

73340-1

73340-1

FILED  
October 7, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 73340-1-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

MARTIN BURTON,

Appellant.

---

---

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

The Honorable Jim Rogers, Judge  
The Honorable Dean S. Lum, Judge

---

---

BRIEF OF APPELLANT

---

---

JARED B. STEED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural History</u> .....	2
2. <u>Trial Testimony</u> .....	3
3. <u>Prior Acts</u> .....	5
a. <i>404(b) Evidence</i> .....	5
b. <i>404(b) Trial Testimony</i> .....	7
c. <i>Limiting Instruction &amp; Closing Argument</i> .....	9
C. <u>ARGUMENT</u> .....	11
BURTON’S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PROPOSE ADEQUATE LIMITING INSTRUCTIONS .....	11
1. <u>Defense Counsel Denied Burton A Fair Trial When He            Proposed An Instruction Which Permitted Jurors to Hear            Otherwise Omitted Evidence</u> .....	12
2. <u>Defense Counsel Was Ineffective For Failing to Request An            Instruction Limiting Jurors Use of Other Uncharged Acts            Between Burton and R.W.</u> .....	17
D. <u>CONCLUSION</u> .....	20

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>City of Seattle v. Patu</u> 108 Wn. App. 364, 30 P.3d 522 (2001) <u>aff'd</u> 147 Wn.2d 717, 58 P.3d 273 (2002).....	19
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	13
<u>State v. Athan</u> 160 Wn.2d 354, 158 P.3d 27 (2007).....	18
<u>State v. Bacotgarcia</u> 59 Wn. App. 815, 801 P.2d 993 (1990) <u>rev. denied</u> , 116 Wn.2d 1020 (1991).....	16
<u>State v. Barragan</u> 102 Wn. App. 754, 9 P.3d 942 (2000).....	18
<u>State v. Bowen</u> 48 Wn. App. 187, 738 P.2d 316 (1987).....	15
<u>State v. Carter</u> 56 Wn. App. 217, 783 P.2d 589 (1989).....	20
<u>State v. Foxhoven</u> 161 Wn.2d 168, 163 P.3d 786 (2006).....	18
<u>State v. Gresham</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	12, 14, 15, 18
<u>State v. Kennealy</u> 151 Wn. App. 861, 214 P.3d 200 (2009) <u>rev. denied</u> , 168 Wn.2d 1012 (2010).....	15
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	20

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	15
<u>State v. Russell</u> 171 Wn.2d 118, 249 P.3d 604 (2011) .....	18
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	18
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	11
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997) <u>cert. denied</u> , 523 U.S. 1008 (1998).....	11
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	11
<u>State v. Tilton</u> 149 Wn.2d 775, 72 P.3d 735 (2003).....	20
<u>State v. Woods</u> 138 Wn. App. 191, 156 P.3d 309 (2007).....	13
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 404 .....	5, 7, 9, 12, 14, 15, 18
U.S. Const. amend. V .....	11
Const. art. I, § 22.....	11

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to effective representation when his attorney proposed an instruction which permitted jurors to hear evidence not otherwise adduced at trial that appellant had previously assaulted another woman.

2. Appellant was denied his right to effective representation when his attorney failed to request an instruction limiting the jury's use of evidence of uncharged acts between appellant and the complaining witness.

Issues Pertaining to Assignments of Error

1. The trial court allowed evidence that the complaining witness was aware appellant had previously assaulted another woman as evidence of the complaining witness's fear that appellant would carry out his alleged threat to kill her. Evidence of the prior alleged assault ended up not being introduced during trial. Nonetheless, defense counsel proposed, and the trial court gave, a limiting instruction which introduced evidence of the alleged assault to the jury. Defense counsel also discussed the instruction and alleged facts of the assault during closing argument. Where there was no legitimate strategy for counsel's action of permitting jurors to hear evidence which demonstrated appellant had a propensity for violence and which was not otherwise adduced at trial, was counsel ineffective for proposing the instruction?

2. The trial court allowed evidence that appellant allegedly assaulted the complaining witness the day before the charged incidents as evidence of the complaining witness's state of mind. Where this evidence permitted jurors to infer appellant had a propensity for violence, was counsel ineffective for failing to propose an instruction limiting jurors' use of this evidence?

B. STATEMENT OF THE CASE

1. Procedural History.

The King County prosecutor charged appellant Martin Burton with one count each of second degree assault by strangulation and felony harassment. CP 1-6. A jury found Burton guilty. CP 32, 35; 4RP<sup>1</sup> 306-09. The jury also returned special verdicts finding that Burton and the complaining witness were members of the same household. CP 36-37; 4RP 306-09. The trial court sentenced Burton to concurrent prison sentences of 45 months for the assault conviction and 43 months for the harassment conviction. The trial court also imposed 18 months of community custody. CP 74-82; 5RP 12-14. Burton timely appeals. CP 92.

---

<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – November 19, 2014; 2RP – December 17, 2014; 3RP – March 10 and 11, 2015; 4RP – March 16, 17, 18 and 19, 2015; 5RP – April 3, 2015.

2. Trial Testimony.

On August 11, 2014, Burton and R.W. walked into a QFC store in West Seattle. 4RP 30-31, 40-41, 72, 150, 217. Both Burton and R.W. were intoxicated. 4RP 31, 33-34, 43, 225. Assistant store manager, Travis Patricelli, saw bruises and blood on R.W.'s face. 4RP 26, 30-31. Burton was yelling at R.W. 4RP 31, 34. R.W. appeared afraid and asked for help. 4RP 31-33. Patricelli did not see Burton touch R.W. 4RP 32-34.

The police were called to the store. 4RP 31, 40-41, 72, 150, 217. R.W. told medical responders and police that Burton had hit, pushed, and strangled her. 4RP 43, 48, 75-76, 85, 221-22. R.W. looked at Burton when answering questions. 4RP 33, 219-20. R.W. said a similar incident had happened between her and Burton previously. 4RP 76, 85. R.W. also reported that Burton said he would kill her if she said anything. 4RP 222.

R.W. had an elevated pulse and complained of face, neck, and abdominal pain. 4RP 42-48, 74-76, 85. Medical technicians noticed bruising around R.W.'s eyes and nose and a bloody scratch on her face. 4RP 42, 46, 77, 79-80, 84, 105, 108, 218, 225, 228. Her breathing was not labored. 4RP 86. R.W. denied having chest pain or difficulty breathing. 4RP 48. There were no injuries to the back of R.W.'s head or neck. 4RP 42, 46, 81. R.W.'s eyes showed no petechiae. 4RP 44.

Burton had no injuries. 4RP 109. He denied doing anything to R.W. 4RP 33. Police described Burton as agitated and frustrated. 4RP 33, 106. Burton tried to interject and interrupt R.W.'s conversation with police. 4RP 106, 219-20. Burton initially responded "oh, no, I'm not," when told he was under arrest. Burton quickly cooperated however, and allowed police to handcuff him. 4RP 107, 227-29.

At trial, R.W. testified she was homeless and an alcoholic. 4RP 127-28, 130-31, 156. She explained that she and Burton were friends and had eventually become romantically involved. Burton became violent when she tried to end the relationship. 4RP 135-36, 193-94, 200-01. Burton told R.W. that if she was not with him she would not be with anyone. 4RP 133-34, 138-39, 157-58, 184-85.

R.W. said that the night before going to QFC Burton sexually assaulted, punched, and choked her. 4RP 138-39, 147, 164-65, 181, 184-85. The next day, Burton asked R.W. to buy him a soda. When R.W. refused, Burton sexually assaulted R.W., slapped and choked her, and pushed her head into a wall. 4RP 141-44, 148-52, 167, 191-92, 201. R.W. said Burton grabbed her by the neck a few times. 4RP 144, 148, 191-92. The pressure on her neck made it hard to breathe. 4RP 142, 145-46, 153, 192.

R.W. tried to get away from Burton by going to QFC. 4RP 146-47. Burton followed her. 4RP 150-51. Outside the store, Burton told R.W. that

if he went to jail he would kill her. 4RP 150, 186. R.W. believed Burton would carry out his alleged threat. 4RP 150, 154.

3. Prior Acts.

a. *404(b) Evidence.*

Before trial, the State sought to admit evidence that the day before the charged incidents, Burton had sexually assaulted, punched, strangled, and threatened R.W. 3RP 40; Supp. CP \_\_\_\_ (sub no. 65, State's Trial Memorandum, filed 3/10/15, at 7-9). The State also sought to introduce evidence that Burton had previously assaulted a woman named "Virginia." 3RP 34-37; 4RP 119-21; Supp. CP \_\_\_\_ (sub no. 65, State's Trial Memorandum, filed 3/10/15, at 7-9).

The State argued the prior incidents between Burton and R.W. were admissible under ER 404(b) to assess R.W.'s credibility and evaluate whether her belief that Burton would carry out the alleged threats was reasonable. Supp. CP \_\_\_\_ (sub no. 65, State's Trial Memorandum, filed 3/10/15, at 7-9).

The State also argued that Burton's prior alleged assault of "Virginia" was admissible to evaluate whether R.W.'s belief that Burton would carry out the alleged threats was reasonable. The State explained that "Virginia" had told R.W. about the assault, for which Burton pled

guilty to fourth degree assault in 2013. 3RP 34-37; 4RP 121; Supp. CP \_\_\_\_ (sub no. 65, State's Trial Memorandum, filed 3/10/15, at 7-9).

Defense counsel objected to admission of the prior incidents between Burton and R.W. CP 27-28. Defense counsel also objected to admission of Burton's alleged assault of "Virginia," arguing the evidence was highly prejudicial given the similarity of the prior alleged assault and the current charged assault. 3RP 34-37. Defense counsel noted the evidence "walks dangerously close to character evidence, which is inadmissible." 4RP 120. Defense counsel argued the jury would therefore likely use the prior alleged assault on "Virginia" as evidence of Burton's propensity for violence. 3RP 43.

The trial court admitted the prior incidents between Burton and R.W., finding they were relevant to proving R.W.'s "state of mind." 3RP 40-41; 4RP 124. The trial court acknowledged evidence of Burton's alleged assault of "Virginia" was "pretty prejudicial." 3RP 38, 41-44, 48. Accordingly, the trial court reserved ruling until the State could make an offer of proof that R.W. was aware of the prior alleged assault. 4RP 3.

R.W. was questioned about her knowledge of the alleged assault during an evidentiary hearing outside the hearing of the jury. 4RP 111-12. R.W. said that "Virginia" had told her Burton sexually assaulted, pushed, slapped, and slammed her head into the ground. "Virginia" was

hospitalized as a result. R.W. believed the incident happened in the last two years. 4RP 114-18. R.W. explained that she was fearful of Burton because she knew he had previously assaulted people including “Virginia.” 4RP 117-18.

Defense counsel maintained evidence of Burton’s alleged assault on “Virginia” constituted improper character evidence. 4RP 120. The trial court overruled defense counsel’s objection, concluding the evidence of “Virginia being roughed up” was relevant to R.W.’s “knowledge or fear” as to the harassment charge. 4RP 121-22. The trial court excluded evidence of Burton’s sexual assault of “Virginia,” prison sentence, and fights with other people in the community. 4RP 122-24.

*b. 404(b) Trial Testimony*

Despite the trial court’s prior exclusion, R.W. nonetheless testified that Burton had been in jail and the department of corrections, strangled three other men, and sexually assaulted “other women.” R.W. also referred to Burton as a “violent man,” and “rapist” and alleged that he had a crack cocaine addiction. 4RP 132, 155, 158, 161, 166-70, 186-87. The trial court sustained several defense objections. 4RP 136-37, 140, 154. Defense counsel informed the trial court he had spoken with Burton and for “strategic reasons,” would not be requesting a mistrial. 4RP 173-74.

During direct examination, the State attempted to elicit information from R.W. about her knowledge of Burton's alleged assault on "Virginia."

The following exchange occurred:

Q: Do you know a woman named Virginia?  
A: My street auntie  
Q: And what do you call her?  
A: My street aunt – well, she's wasn't *[sic]* really – I met her on the street, but she's one of my street aunties.  
Q: So she's not your real aunt, right?  
A: No  
Q: Okay. But she's someone that is close to you?  
A: Yes  
Q: And one of those adopted family members that you were referring to?  
A: Yes  
Q: And, [R.W.], you spent time in jail, correct?  
A: Correct  
Q: Was there a time where you and your street Auntie Virginia were in jail together at the RJC?  
A: Yes  
Q: Did she tell you about anything that the Defendant had done to her recently that would cause her injury?  
A: I asked her if she had seen my fiancé, or my ex now, but my fiancé at the time, Martin Anthony Burton, and she said, "He's in jail." He was in jail because I was –  
Defense: Objection  
R.W.: -- I was writing to him –  
Court: Sustained. Counsel, ask a directed question. Ask a direct question  
Prosecutor: Okay  
Q: So –  
R.W.: I was writing letters to him and –  
Court: Hold on.

Prosecutor: Wait a second, [R.W.]  
A: -- he wasn't answering my letter. I don't -- you know what? I can't deal with this. I've never been through this before.  
Q: It's okay. Just take it easy, okay?  
A: This is really frustrating. I also have a court hearing I have to go to, and I'm in custody. I'm just -- this is too much for me.  
Q: I know it's overwhelming.  
A: I'm not -- I've never been through this before  
Q: Let's --  
A: And I'm in a lot of pain, my arm, my shoulder. My shoulder is sprained and bruised.  
Q: So I want to move to August, okay?  
A: I'm in a lot of pain  
Q: So now we're going to move to August. The night before the QFC incident, did anything happen with the Defendant?

4RP 136-138.

R.W. was not questioned further about her knowledge of the alleged incident between Burton and "Virginia." No evidence of Burton's alleged assault on "Virginia" was introduced during the State's case-in-chief.

*c. Limiting Instruction & Closing Argument*

Before resting, the State questioned whether defense counsel intended to ask for a written 404(b) limiting instruction. Defense counsel responded that he did. 4RP 206. The trial court told defense counsel a limiting instruction would be given if counsel drafted one. 4RP 206-07.

Despite the jury never hearing about the prior assault against “Virginia,” defense counsel proposed, and the trial court gave, the following instruction:

I am allowing evidence that [R.W.] knew of Defendant’s prior assault against a person named Virginia. You may consider this evidence only for the limited purpose of considering whether [R.W.] knew about this assault prior to August 11, 2014, and whether or not the State has proved that her fear that the Defendant would carry out his threat to kill her, was reasonable. You must not consider this evidence for any other purpose.

CP 51 (instruction 8).

Defense counsel failed to request a limiting instruction for the prior incidents between Burton and R.W.

During closing argument, defense counsel discussed instruction 8, explaining:

Now, let me say something about that. We heard very little about the context in which she [R.W.] heard that Martin had done this to another person. We don’t know whether she – well, she wasn’t there. She said that Virginia told her that. We don’t know whether or not he threatened to kill Virginia. We don’t know, in fact, whether or not he did kill Virginia. So I would submit to you, ladies and gentlemen, that the lack of context and follow up to that doesn’t provide a reasonable basis for being afraid that Martin would kill her. But the fact is, we would submit, that he didn’t say anything like that.

4RP 288-89.

C. ARGUMENT

BURTON'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PROPOSE ADEQUATE LIMITING INSTRUCTIONS

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Burton's counsel was ineffective for proposing an ER 404(b) evidence limiting instruction which permitted jurors to hear evidence not otherwise adduced at trial that Burton had allegedly assaulted "Virginia." Defense counsel was also ineffective for failing to propose an instruction

limiting the jury's use of other uncharged acts between Burton and R.W. Reversal is required because there is a reasonable probability the inadequate instructions materially affected the outcome at trial.

1. Defense Counsel Denied Burton A Fair Trial When He Proposed An Instruction Which Permitted Jurors to Hear Otherwise Omitted Evidence.

Under ER 404(b), “[e]vidence 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) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

The trial court allowed evidence that R.W. knew Burton previously assaulted “Virginia” as evidence of R.W.’s fear that Burton would carry out his alleged threat to kill her. Evidence of the prior alleged assault was ultimately not introduced during trial however. Nonetheless, defense counsel proposed, and the trial court gave, a limiting instruction which introduced evidence of Burton’s alleged assault on “Virginia” to the jury. In discussing the instruction during closing argument, defense counsel further explained:

We heard very little about the context in which [R.W.] heard that [Burton] had done this to another person. We don't know whether she – well, she wasn't there. She said that Virginia told her that. We don't know whether or not he threatened to kill Virginia. We don't know, in fact, whether or not he did kill Virginia.

4RP 288-89.

In proposing an instruction regarding evidence that had never been introduced at trial and then further elaborating on this omitted evidence, counsel rendered deficient performance. Counsel had a duty to guard his client against the most damaging inference that could be drawn from this evidence: that Burton had assaulted and possibly threatened to kill someone before, so he must have done it again. Instead, defense counsel's instruction and discussion of it during closing argument, introduced otherwise omitted evidence and left no doubt that jurors were well aware Burton had previously assaulted another woman. Defense counsel's conduct fell below an objective standard of reasonableness.

Proposing a detrimental instruction may constitute ineffective assistance of counsel. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct); State v. Woods, 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007) (counsel ineffective for offering a faulty self-defense instruction). Such is the case

here. There was no reasonable trial strategy for proposing an instruction that permitted the jury to hear otherwise omitted evidence of Burton's prior alleged assault. Counsel was aware of the prejudicial effect that evidence of Burton's alleged assault on "Virginia" would have on the jury as demonstrated by his objection to admission of the evidence and later request for a limiting instruction. But, counsel failed to realize that evidence of the prior alleged assault was never introduced during trial. Defense counsel greatly exacerbated the problem by suggesting during closing argument that Burton's alleged assault of "Virginia" may have also included threats to kill her.

The fact that the defense instruction told the jury it could not consider the alleged assault for any purpose other than gauging the reasonableness of R.W.'s fear does not render the instructional error harmless. "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that *the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.*" Gresham, 173 Wn.2d at 423-424 (emphasis added).

While the instruction identified a purpose for which jurors could use the otherwise excluded ER 404(b) evidence, it failed to include language

setting for the prohibition mandated under Gresham. Contrary to the express language of ER 404(b), the instruction also failed to tell jurors the one way in which they absolutely could not use the evidence. Cf. State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated “the jury could not use the testimony to judge Kennealy’s character or propensity to commit such acts, but that it could only consider the testimony in determining whether it showed that Kennealy had a common scheme or plan.”), rev. denied, 168 Wn.2d 1012 (2010); State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (noting court properly instructed jurors that evidence could only be considered for whether there was a common scheme or plan and not to prove defendant’s character).

Thus, in addition to introducing otherwise omitted evidence, defense counsel’s instruction did not actually limit the jury’s consideration of the evidence. The flawed instruction allowed jurors not only to consider the prior misconduct as evidence that Burton committed the charged crime but also to consider that evidence as proof of Burton’s propensity to commit the charged crime.

Counsel’s flawed instruction was prejudicial. Evidence of other misconduct is prejudicial because jurors may convict on the basis that 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), abrogated on other

grounds by, Lough, 125 Wn.2d at 854. Such evidence “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. A juror’s natural inclination is to reason that, having previously committed an offense, 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), rev. denied, 116 Wn.2d 1020 (1991).

A new trial is required here. This case came down to the credibility of R.W.’s testimony. There were no independent eyewitnesses to what happened. No one heard Burton’s alleged threat to kill R.W. There was no physical evidence of petechiae, swelling, or marks on R.W.’s neck suggestive of strangulation.

Faced with deciding whether R.W.’s accusations were truthful, jurors naturally would tend to view evidence of a prior assault, as proof that Burton committed the acts for which he was charged. The flawed limiting instruction allowed the jury to infer that Burton had a propensity for violence, particularly against women, and, acting in conformity with his character, must have committed the charged assault and harassment against R.W.

Counsel's flawed limiting instruction and comments during closing argument admitted otherwise omitted evidence that unfairly prejudiced Burton. Counsel admitted information about Burton that the jury would not otherwise have heard about, but could not ignore, painting a picture of him as a violent man, and a person who would hit women. Under the instruction given, the jury was free to use Burton's prior bad acts to conclude that he acted similarly here. There was no legitimate tactical reason for counsel's course of action. Neither of Burton's convictions is unaffected as each turn on R.W.'s credibility. A new trial is required because the instructional error and defense counsel's needless arguments pertaining to it affected the outcome of trial.

2. Defense Counsel Was Ineffective For Failing to Request An Instruction Limiting Jurors Use of Other Uncharged Acts Between Burton and R.W.

Burton's counsel was also ineffective for failing to propose a 404(b) limiting instruction limiting the jury's use of other uncharged acts between Burton and R.W. The trial court allowed evidence that Burton allegedly sexually assaulted, strangled, and hit R.W. the night before the charged incidences as evidence of R.W.'s fear that Burton would carry out his alleged threat to kill her. Reversal is required because there is a reasonable probability the lack of a limiting instruction materially affected the outcome at trial.

Consistent with 404(b)'s categorical bar prohibiting character evidence, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's ER 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Counsel must nevertheless request the instruction and the failure to do so generally waives the error. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). In Burton's case there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the character evidence. Had counsel requested an instruction, the court would have been required to give one. Defense counsel's decision not to propose a limiting instruction, is puzzling since he acknowledged the evidence was prejudicial. 3RP 34, 37.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). The "reemphasis" theory is inapplicable here. Evidence that Burton had

previously sexually assaulted, strangled, hit, and threatened R.W. was not of a type the jury could be expected to forget or minimize. This was especially true in light of defense counsel's proposed instruction informing jurors that Burton had also allegedly assaulted a different woman previously. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed a central piece of the State's case.

In any event, nothing suggests defense counsel was worried about reemphasizing the convictions. Indeed, Burton declined to request a mistrial despite R.W.'s repeated testimony about otherwise excluded evidence. Regardless of the questionable strategic decision to continue with trial, there was nothing preventing Burton from still limiting the jury's use of that evidence. See e.g., City of Seattle v. Patu, 108 Wn. App. 364, 369, 30 P.3d 522 (2001) (Patu testified about the circumstances of his prior conviction and also requested a limiting instruction), aff'd 147 Wn.2d 717, 58 P.3d 273 (2002).

Counsel's failure to propose an adequate limiting instruction fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting a limiting instruction. Counsel was aware of the risk of prejudice from the 404(b) evidenced by his objection to its admission. Counsel simply neglected to request a

necessary limiting instruction. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

For the reasons set forth in section C.1., supra, there is a reasonable probability that defense counsel's failure to request an instruction limiting the jury's use of other uncharged acts between Burton and R.W. affected the outcome.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Burton's convictions and remand for a new trial.

DATED this 7<sup>th</sup> day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JARLE B. STEED

WSBA No. 40635

Office ID No. 91051

Attorney for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73340-1-I
	)	
MARTIN BURTON,	)	
	)	
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 7<sup>TH</sup> DAY OF OCTOBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARTIN BURTON  
DOC NO. 998076  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF OCTOBER 2015.

X *Patrick Mayovsky*