SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CRAIG KENEMORE,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 58207-4-II
Lewis County No. 22-1-00480-21

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, CRAIG KENEMORE, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Kenemore seeks review of the October 1, 2024, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUE PRESENTED FOR REVIEW

Kenemore was charged with assaulting his wife with a deadly weapon based on her testimony that he pointed a shotgun at her. Trial counsel did not object to testimony from other witnesses that Kenemore had threatened other people with a shotgun on previous occasions. Where no legitimate trial strategy justified the failure to object to this highly prejudicial propensity evidence, did Kenemore receive ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Around 4:00 a.m. on May 17, 2022, Tamara Miller called 911 and reported that she had shot her husband, saying it was self defense. RP 75. First responders arrived at the scene and found Craig Kenemore lying on the kitchen floor with a gunshot wound to the face. RP 79, 83. Miller was next to him, and she repeated that she had shot Kenemore in self defense. RP 81. The .45 caliber semiautomatic pistol Miller had shot him with was on the kitchen island. RP 224-25. A shotgun was on the floor in the living area. RP 92.

The hollow point round had entered Kenemore's face and exited through his back, and he was bleeding profusely. RP 94, 133, 143, 246, 305. Kenemore was airlifted to a hospital, where he remained for a number of months. RP 312, 314.

In August 2022, the Lewis County Prosecuting Attorney charged Kenemore with assaulting Miller with a deadly weapon and harassment—threat to kill. CP 1-4. The State alleged in each

count that Kenemore was armed with a firearm and that the crimes were committed against an intimate partner. *Id*.

Testimony at trial established that there were several people at the Miller/Kenemore house socializing the evening before the shooting. RP 365, 417. Everyone was drinking alcohol, including Miller and Kenemore. RP 368-60, 418. Everyone was having a good time. RP 370, 372, 659. Most of the guests had left by 9:00 p.m. RP 420, 501. The only guest who remained was Heather Salazar, a close friend of Miller's who was staying with them at the time. RP 460, 473, 504, 661.

As the evening wore on, they all became fairly intoxicated, and an argument occurred, which became heated. RP 505-06, 664, 666. According to Salazar, Kenemore became angry, knocked a drink out of Miller's hand, and began yelling into her face. RP 506. When Salazar tried to intervene, Kenemore called her names and made a motion with his fist. RP 508-09. Kenemore's anger escalated, and he kept yelling at Miller and Salazar. RP 512-13, 667-68. Salazar became uncomfortable and

left, returning home to California. RP 515, 677. On her way, she stopped at the home of Darryl Crago and Jeremy Moen, close friends of Kenemore and Miller who had been at the house earlier, to tell them she was concerned about Kenemore's behavior. RP 375-76, 429, 519.

Crago drove to Kenemore's house to talk to him, while Miller drove to Moen's house to talk to her. RP 377-79, 432, 680. After about an hour Crago texted Moen that Kenemore had calmed down, and both he and Miller went home. RP 385-87, 435, 684.

When Miller got home, she went to her bedroom and placed a chair in front of the door, hoping she would be able to go to sleep. RP 687. She heard Kenemore yelling that he was going to burn the place down, which she took as a threat to her life. RP 688-89. He pushed into her room and screamed at her for her keys so he could move her car. RP 689. Miller told him she wanted to be left alone, but then she gave in and handed him the keys. RP 690-91.

While Kenemore was outside, Miller could hear him yelling, and she activated a voice recording app on her phone. She got dressed and armed herself with her .45, placing the loaded gun in the front pocket of her hoodie. RP 693, 707. Miller continued recording for the next hour, during which Kenemore made several threats involving Salazar, Miller, and Miller's dog. Exhibit 100; RP 699-700. At one point they moved outside to the porch to smoke. RP 700. When Miller decided she was done, she went back into the house, planning to grab her bag and her dog and leave. RP 700.

Kenemore walked in behind her and closed the door, then walked around in front of Miller holding the shotgun that was always kept by the front door. RP 701. Kenemore continued threatening the dog, kicking at the dog and following it with the shotgun as it ran around the kitchen. RP 703.

Miller testified on direct exam that after the dog ran to the bedroom, Kenemore pointed the shotgun at her, and she pulled out her gun and shot Kenemore. RP 704-07. On cross

examination she agreed that on the recording she heard Kenemore ask if she wanted to watch him shoot the dog just three seconds before she shot Kenemore. She acknowledged that her earlier testimony that the dog was already in the bedroom at the time of the shooting was not accurate. RP 772.

Miller called 911 and reported that she had shot her husband. RP 708. While she was on the call she kept yelling at Kenemore that it was his fault for pointing a shotgun at her. RP 707-08. When Kenemore fell to the floor after being shot, the shotgun fell next to him. Miller picked it up and moved it to the living room, where law enforcement found it. RP 715.

Miller also testified that her marriage to Kenemore had been going downhill for years and was pretty bad in May 2022. RP 618, 733. Kenemore's level of drinking was increasing, and he was more angry and aggressive when he was drinking heavily. RP 623. She testified that around the time she shot him, Kenemore was quick to anger, with her and with others. RP 625. She said he did not generally go around threatening people,

although she had seen it happen before. RP 628. He seemed to be looking for a fight that day, however. RP 655.

Both Crago and Salazar testified about the events of the evening as well as their relationship with and knowledge of Kenemore. Both also testified to Kenemore's prior use of the shotgun. Crago testified that he and Kenemore were like brothers. He had been to Kenemore's house over 100 times, and they socialized frequently. RP 356-57. Crago testified that when Kenemore gets angry, he gets really angry, then he calms down, then ramps back up again. RP 385. Crago said that Kenemore does not normally go around threatening people, but when he is down or angry, his personality can change. RP 396.

The prosecutor asked Crago if he recalled a time Kenemore approached him in an aggressive manner. RP 396. When Crago said he did, the prosecutor asked him to describe it. Crago responded, "It was shortly after we had met. I think it was actually the second time I had showed up at his house. I showed up in my Honda, which he didn't recognize, and he came out the

front door with a shotgun." RP 396. Defense counsel did not object to the prosecutor's questions or Crago's responses.

Salazar testified that she had been staying with Miller and Kenemore for three or four days prior to the shooting, and the visit was going well. RP 474. The prosecutor asked, "Do you recall any big blow-ups or confrontations in the days before, ultimately, the event that occurred?" RP 477. Salazar responded that a couple of days before, a kid rode onto the property wearing a helmet with a tinted face mask, and Kenemore pulled the shotgun on him, saying no one goes on his property without showing his face. RP 477-78. The prosecutor asked, "Okay. But he was quick to bring the shotgun out?" RP 478. When Salazar agreed that he was, the prosecutor asked, "Had you ever seen that – something like that, another time like that?" RP 478.

When Salazar started to answer, defense counsel objected on relevance grounds. RP 478. The court overruled the objection, and Salazar answered, "He had gone outside with the shotgun

quite a few times, stomping and thinking he saw something, but… there was nobody out there at that time." RP 478.

Defense counsel requested an instruction on the lesser included offense of harassment and argued that Kenemore's threats were not threats to kill. He threatened to burn down the house or kill the dog, but he did not threaten Miller's life. RP 868-69. Counsel also argued that the State had not proven second degree assault, because Kenemore did not point the shotgun at Miller; rather, Miller shot Kenemore because she thought he was going to harm her dog. RP 867.

The jury found Kenemore not guilty of felony harassment but guilty of gross misdemeanor harassment. It also found him guilty of second degree assault. It found that Kenemore was armed with a firearm during the commission of both offenses and that Kenemore and Miller were intimate partners. CP 46-50. The court imposed a high-end standard range sentence of 12 months with a 36-month firearm enhancement on the second degree

assault count, running concurrently with a 364-day sentence on the harassment count. CP 84.

Kenemore argued on appeal that trial counsel's failure to object to highly prejudicial evidence regarding his prior use of a shotgun constituted ineffective assistance of counsel. The Court of Appeals affirmed his convictions.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals's misapplication of the standard for evaluating ineffective assistance of counsel significantly impacts Kenemore's constitutional rights.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a

simple right to have counsel appointed; it is a substantive right to meaningful representation. *See Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

Representation of a criminal defendant carries certain basic duties, including assisting the defendant, advocating for the defendant's cause, and using skill and knowledge that will ensure the trial is fair and reliable. *State v. Vazquez*, 198 Wn.2d 239,

249, 494 P.3d 424 (2021) (citing *Strickland*, 466 U.S. at 688). Defense attorneys must know the rules of evidence. *Vasquez*, 198 Wn.2d at 249. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). Making appropriate objections based on these rules thus falls within a defense attorney's duty to ensure a fair and reliable trial. *See Vasquez*, 198 Wn.2d at 249.

A defendant is denied his right to effective representation when (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *State v. Bertrand*, 3 Wn.3d 116, 128, 546 P.3d 1020 (2024) (citing *Strickland*, 466 U.S. at 687-88). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In this case, trial counsel was deficient in failing to object to inadmissible and highly prejudicial evidence that Kenemore

had a propensity to threaten people with a shotgun. Where a defendant claims ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, the defendant must show (1) the absence of a legitimate strategic reason for failing to object, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996)).

In *Saunders*, the defendant was charged with possession of methamphetamine and heroin. He testified at trial, and defense counsel elicited on direct examination that he had a prior conviction for possession of methamphetamine. *Saunders*, 91 Wn. App. at 578. The Court of Appeals held that trial counsel was ineffective. First, there was no strategic or tactical reason to offer the evidence. *Id*. at 578-79. The evidence had not been ruled

admissible pretrial, and there was no reason not to object to such damaging evidence if offered by the State. Second, evidence of the prior conviction would have been ruled inadmissible if challenged, since it was not probative of credibility and it was inherently prejudicial, as it tended to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. *Id*. at 579-80. Finally, the error was prejudicial in light of the fact that the evidence against the defendant was not overwhelming. *Id*. at 580-81.

Here, as well, there was no legitimate strategic reason for trial counsel's failure to object to inherently prejudicial propensity evidence. Kenemore was charged with second-degree assault based on allegations that he threatened Miller with a shotgun. Both Crago and Salazar testified about prior incidents in which Kenemore had used a shotgun to intimidate and threaten people. Defense counsel did not object to Crago's testimony at all, and he raised only a relevance objection to Salazar's testimony, which the court overruled. RP 396, 477-78.

Under ER 404(b)[1], evidence that relies on the propensity of the defendant to commit a crime is not admissible to show the defendant acted in conformity with that propensity. Using prior acts to prove the current charge invites conviction on the inference that once a criminal, always a criminal. *Wade*, 98 Wn. App. at 333-34. This forbidden inference erodes the presumption of innocence fundamental to our system of justice. *Id*. at 336. This propensity evidence is exactly what the jury heard from Crago and Salazar at trial, due to defense counsel's unreasonable failure to object.

Kenemore's defense to the second degree assault charge was that he did not point the shotgun at Miller. She did not shoot him in self defense but rather because he was threatening to hurt her dog. RP 867. There is no conceivable defense strategy under which it would be reasonable not to object to testimony that

[1] "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).

Kenemore has a propensity to threaten people with a shotgun. Such testimony could only harm the defense, making Kenemore seem like the type of person who would commit the very offense charged. It was counsel's duty to know the rules of evidence and to object to unfairly prejudicial testimony which violated them.

Although counsel raised a relevance objection to Salazar's testimony that Kenemore was quick to bring out the shotgun on other occasions, that objection did not properly inform the court of the error. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (relevance objection not sufficient to give court opportunity to evaluate evidence under ER 404(b)). Propensity evidence is inadmissible not because it is irrelevant but because it is unfairly prejudicial. *See State v. Briejer*, 172 Wn. App. 209, 223, 289 P.3d 698 (2012).

Next, an objection by the defense, based on ER 404(b), most certainly would have been sustained. It is well established that ER 404(b) is a categorical bar to admission of evidence which does no more than imply the defendant is a criminal type

who would be likely to commit the charged crimes, and a court would abuse its discretion in admitting such propensity evidence over objection. *State v. Gresham*, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The Court of Appeals did not address trial counsel's deficient performance, instead concluding that Kenemore could not establish prejudice and thus did not prove ineffective assistance of counsel. The Court reasoned that even if the propensity evidence was excluded, the remaining evidence was compelling. Opinion, at 11.

The Court of Appeals focused on evidence that would support the verdict. Opinion, at 11. But this is not a sufficiency determination. A defendant is prejudiced when there is a reasonable probability that the verdict would have been different, but for counsel's deficient performance. *Bertrand*, 3 Wn.3d at 129. The reasonable probability standard is lower than a preponderance standard. *Id*. (citing *State v. Estes*, 188 Wn.2d

450, 458, 395 P.3d 1045 (2017)). Kenemore established a reasonable probability here.

There was evidence to support the defense theory that Miller shot Kenemore because of his threat to her beloved pet. But because of counsel's error, the jury also heard highly prejudicial evidence that Kenemore had a propensity to threaten people with a shotgun. Improper references to a defendant's prior conduct tend to "shif[t] the jury's attention to the defendant's propensity for criminality, the forbidden inference. . .". *State v. Perrett*, 86 Wn. App. 312, 320, 936 P. 2d 426 (quoting *State v. Bowen*, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), *review denied*, 133 Wn.2d 1019 (1997). There is a reasonable probability that the jury disregarded the defense due to this improper evidence and inference.

The Court of Appeals also said that since credibility determinations are the province of the jury, its confidence in the outcome is not undermined by the admission of propensity evidence. Opinion, at 11. What the court overlooked is that there

was a reasonable probability the unfairly prejudicial evidence impacted the jury's credibility determination, and the verdict depended on the jury's determination that Miller was credible. The only evidence that Miller shot Kenemore in self defense, because he pointed the shotgun at her, came from Miller. But her description of the incident in the kitchen was shown not to line up with the recording she made. She testified initially that the dog, who Kenemore had been threatening, was already locked in the bedroom when she shot Kenemore. RP 704. She acknowledged after listening to the recording, however, that the dog was still in the kitchen. RP 772. It is reasonably likely the jury found Miller's description credible because it heard of other instances when Kenemore threatened people with a shotgun, but it would have had a reasonable doubt without that improper evidence. Thus, it is reasonably likely the jury would have reached a different decision but for counsel's error. The Court of Appeals's misapplication of the standard for reviewing ineffective assistance of counsel significantly impacts

Kenemore's constitutional rights, and this Court should grant review. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Kenemore's convictions.

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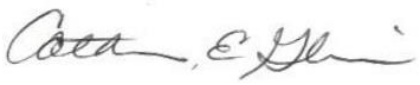
DATED this 31st day of October, 2024.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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Filed
Washington State
Court of Appeals
Division Two

October 1, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CRAIG ALAN KENEMORE, Appellant.	No. 58207-4-II UNPUBLISHED OPINION

VELJACIC, A.C.J — Craig Kenemore appeals his convictions for assault in the second degree and gross misdemeanor harassment. He argues that he received ineffective assistance of counsel because his attorney failed to object to inadmissible, highly prejudicial propensity evidence. He also argues the victim penalty assessment (VPA) and DNA collection fee imposed must be stricken. Because counsel's failure to object at trial did not prejudice Kenemore, we affirm; however, we remand with instructions to strike the VPA and DNA collection fee.

FACTS

I. FACTUAL BACKGROUND[1]

On the evening of May 16, 2022, Craig Kenemore and his wife, Tamara Miller, had friends over for a get together at their house. Kenmore and Miller both drank alcohol. Their guests included friends Darryl Crago and his spouse, Jeremy Moen, known as "Mo." 1 Rep. of Proc.

[1] This narrative account is established predominantly from trial testimony.

(RP) at 399. Kenemore and Miller both had firearms in the house, including a shotgun that was kept behind the front door. Vera Phillips ("Ma"), who was the mother of Kenemore's childhood friend, lived with them, and they also had three Rottweiler dogs: Eleanor, Knute, and Tapfer, with Knute being more attached to Miller.

Earlier in the evening, Miller worked on putting flooring down in the shop with Moen and Miller's friend, Heather Salazar, who had been staying with them for several days. Afterwards, there was socializing. Sometime between 8:00 a.m. and 9:00 p.m., Crago and Moen left to go home. Salazar was the only remaining guest.

There were conflicting accounts as to whether Miller and Kenemore had any arguments up to that point in the evening. According to Crago, he had not seen any argument between Kenemore and Miller or Salazar. According to Moen, there was a "mild conflict" when Kenemore came out to the shop and critiqued their flooring work. 1 RP at 414. Moen also stated Kenemore gave them a "disdainful" look and had an "intense conversation" with Miller. 1 RP at 421-22.

At around 1:00 a.m. on May 17, 2022, Salazar showed up at Crago and Moen's house expressing concern for Miller's safety. Later, Salazar stated she could not recall what exactly angered Kenemore but that Miller interrupted him speaking to Salazar, and he threw his chair behind him, got in Miller's face, yelled at her, and slapped her cup out of her hand. Salazar stated she tried to intervene between Kenemore and Miller, and Kenemore's anger turned toward Salazar with him calling her names and saying he was going to "beat [her] down." 2 RP at 509. Salazar also stated Kenemore said he was going to kill Salazar and burn the house down.

After Salazar's arrival at his house, Crago immediately went back over to Kenemore's house to check on him and Miller. Crago said when he arrived, Kenemore and Miller were talking but stopped when he walked into the room. About 30 seconds later, Miller left. Crago said

Kenemore was more intoxicated and was upset and angry. He said Kenemore told him he found it disrespectful that Salazar parked under the covered area by the house where Miller would normally park, despite the fact that Miller suggested she park there. Kenemore was also upset that he and Miller had given sponsorship money for a fundraising event but that their businesses would not appear on the T-shirts for the event. Crago talked with Kenemore for about an hour to an hour and a half before he felt that Kenemore had calmed down, and Crago returned home.

While Crago had gone to speak with Kenemore, Salazar remained at Crago and Moen's residence. After about 45 minutes, Miller also showed up there. She had brought Knute with her. As soon as Miller showed up, Salazar left to go back to California. Moen offered to let Miller stay there for the night, but Miller declined. Moen stated that while Miller appreciated the offer, Miller "saw it as an inconvenience" and said, "No, I'll take care of this myself." 1 RP at 434.

At around 2:20 a.m., Miller left Moen's house and returned home, but she did not park under the carport. Miller put some of her things in a duffel bag, then put on her pajamas to go to bed. She stated that she put a desk chair with a case of water on it in front of the door because she "just wanted to go to bed [and] be left alone." 2 RP at 687.

Kenemore came into the room demanding the keys to her vehicle to put it under the carport. Kenemore was upset that she had barricaded the door. Miller gave him the keys.

At this point, Miller changed out of her pajamas and put on jeans and a sweatshirt. She then started an audio recording on her phone.

At the beginning of the recording, metallic clattering sounds can be heard, after which Miller states to the recording, "This is me loading my gun because my husband threatened my life." Ex. 100 (audio recording), at 1 min., 13 sec. to 1 min., 18 sec. Then, the recording documents the sound of the gun being loaded. Miller states, "I'm putting my .45 in my holster because my

husband threatened my life." Ex. 100 (audio recording), at 1 min., 27 sec. to 1 min., 32 sec. Miller testified she placed the gun into the kangaroo pocket of her sweatshirt.[2]

The recording then documents Kenemore accusing Salazar of being a homewrecker, threatening to kill Salazar, and threatening to burn the house down. Kenemore stated he would "cut [Salazar's] fucking throat with [a razor blade]" and that he would kill Salazar in front of Miller and make her watch and participate. Ex. 100 (audio recording), at 14 min., 4 sec. to 14 min., 6 sec. Kenemore also expressed offense that Miller had barricaded her door. Kenemore stated he had never touched Miller and asked her if he had, to which Miller responded, "No, but you've gotten close." Ex. 100 (audio recording), at 21 min., 27 sec. to 21 min., 29 sec. Kenemore said, "Do you ever think I'd lay a hand on you ever, ever, ever honestly?" Ex. 100 (audio recording), at 24 min., 48 sec. to 24 min., 52 sec. Miller responded "No, but you'd destroy the world." Ex. 100 (audio recording), at 24 min., 53 sec. to 24 min., 54 sec.

About halfway through the audio recording, Kenemore asked Miller to go outside and not smoke in the house. Miller agreed, and they went outside. Kenemore went on to say, "I don't think it's fair I'm being treated like a monster? . . . Tammy would I ever hit you? Would I ever hurt you? Would I ever touch you?" Ex. 100 (audio recording), at 26 min., 27 sec. to 26 min., 43 sec. Miller responded, "No, but you'll threaten to burn the house down. You'll threaten to shoot my dog." Ex. 100 (audio recording), at 26 min., 44 sec. to 26 min., 47 sec. Kenemore stated, "I will burn the house down . . . and I will shoot Knute." Ex. 100 (audio recording), at 26 min., 52 sec. to 26 min., 56 sec. Kenemore also stated he almost shot Miller when they lived in California.

[2] There is inconsistency in the record as to whether Miller placed the gun in the holster and then into her pocket. On the recording, Miller states she places the gun in the holster. However, at trial, Miller testified that she did not believe it was in the holster.

Near the end of the recording, Kenemore stated he was going to shoot himself. Miller said, "Get out of my face," and Kenemore responded, "What are you gonna do, shoot me?" Ex. 100 (audio recording), at 47 min., 21 sec. to 47 min., 24 sec. Kenemore stated he was going to shoot Knute just to make Miller "even more sad." Ex. 100 (audio recording), at 48 min., 3 sec. to 48 min., 4 sec. He told Miller to leave, saying, "The keys are in [the car]. Get it and go. Bye. . . . Get Ma and go." Ex. 100 (audio recording), at 48 min., 17sec. to 48 min., 20 sec.; 48 min., 47 sec. to 48 min., 48 sec.

Kenemore stated, "Get your baby boy. Or no, leave him here. . . . Go. Go now. Beat it. Get in your truck and go. Go. Get out of here. . . . Run. Run like the wind. Take Ma if you want to or leave her here." Ex. 100 (audio recording), at 49 min., 28 sec. to 49 min., 46 sec. Then, Kenemore can be heard calling Knute, "Hey, Knute, what's up bud?" Ex. 100 (audio recording), at 49 min., 53 sec. to 49 min., 55 sec. Kenemore said, "Do you think I'm kidding? Do you wanna watch? Turn your head. Turn your fucking head. . . . Turn your fucking head." Ex. 100 (audio recording), at 50 min., 1 sec. to 50 min., 10 sec.

Then, the recording picks up a single loud pop. The recording documents a thudding sound. Miller can be heard quietly saying, "Don't . . . fuck with me." Ex. 100 (audio recording), at 50 min., 19 sec. to 50 min., 22 sec. Then, Kenemore said, "I never—." Ex. 100 (audio recording), at 50 min., 22 sec. to 50 min., 24 sec.

Miller then stated louder, "What in the fuck? You throw a fucking shotgun in my face and you spun around? What in the hell?" Ex. 100 (audio recording), at 50 min., 25 sec. to 50 min., 33 sec.

Miller's recording went silent after 51 minutes 2 seconds. She had dialed 911 and was on that call during this time. Miller told the 911 operator that she shot her husband in self-defense.

On the 911 recording, Kenemore asked Miller why she shot him, and she replied, "Why did I shoot you? Because you fucking pulled the shotgun on me." Ex. 98 (911 audio recording), at 5 min., 42 sec. to 5 min., 46 sec.; *see also* Ex. 98 (911 audio recording), at 7 min., 29 sec. to 7 min., 30 sec.; 10 min., 13 sec. to 10 min., 15 sec. (documenting Miller repeating that Kenemore pulled the shotgun on her.) Kenemore said something in response, but it is unclear. Then, they began talking about where the dogs were.

First responders stated that Kenemore had been shot in the face, and the handgun Miller used was on the kitchen island. There was also a shotgun on the living room floor. Kenemore was airlifted to a hospital where he remained for several months.

Kenemore was ultimately charged with assault in the second degree and harassment—threat to kill.

II. TRIAL

At trial, Kenemore did not testify. His theory of the case was that he did not point a shotgun at Miller, but rather, Miller shot him because he was going to shoot her dog, Knute. Miller testified that after they went outside to smoke, she went back in to grab her bag and her dog to leave. Kenemore followed her inside and picked up the shotgun from behind the door at some point. She said he walked in front of her with the shotgun and touched her in the chest with the gun barrel. She testified Kenemore was calling Knute and tracking his movements with the shotgun as Knute ran around the kitchen island. She stated Kenemore "kind of trip[ped] up a little bit as Knute r[an] past" and then he stopped tracking the dog. 2 RP at 704. Then, she said Knute ran back to the bedroom. The State asked Miller what was happening in the recording when Kenemore said, "Turn your head. Turn your head," 2 RP at 705, and she responded:

> I—I was looking down the hallway, and I was afraid to turn my head. And then I turned my head and I saw the shotgun come up on me.

> . . . .
> And when I finally—I was afraid to look, because I thought he was going to shoot me. As he's saying, "Look at me. Look at me. Look at me." And I made sure that Knute was safe and I looked.
> And he was doing—doing this with the shotgun. He was—he was—had the shotgun like this and was turning his whole body, and it was—it was coming on me, the barrel of the shotgun.
> . . . .
> [State]: And what did you decide to do when you saw that?
> [Miller]: I pulled my gun out of my pocket and I shot him.

2 RP at 705-06.

On cross-examination, when asked about the moment she shot Kenemore, the following exchange took place.

> [Defense Counsel]: . . . [D]o you know if [Kenemore's] focus was on Knute at that moment?
> [Miller]: Knute was in my bedroom at that time, so I would say, no.

2 RP at 764. However, later on cross-examination, the following exchange took place.

> [Defense Counsel]: So at 50:07 [in the recording], he's asking if you want to watch him shoot Knute. And three seconds later, you shoot him in the face; is that right?
> [Miller]: Apparently.
> [Defense Counsel]: So your dog wasn't out of the kitchen?
> [Miller]: I don't know. I guess not. In my—in my memory, he was already gone.

2 RP at 772.

The State also asked Crago if he recalled a time when Kenemore approached him in an aggressive way, and Crago responded:

> It was shortly after we had met. I think it was actually the second time I had showed up at his house. I showed up in my Honda, which he didn't recognize, and he came out the front door with a shotgun.

1 RP at 396.

The State asked Salazar if there were any big confrontations that occurred in the days leading up to the shooting, and she responded:

> Well, there was a couple days before that had happened, a kid came up on the property with an all-tinted mask from a helmet, and Craig pulled out the shotgun on him saying how he doesn't go on his property without showing his face. And it happened to be one of their mutual friend's sons.
>
> [State]: Okay. So he actually ended up knowing the person, but he didn't recognize him based on some helmet he was wearing?
>
> [Salazar]: Right.
>
> [State]: Okay. But he was quick to bring the shotgun out?
>
> [Salazar]: Yes.
>
> [State]: Had you ever seen that—something like that, another time like that?
>
> [Salazar]: He had gone outside with the shotgun quite a few times, stomping and thinking he saw something, but—
>
> . . . .
>
> but there was nobody out there at that time.

1 RP at 477-78. Kenemore's counsel objected to Salazar's testimony on relevance grounds, but the court overruled the objection.

The jury ultimately found Kenemore guilty of assault in the second degree and gross misdemeanor harassment, but not guilty of harassment—threat to kill. The jury also found that Kenemore was armed with a firearm when he committed both offenses and that Kenemore and Miller were intimate partners.

The court imposed a high-end standard range sentence of 12 months for the assault in the second degree conviction with a 36-month firearm enhancement. This sentence was to run concurrently with the 12-month sentence for the gross misdemeanor harassment conviction. The court also found Kenemore indigent, but imposed a $500 victim assessment and a $100 DNA collection fee.

Kenemore appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Kenemore argues that he received ineffective assistance of counsel because his attorney failed to object to prejudicial propensity evidence relating to two prior instances of conduct

regarding display of his shotgun. We conclude that even if counsel's performance was deficient, prejudice does not flow from the identified deficient performance.

A. Standard of review

We review ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Further, "we do *not* view the evidence in the light most favorable to the State; instead, we 'must consider the totality of the evidence before the judge or jury.'" *State v. Bertrand*, 3 Wn.3d 116, 139, 546 P.3d 1020 (2024) (quoting *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

B. Legal principles

To prove ineffective assistance of counsel, a defendant must show (1) counsel's representation was so deficient it fell "below an objective standard of reasonableness" and (2) that deficiency prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting and applying test from *Strickland*, 466 U.S. at 687-88). Failure to satisfy either requirement "'defeats' the claim." *Bertrand*, 3 Wn.3d at 128 (quoting *Strickland*, 466 U.S. at 700).

First, "[t]he defendant must overcome 'a strong presumption that counsel's performance was reasonable.'" *Id.* at 130 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 863. A "defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Further, when an ineffective assistance of counsel claim is based on a failure to object, the defendant must show that the objection "would likely have been successful." *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). "However, if defense counsel fails to object

to *inadmissible* evidence, then they have performed deficiently." *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021).

Second, prejudice requires showing that had counsel's performance not been deficient, "there is a reasonable probability . . . the result of the proceeding would have differed." *Estes*, 193 Wn. App. at 488. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Therefore, "prejudice exists when there is 'a probability sufficient to undermine [the court's] confidence in the outcome.'" *Bertrand*, 3 Wn.3d at 129 (alterations in original) (quoting *Strickland*, 466 U.S. at 694).

1. ER 404(b)

The purpose of ER 404(b) is to "'prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act.'" *Vazquez*, 198 Wn.2d at 256 (quoting *State v. Trickler*, 106 Wn. App. 727, 734, 25 P.3d 445 (2001)). "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.'" *Vazquez*, 198 Wn.2d at 256 (alternation in original). However, such evidence may be used to show things such as "intent, knowledge, or absence of mistake." *Trickler*, 106 Wn. App. at 732.

Kenemore argues his counsel should have objected to Crago's and Salazar's testimony that he pulled a shotgun on people on two prior occasions and that counsel was deficient for failing to do so. Kenemore argues this testimony was inadmissible propensity evidence under ER 404(b).

Crago testified that "[he] showed up in [his] Honda, which [Kenemore] didn't recognize, and [Kenemore] came out the front door with a shotgun." 1 RP at 396. Salazar testified that "a kid came up on the property with an all-tinted mask from a helmet, and [Kenemore] pulled out the

shotgun on him saying how he doesn't go on his property without showing his face." 1 RP at 477-78. The State responded by asking, "But he was quick to bring the shotgun out?" 1 RP at 478. To which Salazar replied, "Yes," and further elaborated how Kenemore "had gone outside with the shotgun quite a few times." 1 RP at 478.

Even if Kenemore can show that counsel's performance was deficient for failing to object to this testimony, he cannot show that this deficiency prejudiced him. If the improper propensity evidence had been excluded, the remaining evidence was nevertheless compelling. The phone recording corroborated Miller's account of events because her testimony tied in precisely with the recording as she described what Kenemore meant when commanding that she turn her head. The timing of his words related to the soon-following report of the discharge of Miller's pistol align with her testimony that he was commanding that she look at him while he held the shotgun to her chest. Further, the jury also heard on the recording Kenemore's own testimony that he had almost shot Miller previously. Therefore, in light of the totality of the evidence, there is no reasonable probability that the result of the proceeding would have differed. Since credibility determinations are the province of the jury, our confidence in the outcome is not undermined, and we conclude that Kenemore was not prejudiced by any deficient performance.

II. VPA AND DNA COLLECTION FEE

Kenemore also argues the VPA and DNA collection fee should be stricken. The State concedes. We agree with Kenemore and accept the State's concession.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the crime victim penalty assessment on indigent defendants. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048, *pet. for rev. filed*, 102378-2 (2023). The legislature also amended RCW 43.43.7541 to

require waiver of a DNA collection fee imposed before July 1, 2023 upon the defendant's motion. RCW 43.43.7541(2).

Here, Kenemore was found indigent and requested the DNA collection fee imposed be struck. In light of these statutory changes, we remand with instructions to strike the VPA and the DNA collection fee.

CONCLUSION

We affirm Kenemore's convictions. However, we remand for the trial court to strike the VPA and DNA collection fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Lee, J.

Che, J.

GLINSKI LAW FIRM PLLC

October 31, 2024 - 12:04 PM

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