

66429-8

66429-8

NO. 66429-8-I

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Respondent,

v.

GERARDO ORTIZ

Appellant.

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

The Honorable Jay White

APPELLANT'S OPENING BRIEF

SUZANNE LEE ELLIOTT
Attorney for Appellant

705 Second Ave.
Suite 1300
Seattle, WA 98104
(206) 623-0291

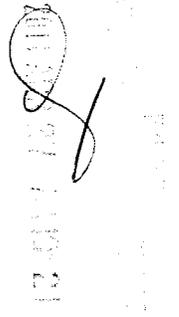
A vertical stamp is located on the right side of the page, partially overlapping the text. It contains the text "RECEIVED" at the top, followed by a date "JUN 11 2011" and a time "10:10 AM". Below the stamp, there is a handwritten signature in dark ink.

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 4

 1. The trial court erred in admitting evidence of a prior uncharged assault by Ortiz against Love. 4

 3. Trial counsel was ineffective for failing to object to the introduction of evidence that Ortiz has previously assaulted Love. 7

 a. Counsel’s performance was deficient. 7

 b. Counsel’s deficient performance prejudiced Ortiz. 8

D. CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

State v. Posey, 161 Wash.2d 638, 648, 167 P.3d 560 (2007) 5

State v. Hendrickson, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996)..... 7

State v. Holmes, 43 Wash.App. 397, 400, 717 P.2d 766, review denied,
106 Wash.2d 1003 (1986)..... 5

State v. Jones, 33 Wash.App. 865, 872, 658 P.2d 1262, review denied 99
Wash.2d 1013 (1983)..... 7

State v. Madison, 53 Wash. App. 754, 763, 770 P.2d 662 (1989)..... 7

State v. Magers, 164 Wash.2d 174, 184, 189 P.3d 126 (2008)..... 5

State v. Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002)..... 5

State v. Thomas, 109 Wash.2d 222, 225, 743 P.2d 816 (1987) 6

State v. Wilson, 60 Wn.App. 887, 891-92, 808 P.2d 754, review denied,
117 Wn.2d 1010 (1991) 5

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984)..... 6

Rules

ER 404(b)..... 1, 5

Constitutional Provisions

U.S. Const. amend. VI 6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence that Ortiz had previously assaulted Love.
2. Trial counsel was ineffective for failing to object to the introduction of the ER 404(b) evidence.

Issues Pertaining to the Assignments of Error

1. Where the State failed to forewarn the trial court that it was seeking to admit evidence that Ortiz had previously assaulted Love and where there was no basis offered for the admission of that evidence under ER 404(b), was it error to admit the evidence.
2. Where there were no eyewitnesses to the alleged crimes and where both Ortiz and Love testified, was trial counsel ineffective for failing to object to clearly inadmissible evidence that reflected negatively on Ortiz's character and credibility?

B. STATEMENT OF THE CASE

Gerardo Ortiz was charged with first degree burglary, first degree kidnapping and second-degree assault. CP 4-6. All of the crimes were alleged to have occurred on January 17, 2010. Id. The state also alleged that the burglary was an aggravated domestic violence offense. Id. The jury

acquitted Ortiz on the kidnapping count but convicted him of the other charges. CP 37.

Nicki Lyn Love testified that she met Ortiz in November 2009 via Match.com, an Internet dating site. 10/21/10 RP 16. She had a two and one half-year-old son. 10/21 RP at 13. Love took Ortiz to meet her mother on the first date. 10/21/10 RP 18. Three weeks into the relationship Ortiz bought her a ring. 10/21/10 RP 20. She then purchased a ring for Ortiz. 10/21/10 RP 22.

Love said that Ortiz got along well with her son. 10/21/10 RP 26. In the state's case-in-chief, the prosecutor asked:

Obviously we're going to talk about what happened on January 16 and 17, 2010, but about a week before that there was an incident involving the defendant, his friends, and you; is that right?

10/21/10 RP at 28.

Ms. Love then explained that about January 10, 2010 she and the defendant had a "huge fight". Id. According to her, Ortiz called her a "loose whore". Id. During this fight, Ortiz "punched me in the arm" which "left a big bruise." 10/21/10 RP 30. She stated that this hurt her badly. Id. She also testified that during this fight Ortiz took her keys and kept them.

As to the charged counts, Love testified that on the evening of January 16-17, she and Ortiz and her son were at a party. Ortiz took her son

home in his car and she followed. 10/21/10 RP 39. Just after she entered her apartment, Ortiz attacked her. 10/21/10 RP 43-44. Love testified that the assault began at midnight and ended at 4:35 a.m., where Ortiz left the apartment. 10/21/10 RP 45. Although Love had given Ortiz a key to the apartment, she asked him to leave during the assault. And, according to her, her son was sitting on the couch and witnessed the assault. 10/21/10 RP 46.

According to Love, she yelled for help but no one came. 10/21/10 RP 62. She even left the apartment and banged on a neighbor's door but no one answered. 10/21/10 RP 60.

Exhibits admitted at trial showed Ms. Love had bruises consistent with an assault. 10/25/10 RP 30. It was Ortiz's testimony that someone else had assaulted Love.

Ortiz confirmed that he and Love met on Match.com. 10/25/10 RP 47. He also confirmed the details of the first few weeks of their relationship. 10/25/10 RP 48-57. He testified that Love appeared to have an alcohol problem. 10/25/10 RP 59-64. Ortiz confirmed that on the evening of the 16th, he, Love, and her son were at a party. 10/25/10 RP 72.

Ortiz said, however, that Love left the party with her son and drove home. 10/25/10 RP 75. Ortiz followed and went up to the apartment. Id. At that point, they gave each other their keys back. Id.

Ortiz went to his truck, which was parked outside Love's apartment. He was tired and had been drinking so he put his seat back and tried to sleep. 10/25/10 RP 79. A few minutes later, a red pick-up truck pulled up. Nicki Lyn then left the apartment, got in her car and followed the truck out of the apartment parking lot. 10/25/10 RP 80. Ortiz began to follow them but then decided to return to the apartment parking lot. 10/25/10 RP 81. Forty-five minutes later, Love returned. 10/25/10 RP 82.

He followed Love into the apartment where Love started "swinging at me." 10/25/10 RP 82. He said that Love looked "awful" and "like she had been in a scuffle." *Id.* Ortiz said that, at the point, he left Love's apartment. He pulled into a strip mall parking lot and stayed there for about an hour. 10/25/10 RP 83. The he drove home. 10/25/10 RP 84.

The jury found Ortiz guilty of the burglary and assault. CP 35-36. Judgment and sentence were entered. CP 40-47. This timely appeal followed. CP 38-39.

C. ARGUMENT

1. The trial court erred in admitting evidence of a prior uncharged assault by Ortiz against Love.

"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."

ER 404(b); *State v. Holmes*, 43 Wash.App. 397, 400, 717 P.2d 766, review denied, 106 Wash.2d 1003 (1986). ER 404(b) only applies to prior misconduct offered as substantive evidence, not evidence offered for impeachment. *State v. Wilson*, 60 Wn.App. 887, 891-92, 808 P.2d 754, review denied, 117 Wn.2d 1010 (1991). Although the prosecutor never revealed his purpose in admitting this evidence, he elicited it in his case-in-chief. Thus, it appears that it was offered as substantive evidence of Ortiz's "assaultive character."

To justify the admission of prior acts under ER 404(b), the State must demonstrate that the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and that its probative value outweighs its prejudicial effect. *State v. Magers*, 164 Wash.2d 174, 184, 189 P.3d 126 (2008). "To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charge[d], and (4) weigh the probative value against the prejudicial effect." *State v. Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002).

Generally, an appellate court will defer to the assessment of the trial judge who is best suited to determine the prejudicial effect of a piece of evidence. *State v. Posey*, 161 Wash.2d 638, 648, 167 P.3d 560 (2007). Here,

however, because the state did not forewarn the trial judge or defense counsel that it intended to introduce evidence of a prior alleged assault by Ortiz on Love, and because defense counsel did not object, the court did not comply with these requirements.

This Court should find that the evidence of the prior assault was inadmissible. First, there was no purpose identified for its admission. The only issue in the case was the identity of the person who assaulted. But the fact that Ortiz and Love had a previous altercation did not shed any light on that issue. Instead, it was admitted as “proof” of Ortiz’s bad character – that he was a jealous person who was likely to assault Love. This was improper and had the State made the proper motion or had the defense properly objected to the evidence, it would have been excluded.

3. *Trial counsel was ineffective for failing to object to the introduction of evidence that Ortiz has previously assaulted Love.*

A defendant has the constitutional right to effective assistance from counsel. See U.S. Const. amend. VI; Wash. Const. art. I, § 22. To show that counsel was ineffective, a defendant must establish both deficient representation and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wash.2d 222, 225, 743 P.2d 816 (1987). Matters that go to legitimate trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129

Wash.2d 61, 77-78, 917 P.2d 563 (1996). We give considerable deference to counsel's performance, presuming it was effective. *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. To show prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the trial result would have been different. *Thomas*, 109 Wash.2d at 226, 743 P.2d 816.

a. Counsel's performance was deficient.

Generally, when trial counsel's actions involve matters of trial tactics, appellate courts generally hesitate to find ineffective assistance of counsel, and will indulge in the strong presumption that counsel's performance was reasonable. *State v. Jones*, 33 Wash.App. 865, 872, 658 P.2d 1262, review denied 99 Wash.2d 1013 (1983). However, "in egregious circumstances, on testimony central to the State's case, ... the failure to object [will] constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wash. App. 754, 763, 770 P.2d 662 (1989)(citing *Strickland*, supra, and *State v. Ermert*, 94 Wash.2d 839, 621 P.2d 121 (1980)), review denied, 113 Wash.2d 1002, 777 P.2d 1050 (1989).

Here counsel's performance was deficient. The rules of evidence make it clear that this evidence was inadmissible yet trial counsel did not object. There was no tactical reason to let this information into evidence. It only served to prejudice Ortiz in the eyes of the jurors.

b. Counsel's deficient performance prejudiced Ortiz.

As to the evidence's prejudicial effect, the impact on Ortiz's case was great. The question in this case was not whether Love was assaulted but who assaulted her. . Because there were no eyewitnesses to the touching, it was simply a matter of determining who was telling the truth, Love or Ortiz. Thus, the question of guilt thus necessarily turned on the relative credibility of the accused and the accuser. Any evidence admitted to improperly disparage Ortiz's credibility was highly prejudicial to him.

D. CONCLUSION

For the reasons stated above, this Court should reverse Ortiz's convictions for burglary and assault and remand for a new trial.

Respectfully submitted this 26th day of April 2011.



Suzanne Lee Elliott
WSBA 12634

Certification of Service by Mail

I declare under penalty of perjury that on the date listed below, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

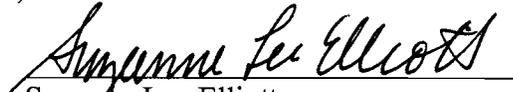
Appellate Unit
King County Prosecutor's Office
516 Third Avenue, W554

Seattle, WA 98104-2386

And To:

Mr. Gerardo Ortiz #346507
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99362

4/26/2011
Date


Suzanne Lee Elliott