteness of the prior conviction, the age and circumstances of the defendant at the time, the length of Mr. Harris's prior record, or the impeachment value. Jones, 101 Wn.2d at 121-22. And the court did not consider if a conviction for murder was in fact relevant to Mr. Harris's veracity, the key factor in deciding the issue. Calegar, 133 Wn.2d at 723; Jones, 101 Wn.2d at 118-19.

d. The error in admitting Mr. Harris's prior convictions was not harmless. This Court must reverse a conviction where "within reasonable probabilities" the erroneous introduction of a defendant's prior convictions may have materially affected the jury verdict. Calegar, 133 Wn.2d at 727; Hardy, 133 Wn.2d at 712. This Court must look to the evidence at trial, the importance of the defendant's credibility, and the effect the prior conviction may have had on the jury. Id.

Washington courts have noted the admission of a defendant's prior criminal conviction is inherently prejudicial. Hardy, 133 Wn.2d at 710; Jones, 101 Wn.2d at 120. Several studies have shown that juries are more likely to convict when they learn the defendant has a prior record. Hardy, 133 Wn.2d at 710-11 (citing Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Convictions, 42 Vill. L. Rev. 1 (1997); Edith Greene & Mary Dodge, The Influence of Prior Record Evidence on Juror Decision Making, 19 Law & Hum. Behav. 67, 76 (1995); Harry Kalven, Jr. & Hans Zeisel, The American Jury 161 (1966)). "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again." Jones, 101 Wn.2d at 120.

This Court must conclude that the jury was deeply impacted by the evidence of Mr. Harris's prior murder conviction. Permitting the admission of a 27 year-old homicide conviction, because he blamed it on his co-defendant brother, as well as admission of the fact that Mr. Harris was incarcerated for almost 25 years invites speculation by the jury of the most venal kind. See, e.g., Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763 (1961) (noting tendency of juries to infer guilt of defendants due to past convictions).

Thus, due to this violation of Mr. Harris's right to due process and a fair trial, his conviction must be reversed and remanded for a new trial. Calegar, 133 Wn.2d at 728-29; Hardy, 133 Wn.2d at 713; U.S. Const. Amend. VI, XIV, Wash. Const. Art. I, §§ 3, 21, 22.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MR. HARRIS'S PRIOR CONVICTION UNDER EVIDENCE RULE 404(b).

a. Evidence Rule 404(b) prohibits the admission of propensity evidence. Prior acts are generally inadmissible at trial, due to the great risk of prejudice to the accused:

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). The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

Where the only relevance of the other acts is to show a propensity to commit similar acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

Before admitting such evidence, a trial court is obligated to: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

Here, the trial court erroneously admitted evidence of Mr. Harris’s prior conviction for murder in the instant misdemeanor case, which was irrelevant and highly prejudicial. 7/14/09 RP 29.

b. The trial court abused its discretion by finding that the prior conviction was relevant to the offense charged. In the context of ER 404(b),

[t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable.

State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even where the evidence is relevant, the court must balance the probative value against the prejudicial effect of the evidence before admitting it. Schaffer, 63 Wn. App. at 768 (citing ER 403).

To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)). Here, the trial court admitted evidence of the prior murder conviction, finding it relevant to the instant communication with a minor charge. Despite the court's ruling, the prior conviction had no plausible connection to the charge before the jury.

The court failed to carefully consider the relevance of the prior conviction to the issue of Mr. Harris's credibility, instead ruling: "Well, I think it is certainly highly prejudicial, but his testimony has now made it relevant ... I will entertain a proposal for a limine [sic] instruction, but I don't know what good it's going to do, frankly." 7/14/09 RP 29 (emphasis added). The trial court conceded that the admission of Mr. Harris's prior murder conviction was so prejudicial that any limiting instruction would be insufficient to cure the prejudice caused by its

introduction. The trial court's failure to exclude the prior conviction, despite finding that the evidence would so taint the jury that a limiting instruction was unlikely to help, was a clear indication that the prior conviction was simply introduced as propensity evidence.³

Under ER 404(b), the trial court must consider the introduction of prior bad acts, weighing probative value against prejudicial effect, balancing these concerns on the record. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); see also State v. Wade, 138 Wn.2d 460, 463, 979 P.2d 850 (1999). Without a thorough analysis on the record, an appellate court is unable to determine whether the trial court's ruling was based on a "careful and thoughtful consideration" of the issues. Saltarelli, 98 Wn.2d at 362. Where a trial court fails to conduct such a balancing act on the record, ER 404(b) "evidence is not properly admitted." Tharp, 96 Wn.2d at 597.

Here, the trial court made no effort to balance the probative value against the prejudicial effect of the prior conviction on the record, as required by ER 404(b). After erroneously stating that Mr.

³ The trial court's limiting instruction follows:

Ladies and gentlemen, you've heard testimony about the defendant having been convicted of murder and having been incarcerated because of that conviction. You may not consider that conviction or the defendant's incarceration as a result of that conviction for the purpose of whether or not the defendant committed the crime that he's accused of in this case. This evidence has only been admitted for the limited purpose of allowing you to consider it in order to assess the credibility of the defendant's testimony in this trial and for no other purpose. So to repeat you may not consider this evidence for the purpose of determining directly whether the defendant committed the crime for which he is accused in this trial.

Harris had made the prior conviction relevant, due to his testimony concerning his memory loss at Western State Hospital, the court failed to perform an ER 404(b) balancing test of prejudicial and probative value on the record and simply indicated the evidence could be introduced. Such actions are not the “careful and thoughtful” balancing test envisioned by ER 404(b) and Saltarelli, 98 Wn.2d at 362. By failing to perform such a balancing test, the court abused its discretion in admitting the evidence.

c. Mr. Harris did not open the door to character evidence. During pre-trial motions, the trial court had noted the inherent prejudice that would follow the admission of Mr. Harris’s prior conviction, inquiring of the prosecutor, “Well, certainly the State has no intention of introducing the murder conviction?” 7/7/09 RP 50. The prosecutor replied: “No. And I don’t have any intention to introduce frankly the statement that he’s made that I’m an old crook. I don’t see how that bears on our case absent the defendant getting up and saying he’s a saint. And all bets are off.” Id. at 50 (emphasis added).

Since the record reflects that Mr. Harris did not put his good character into evidence, the prosecutor had no basis upon which to argue that Mr. Harris opened the door to the introduction of the prior

murder conviction. Although the prosecutor had warned that certain testimony might open the door to the prior conviction, the prosecutor did not mention Mr. Harris testifying concerning memory loss. The prosecutor certainly made no mention of Mr. Harris's testimony concerning his responses on the competency examination administered in December 2008, which was the subject of the testimony concerning his memory loss regarding his brother. 7/14/09 RP 17.

During this portion of the trial, Mr. Harris's defense attorney inquired on direct examination about his stay at Western State Hospital during December 2008. 7/14/09 RP 17-18. Mr. Harris was asked if he remembered speaking with Dr. Danner at the hospital, and Mr. Harris responded:

I had recently been on a horrific four-month long binge where I was doing nothing but drinking. I had walked away from my whole life, and I was almost a basket case. I couldn't even remember my own phone number or that I had a brother or where I lived. Neither, had I talked to anyone that I'd known for four months. So I was in pretty bad shape.

7/14/09 RP 17 (emphasis added).

In a situation where a defendant opens the door to character evidence by putting his own good character at issue, impeachment with prior bad acts has been permitted. See, e.g., Pogue, 104 Wn.

App. at 986-87; State v. Renneberg, 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974).

Here, however, the prosecutor sought to impeach Mr. Harris's credibility concerning his memory at the time of his competency examination five months later -- not his memory of the incident itself. The incident at the Night's Inn motel occurred on July 30 and 31, 2008, resulting in the immediate arrest of Mr. Harris. 7/13/09 RP 79-86; 89-91; 205. The competency examination at Western State Hospital -- during which Mr. Harris testified that he was "almost a basket case" and unable to remember his phone number, that "I had a brother or where I lived" -- occurred in December 2008. 7/14/09 RP 17.

There was no relevancy basis for the introduction of the 1982 homicide conviction, and Mr. Harris had not put his good character into evidence -- only his ability to recall events several months later. Accordingly, the introduction of the 1982 murder conviction was in error.

d. Erroneous admission of Mr. Harris's prior murder conviction affected the outcome of the trial, requiring reversal. An appellate court must reverse on ER 404(b) grounds if it determines within reasonable probabilities that the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102

Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599.

Here, the introduction of the prior murder conviction undoubtedly had an impact on the verdict in this misdemeanor case. The emotional response of a jury to hearing about Mr. Harris's murder conviction, and about the 25 years he spent in prison was clear from the trial court's own cynical response concerning a limiting instruction: "I don't know what good it's going to do, frankly." 7/14/09 RP 29. In addition, permitting Mr. Harris to be impeached with an interview he did while forcibly medicated was prejudicial and of questionable relevance.

In this misdemeanor case where Mr. Harris was charged with passing notes to a minor, the jury was invited to speculate that Mr. Harris was a violent prior offender, capable of untold horrors – even murder, if given the opportunity. The admission of this prior conviction was irrelevant and highly prejudicial, and inevitably affected the verdict; thus, Mr. Harris's conviction must be reversed and remanded. Freeburg, 105 Wn. App. at 501, 507.

E. CONCLUSION

Mr. Harris's conviction must be reversed and remanded for a new trial because the admission of his prior conviction was a violation of his due process rights.

DATED this 6th day of April, 2010.

Respectfully submitted,



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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
Respondent)	NO. 64056-9
v.)	
WILLIAM HARRIS,)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 6TH DAY OF APRIL, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecutors Office
Appellate Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 APR -6 PM 4:13

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF APRIL, 2010

x Ann Joyce