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COA NO. 64374-6-I

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

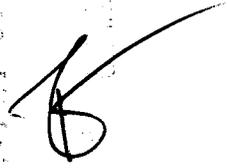
STATE OF WASHINGTON,

Respondent,

v.

ANDRE KARLOW,

Appellant.

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

The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE LACK OF A LIMITING INSTRUCTION FOR BAD ACT EVIDENCE REQUIRES REVERSAL.

The State asserts defense counsel was not deficient in failing to request a limiting instruction for ER 404(b) evidence that permeated the trial because such instruction would have told the jury to disregard much of Karlow's testimony. Br. at 16.

A limiting instruction, however, would have done no such thing. The purpose of a limiting instruction is to limit the jury's use of ER 404(b) evidence to permissible purposes. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The limiting instruction prevents the jury from using ER 404(b) evidence as evidence of a defendant's criminal propensity in deliberations. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999).

Karlow certainly did not ask the jury to acquit him based on a propensity for criminality. Limiting instruction would have allowed the jury to use Karlow's testimony for any non-propensity purpose. Other crime evidence, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, should be surrounded with definite safeguards, including the safeguard of a limiting instruction. State v.

Goebel, 36 Wn.2d 367, 378, 218 P.2d 300 (1950). No legitimate tactic justified the failure to request a limiting instruction.

The State also claims the lack of limiting instruction was harmless because there were multiple reasons why the jury could have discredited Karlow's theory of the case. Br. at 17. That claim ignores the nature of the prejudice here. The jury's consideration of ER 404(b) evidence without limiting instruction distorts the fact-finding process, rendering its result unreliable.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). The ER 404(b) evidence in this case cannot be considered trivial because it pervaded the trial. The jury's consideration of the evidence without limiting instruction cannot be considered academic because such evidence stripped the presumption of innocence from Karlow by allowing the jury to use the forbidden inference that Karlow was a criminal-type with a propensity to commit crime. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the

fact-finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

The State misses the mark in complaining Karlow supposedly relies on the possibility rather than the probability of prejudice resulting from the lack of limiting instruction. Br. at 17. Karlow need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*" State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Contrary to the State's suggestion, Karlow "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693).

The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis. State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). "When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial."

State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Such a conclusion is no different than a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d 226.

A new trial is required here for that reason. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The admission of the ER 404(b) evidence without limiting instruction prejudiced Karlow because it allowed the jury, in finding Karlow guilty, to follow its natural inclination to infer Karlow had criminal propensities and therefore likely reoffended.

2. THE COURT WRONGLY RULED THE ESCAPE AND DISARMING OFFENSES DID NOT QUALIFY AS SAME CRIMINAL CONDUCT.

The State contends the trial court was aware of its scoring discretion under the anti-merger statute and therefore no error can be predicated on the court's ruling that the escape and disarming offenses did not qualify as same criminal conduct. Br. at 22-27. This contention misapprehends the scope of the issue.

The record shows the court knew it had discretion in determining whether the escape and disarming offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a). 6RP 13. The record also shows the court knew it had discretion to count those offenses as separate even if it

determined they were same criminal conduct under RCW 9A.76.025. 6RP 13.

The court exercised its discretion in concluding the offenses did not qualify as same criminal conduct under RCW 9.94A.589(1)(a). 6RP 13. This was the basis for court's scoring determination: "*I did look at the test of same criminal conduct, even though I have the discretion to overlook that, but I did look at that*, that this crime of escape in the first degree I think under these facts were different than the efforts to disarm the police officer in this case, specifically the testimony that I think was believed by the jury verdict about the statements made to -- by Mr. Karlow to Ms. Barlow . . . to try and obtain the gun. And based on those and other facts proved at trial I conclude that they are separate, and therefore I conclude that Mr. Karlow is a 9." 6RP 13 (emphasis added).

In other words, the court recognized it could bypass the RCW 9.94A.589(1)(a) analysis altogether if it wanted to do that. But the court did not do that. Instead, the court based its scoring decision on the RCW 9.94A.589(1)(a) analysis. Having made the determination that the two offenses did not satisfy the same criminal conduct test under RCW 9.94A.589(1)(a), the court did not reach the issue of whether it would treat the two offenses as the same or separate under RCW 9A.76.025. Cf. State v. Davis, 90 Wn. App. 776, 781, 783-84, 954 P.2d 325 (1998) (under the

burglary anti-merger statute, the trial court retains the discretion to apply or *not* to apply the anti-merger statute after conducting a same criminal conduct analysis).

This is why remand is required. The court erroneously determined the offenses were not same criminal conduct under RCW 9.94A.589(1)(a). We do not know what the court would have done under RCW 9A.76.025 had it made the correct determination that those offenses qualified as same criminal conduct under RCW 9.94A.589(1)(a).

B. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial. In the event this Court declines to do so, the Court should remand to correct the sentencing errors.

DATED this 22nd day of November 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64374-6-I
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ANDRE KARLOW,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 22ND DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF NOVEMBER, 2010.

x 