

- 64649-4

64649-4

NO. 64649-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY TAYLOR,

Appellant.

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

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF
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A. SUMMARY OF ARGUMENT.

When Jeffrey Taylor tried to reconcile with his long-term girlfriend during the course of one of many break-ups, the prosecution charged him with stalking. The court instructed the jury it could infer Taylor intended to harass the complainant if he contacted her after receiving notice that she wanted no further contact and was ending their relationship. This “permissive inference” instruction improperly relieved the State of its burden of proof. Taylor was further denied his right to a fair trial by an impartial jury when the prosecution violated the court’s explicit rulings barring certain uncharged acts on the basis of their extremely prejudicial nature.

B. ASSIGNMENTS OF ERROR.

1. The court relieved the prosecution of its burden of proving every essential element beyond a reasonable doubt by improperly directing the jury that it could presume an essential element was proven. CP 41 (Instruction 9).

2. The prosecution’s improper injection of irrelevant and prejudicial allegations against Taylor in violation of pretrial court orders denied Taylor a fair trial by an impartial jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Court instructions telling the jury it may presume the State proved an essential element of the crime if it proved another fact are disfavored. They improperly relieve the State of proving all essential elements when there is not substantial evidence that the presumed fact more likely than not follows from the predicate fact. The court told the jury it could infer Taylor acted with the intent necessary to commit the offense of stalking if he had notice the complainant did not wish any additional contact. Because of the nature of Taylor's relationship with Doage, this presumption was improper and it did not flow from the fact that Doage intended to break-up with Taylor. Did the court's permissive presumption instruction relieve the State of its burden of proof and deny Taylor a fair trial?

2. When a prosecutor injects irrelevant and highly prejudicial information into a trial in violation of a pretrial court ruling, it may undermine the fairness of the proceedings and the accused person's right to a trial by an impartial jury. In violation of a pretrial ruling, the prosecutor elicited testimony of an uncharged act that the trial court had warned would be "extremely prejudicial" and not probative, and also elicited testimony and argued that

Taylor threatened someone with a gun on another occasion. Did the prosecution's efforts to paint Taylor as a violent individual by virtue of uncharged acts in violation of the court's pretrial ruling undermine the fairness of the trial and taint the impartiality of the jury?

D. STATEMENT OF THE CASE.

Jeffrey Taylor and Shanika Doage began dating and then living together in 2000. RP 57.¹ Their relationship lasted for six years but the two broke-up and reconciled more than 10 times. RP 113.

In December 2006, Doage decided to end her relationship with Taylor. RP 63, 159. Taylor thought they would "work on getting back together" as they had in the past. RP 162. He followed her into a Target store on January 3, 2007, and tried to speak with her about their relationship and kiss her, and on January 5, 2007, he went to her apartment. Doage argued with him, told him she did not want to see him anymore, and informed him she had an order of protection with which she had not yet

¹ The verbatim report of proceedings (RP) from trial and sentencing are contained in a single volume of consecutively paginated transcripts.

served him. After January 5, 2007, Taylor never saw Doage again. RP 154-55.

The State charged Taylor with one count of fourth degree assault for grabbing Doage at Target, one count of felony stalking, and one count of felony harassment for his conduct from December 1, 2006, through January 6, 2007. CP 15-16. Doage said he told her to “live in fear,” had threatened her in the past during their volatile and at times violent relationship, and she was afraid of him. RP 61, 71-72, 99. Doage also told the jury, in violation of the court’s pretrial ruling and over objection, that Taylor had choked her in the past and threatened another person with a gun. RP 99, 120. The jury was unable to reach a verdict on the allegation of felony harassment, but convicted Taylor of felony stalking and fourth degree assault. CP 60- 63. He received a standard range sentence and timely appeals.²

² The prosecution charged Taylor with the additional element of committing an “aggravated domestic violence offense,” but did not seek an exceptional sentence after the trial. CP 15-16, 63.

E. ARGUMENT.

1. THE COURT IMPROPERLY INSTRUCTED THE JURY THAT IT COULD PRESUME TALLYOR ACTED WITH THE INTENT NECESSARY TO CONVICT HIM OF STALKING

a. The prosecution bears the burden of proving all elements of an offense, including the necessary intent. The most fundamental concepts of criminal procedure require the State to prove to a jury every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article 1, § 3 of the Washington Constitution³ and the 14th Amendment of the federal constitution.⁴ Sandstrom v.

³ Art. I, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

⁴ The Fourteenth Amendment provides in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment expressly guarantees the right to a jury trial and the Fifth Amendment requires the State to establish all elements of guilt beyond a reasonable doubt; together, they guarantee a criminal defendant the right to have the fact-finder determine, beyond a reasonable doubt, every essential element of guilt. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979);

State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

The prosecution charged Taylor with felony stalking, which required the State to prove he intended to intimidate or harass Shanika Doage. CP 37 (Instruction 6); RCW 9A.46.110(1)(c)(1).⁵ The court instructed the jury that it could infer Taylor acted with the intent required to commit the offense if he tried to contact Doage after receiving actual notice that she did not want to be contacted. CP 41 (Instruction 9).

Instruction 9 is a permissive inference instruction, directing the jury that it may find a presumed fact from a proven one. State v. Brunson, 128 Wn.2d 98, 105, 905 P.2d 346 (1995). This instruction violated Taylor's right to have the prosecution prove every element of the offense beyond a reasonable doubt.

b. The permissive inference instruction relieved the prosecution of its burden of proof. Presumptions or inferences are "not favored in the criminal law," although they may be used by the prosecution in certain circumstances. State v. Cantu, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). A permissive inference instruction

is unconstitutional “unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” County Court of Ulster v. Allen, 442 U.S. 140, 166 n.28, 99 S.Ct. 2213, 60 L.Ed.2d 57 (1969); Cantu, 156 Wn.2d at 825.

In order to give a permissive inference instruction, the inference must be proven beyond a reasonable doubt if it is the sole and sufficient evidence of the element. If the inference is part of the proof of the inferred element, “due process requires the presumed fact to flow ‘more likely than not,’ from the proof of the basic fact.” State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)⁶ (citing Ulster County, 422 U.S. at 165).

Permissive inferences are disfavored because they “tend to take the focus away from the elements that must be proved.” United States v. Warren, 25 F.3d 890, 900 (9th Cir. 1994) (Rymer, J. concurring). The problem lies in their persuasive impact upon jurors. “They are most effective when least appropriate: where the

⁵ Stalking was classified as a felony based on Taylor’s 2002 conviction of fourth degree assault against the complainant. CP 15; RCW 9A.46.110(5)(b); RCW 9A.46.060.

⁶ The Ninth Circuit reversed the conviction in Hanna, holding that the permissive inference instruction unconstitutionally relieved the State of its burden of proof. Hanna v. Riveland, 87 F.2d 1034, 1037 (9th Cir. 1996).

evidence supporting the inference is sparse and the inference is most crucial to the government's case." Id. at 899; see State v. Johnson, 100 Wn.2d 607, 619-20, 674 P.2d 145 (1983) (an inference instruction is "rarely necessary and usually ill advised").

Jurors assume that a judge, a legitimate authority, would not give a permissive inference instruction unless it was appropriate and derived from an accepted rule of law. Charles Collier, Note, The Improper Use of Presumptions in Recent Criminal Law, 38 Stan. L. Rev. 423, 445-46 (1986). Therefore, permissive instructions function like mandatory presumptions, which are unconstitutional. Id. They also "isolate and abstract a single circumstance from the complex of circumstances presented in any given case, and, on proof of that isolated fact, authorize an inference of some other fact beyond reasonable doubt," and thereby "permit juries to avoid assessing the myriad facts which make specific cases unique." United States v. Rubio-Villareal, 967 F.2d 294, 298 (9th Cir. 1992) (quoting Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 Harv. L.Rev. 1187, 1192 (1979)).

In State v. Randhawa, 133 Wn.2d 67, 75, 941 P.2d 661 (1997), the Court reversed a vehicular homicide conviction

because the permissive inference instruction unconstitutionally relieved the State of its burden of proof. The instruction told the jury it “may infer” the defendant drove recklessly if he was speeding, and further explained that the inference was not binding and the jury could decide what weight to give the inference. Id.

The Randhawa Court held that the inferred fact of reckless driving did not necessarily follow the predicate fact of speeding, even though all agreed that Randhawa was speeding. Id. at 78. The Court reversed the conviction due to this inference instruction after reviewing the facts and concluding “we cannot say with substantial assurance that the inferred fact, Randhawa’s reckless driving, more likely than not flowed from the proved fact-Randhawa’s speed.” Id. at 77.

The requisite “substantial assurance” that the presumed fact more likely than not flowed from the predicate fact is not the same as measuring the bare sufficiency of the evidence. Hanna v. Riveland, 87 F.3d at 1037. The reviewing court does not assume that the jury accepted the prosecution’s version of the evidence. Id.

Taylor and Doage had a long-term relationship involving numerous ups and downs. RP 112. They ended their relationship

only to revive it many times. Id. Their break-up in December 2006 was no different from what had occurred throughout the course of the relationship and was not precipitated by any dramatic occurrence. RP 64. Taylor expected they would get back together as they had numerous times over the previous years. RP 162. Thus, even if Doage told Taylor she did not want to hear from him again, it does not more likely than not follow that Taylor understood his efforts to contact her would be construed as intentional harassment.

Taylor did not understand that Doage meant to sever their ties until after the January 5, 2007 incident, when the two argued and the unlikelihood of reconciliation became obvious. RP 159, 162. As recently as early December 2006, Doage had told Taylor their relationship was over but they reconciled for a short period of time and they broke up again in late December. RP 157-59. Once Taylor understood that the relationship ended after the January 5, 2007 argument they had outside her home, he did not see Doage again. RP 154-55.

Because on the nature of their relationship, the jury should not have been instructed that Taylor could be presumed to intentionally harass Doage from the moment she broke up with

him. Taylor reasonably believed reconciliation was probable based on the nature of their relationship. The State's burden of proving his intent to harass Doage does not "more likely than not flow" from Doage's notice to Taylor that she wanted to end their relationship and should not have been inferred by his mere contact with her. The State did not prove with substantial assurance that the inferred intent likely flowed from that predicate fact as required before providing the jury with the permissive inference instruction.

c. The improperly given permissive inference instruction requires reversal. By erroneously giving the jury a permissive inference instruction, reversal is required. Randhawa, 133 Wn.2d at 79. Prejudice is presumed from an instruction that distorts and dilutes the burden of proof, because the prosecution has not been required to prove every element of the crime beyond a reasonable doubt. State v. Jackson, 112 Wn.2d 867, 877, 774 P.2d 1211 (1989).

Taylor explained his lack of actual notice or actual appreciation of the finality of the break-up and said that he did not intend to harass her. RP 152, 161. He "thought we'd work on getting back together." RP 162. His perception of the potential for

reconciliation notwithstanding their temporary break-up was entirely reasonable. By improperly suggesting that the jury could infer he intended to commit the offense of stalking, rather than requiring the State to prove this element beyond a reasonable doubt, Taylor was denied his right to a fair trial by jury.

2. THE PROSECUTION'S INJECTION OF IRRELEVANT AND PREDJUCIAL INFORMATION INTO THE CASE IN VIOLATION OF THE COURT'S PRETRIAL RULING DENIED TAYLOR A FAIR TRIAL

a. The right to a fair trial includes the right to exclude unduly prejudicial evidence that has little probative value.

Uncharged wrongful acts are presumed to be too prejudicial to be admissible. ER 404(b).⁷ To admit evidence of other wrongs or acts, the trial court must find by a preponderance of the evidence that the conduct occurred, identify the purpose for its introduction, determine whether it is relevant to prove an element of a charged offense, and weigh the probative value against the prejudicial

⁷ Under ER 404(b):
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.

effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The court's analysis must occur on the record. State v. Everybodytalksabout, 145 Wn.2d 456, 465-66, 39 P.3d 294 (2002).

Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. LeFever, 102 Wn.2d 777, 782, 690 P.2d 574 (1984); see Saltarelli, 98 Wn.2d at 362; ER 404(b).

Improper conduct by a prosecutor requires reversal when there is a substantial likelihood it affected the jury's verdict. State v. Stith, 71 Wn.App. 14, 22, 856 P.2d 415 (1993); see State v. Ransom, 56 Wn.App. 712, 713 n.1, 785 P.2d 469 (1990) (where prosecutor violates court order on admissibility of evidence, "stringent remedies are sometimes necessary where attorneys cannot understand the need to adhere to such orders.").

b. The prosecution violated the court's explicit pre-trial rulings. Before trial, the prosecution asked the court for permission to introduce evidence of specified uncharged prior

incidents between Taylor and Doage under ER 404(b). The prosecution explicitly asked to introduce three incidents for the purpose of proving motive and reasonable fear: the complainant's allegation that Taylor strangled her in 2002; an incident leading to Taylor's conviction for fourth degree assault in 2002; and a time when Taylor kicked Doage in 2003. RP 9; Supp. CP __, sub. no. 55, p. 4-6 (State's Trial Memorandum).

The court granted the request in part, explicitly denying the State's request to introduce evidence accusing Taylor of trying to strangle the complaining witness. RP 16-17. The court found that this allegation would be "extremely prejudicial." RP 17. The court noted there was no corroborative evidence that the incident occurred such as a police report or a doctor's visit, and it occurred five years before the charged incident, thus making its probative value far less weighty than its "serious" prejudicial effect. RP 17; Supp. CP __, sub. no. 55, p. 4 (State's Trial Memorandum).

Despite the court's clear pre-trial ruling, Doage testified during the State's direct examination that Taylor had done "a whole lot of mean things," including "wrap[ing] vacuum cleaner cords around my neck. He's choked me until I've passed out." RP 99. Taylor objected, stating "that goes beyond the court's ruling."

Id. The court told the jury the disregard “the last answer.” Id. The prosecutor continued by implying the same information, asking whether Taylor had “carried out threats in the past,” and “were those threats to hurt you.” Id. Thus, while the prosecution did not elicit the previously barred strangulation again, it made sure that the substance of the information was not lost on the jury by implicitly reminding the jury that Taylor had “carried out” unnamed “threats” immediately after it heard that Taylor had choked Doage on at least one occasion.

The State further elicited extremely prejudicial uncharged acts when Doage testified that Taylor “threatened” her mother’s roommate “with a gun,” and also said he would “bring[] a gun” if Doage did not come outside. RP 120. Taylor objected and the court sustained the objection. Id. Doage did not say when this incident occurred and the prosecution had never asked the court for permission to admit evidence that Taylor threatened anyone with a gun on another occasion.

In her closing argument, the prosecutor told the jury that Taylor had access to a gun, and “could get access to a gun and shoot her.” RP 179. Doage testified that she did not know Taylor

to carry a gun, although she also accused Taylor of threatening her mother's roommate with a gun. RP 72, 120.

c. The highly prejudicial statements made in violation of the court's order constitute serious trial irregularities denying Taylor a fair trial. Evidence that the defendant possessed a weapon at the time of his arrest that is not connected to the charged crime should not be admitted. State v. Freeburg, 105 Wn.App. 492, 502, 20 P.3d 989 (2001); State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980). When the fact of gun ownership has no direct bearing on an issue in the case, its admission into evidence causes unnecessary prejudice. State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984). "Many view guns with great abhorrence and fear." Id. at 708. "[O]thers may consider certain weapons as acceptable but others as dangerous." Id. Furthermore, any or all people "might believe that [the] defendant is a dangerous individual . . . just because he owned guns." Id.

In Freeburg, this Court stressed the extremely "powerful" nature of firearm evidence. 105 Wn.App. at 502. The Freeburg Court ruled that even when marginally relevant, where a firearm is unnecessary to prove the case, it is error to admit the weapon into

evidence. Id. at 500. In Freeburg, the trial court admitted into evidence the loaded .45 caliber gun the defendant had when he was arrested. Id. at 496. It was not directly alleged that the weapon was used in the crime at issue. Id. at 500. The Court found not only did the gun have minimal probative value, the jury could readily use the weapon to conclude Freeburg was a bad person, generally carried weapons with him, or was more likely to have committed the charged crime because he had access to weapons. Id. Given the variety of purely speculative and improper ways the jury could have used the gun evidence, and since it was not necessary to the prosecution's case, the court ruled the improper admission of the firearm reversible error. Id. at 502.

When a weapon is not alleged to have been used during the charged incident, it is of "highly questionable relevance" and tends "to impugn the defendant's character or suggest a propensity" for using the weapon. Oughton, 26 Wn.App. at 84; see also McKinney v. Rees, 993 F.2d 1378, 1382 (9th Cir.1993) (only inference jury could have drawn from hearing defendant possessed knife months before incident was that he was type of person to have knife and thus is impermissible propensity

evidence); Freeburg, 105 Wn.App. at 500 (error to admit weapon possessed at time of arrest when not part of crime charged).

The prosecution offered testimony that Taylor had threatened someone else “with a gun,” on another occasion, and then argued to the jury that Taylor had access to a gun even though the complainant had testified that she did not know him to have a gun. RP 120, 179.

Additionally, the trial court ordered the prosecution not to elicit testimony about its claim Taylor strangled or choked Doage. RP 17. Yet Doage testified about this precise incident, and implied that it may have happened on more than one occasion. RP 99. Doage’s testimony directly violated the court’s pretrial order by eliciting forbidden testimony of a claimed strangulation. Even though the court warned that such testimony would cause “extreme prejudice,” the prosecution offered testimony about it. RP 17.

The prosecution’s violation of the court’s rulings, both by disregarding the court’s explicit evidentiary ruling and by offering uncharged acts never offered in the pre-trial description of the ER 404(b) evidence it desired to admit, denied Taylor a fair trial.

Even though the court sustained Taylor's objections to the impermissible and inappropriate testimony, some misconduct cannot be cured by a sustained objection or an instruction to disregard prejudicial information. Stith, 71 Wn.App. at 23. When evidence is "inherently prejudicial and of such a nature as likely to impress itself upon the minds of the jury," no instruction can remove the prejudicial effect. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1967); see also State v. Easter, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996) ("We do not condone cavalier violation[s] of trial court pretrial rulings as in this case. Such violations may be so flagrantly prejudicial as to be incurable by instruction.").

Even though the court warned the prosecutor that the claimed strangulation incident was far less probative than prejudicial, Doage testified in some detail about Taylor wrapping cords around her neck and choking her until she passed out. This extremely prejudicial allegation, which the court had not found substantially proven to have occurred based on the lack of corroborative evidence, was exacerbated by the testimony that Taylor had used a gun to threaten an innocent bystander. RP 17, 99, 120. Once the jury heard such inflammatory claims, delivered

in direct violation of the court's pretrial rulings, they are substantially likely to impress upon the jury Taylor's propensity for violence and to thus affect the verdict in the case. The evidence was far from overwhelming given the off-and-on nature of the relationship between Taylor and Doage and the prosecution's violation of the court's rulings denied Taylor a fair trial by impartial jury.

F. CONCLUSION.

For the foregoing reasons, Mr. Taylor respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 21st day of May 2010.

Respectfully submitted,



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