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Division I
State of Washington

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No. 93699.4
Court of Appeals No. 72922-5-1

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WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB JOHANSEN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Petitioner Jacob Johansen asks this Court to accept review of the opinion of the Court of Appeals in *State v. Johansen*, 72922-5-1 (June 27, 2016) (Order Denying Motion to Reconsider July 26, 2016).

B. OPINION BELOW

At Mr. Johansen's trial on second degree assault, conducted a few weeks prior to this Court's opinion in *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014), the trial court admitted a host of other acts evidence concluding such evidence was admissible reasoning the jury could not fairly decide whether Mr. Johansen was guilty of the crime without knowing he was alleged to have previously committed similar acts. *Gunderson* flatly rejected the sort "domestic violence exception" employed by the trial court.

The Court of Appeals affirmed Mr. Johansen's conviction without addressing the impropriety of the trial court's ruling. Instead, employing a prejudice analysis rejected by this Court in *Gunderson* the Court of Appeals conclude the error was harmless because the State nonetheless had sufficient evidence to convict Mr. Johansen.

C. ISSUE PRESENTED

Evidence of another person's conduct is not, by itself, logically relevant to assess the credibility of a witness at trial. That is especially so where the witness has not placed her credibility at issue by contradicting or recanting earlier statements. ER 404(b) does not permit admission of other acts evidence in that circumstance. Did the court err in admitting allegations of Mr. Johansen's past acts ostensibly as relevant to a witness's credibility where the other-acts evidence only established that, if at all, as propensity evidence?

D. STATEMENT OF THE CASE

According to Lexi Boring, she and her boyfriend Jacob Johansen began arguing when he returned late one evening. RP 299-303. The argument stemmed from a series of texts and voicemails earlier in the day in which she had accused him of cheating. RP 611-13.

Ms. Boring became angrier still when Mr. Johansen began packing a bag, stating he was leaving. RP 308. Ms. Boring pushed Mr. Johansen. RP 310-11. Mr. Johansen testified he finished packing his bag and left, without touching Ms. Boring. RP 632.

According to Ms. Boring, however, Mr. Johansen responded to her pushing him by pushing her to the ground and choking her. RP 311-12.

The State charged Mr. Johansen with a single count of second degree assault. CP 8-9. The State also alleged the assault was a part of an ongoing pattern of domestic violence. *Id.*

At trial, the State sought to admit, in its case-in-chief, testimony by Ms. Boring and her parents alleging Mr. Johansen had engaged in assaultive conduct against her for a number of years. In response to a defense objection based upon ER 404(b) that the evidence was simply propensity evidence, the State explained it believed the evidence was necessary to show “this is how Mr. Johansen acts.” RP 32. Mr. Johansen agreed the evidence would be admissible in the bifurcated proceeding in which the jury would determine whether the aggravating circumstance was proved after, and only if, the jury first convicted Mr. Johansen. RP 36.

The trial court concluded the evidence was admissible at trial in addition to at the supplemental proceeding on the aggravating factor. RP 95-98. The court reasoned the jury could not fairly decide whether

Mr. Johansen was guilty of the crime without knowing he was alleged to have previously committed similar acts. RP 98.

Although the court prevented the State from eliciting the specific details, Ms. Boring was permitted to testify Mr. Johansen was violent throughout their relationship and that it escalated throughout. RP 293. She claimed he often choked her. RP 294. Both of her parents were permitted to testify they knew Mr. Johansen had been violent towards their daughter. RP 404, 414-15.

The court instructed the jury it could consider the evidence only for purposes of evaluating Mrs. Boring's credibility. RP 686.¹

The jury convicted Mr. Johansen as charged. CP 47-48. The trial court imposed an exceptional sentence. CP 53.

¹ The court's instructions to the jury were not filed and thus could not be designated prior to filing this brief. Counsel has contacted the Superior Court in an effort to have the instructions filed. If that occurs counsel will file a supplemental designation.

E. ARGUMENT

The trial court erred and denied Mr. Johansen a fair trial by permitting the State to offer other acts evidence.

1. ER 404 bars admission of other-acts evidence offered to prove character.

Generally, evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a).

ER 404(b) provides:

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.

“Properly understood . . . ER 404(b) is a categorical bar to the 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); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is

a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

To admit evidence of other acts 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 that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Gunderson, 181 Wn.2d at 923.

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make

that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) (citing *Saltarelli*, 98 Wn.2d at 362). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

2. There was no relevant purpose for the evidence.

The trial court instructed the jury that it could consider the evidence in assessing Ms. Boring's credibility. RP 686. However, that conclusion is contrary to *Gunderson*.

Gunderson explained other acts evidence could be admitted as relevant evidence of the witness's credibility only where the State first established "why or how the witness's testimony is unreliable." 181 Wn.2d at 925. Moreover, this Court limited this class of evidence to instances in which the State can establish its "overriding probative value." *Id.* The threshold for admission is "*conflicting statements about [the defendant's] conduct.*" *Gunderson*, 181 Wn.2d at 924 (emphasis and brackets in original) (citing *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)). On this point, *Gunderson* abrogates the opinion in *State v. Baker* which concluded such evidence was admissible for purposes of evaluating credibility even where the victim had never

offered contradictory statements. *See State v. Baker*, 162 Wn. App. 468, 475, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011).

Gunderson requires that before other-acts evidence could be admitted in this case, the State had to first show Ms. Boring's testimony was "unreliable" as demonstrated by conflicting statements about Mr. Johansen's conduct. 181 Wn.2d at 924. The evidence in this case did not meet that standard.

The State certainly never contended Ms. Boring's testimony was unreliable. Unlike *Magers* Ms. Boring never made a statement denying the incident or in any way contradicting her trial testimony. To the contrary, the court reasoned the evidence was relevant because Ms. Boring had told others about the alleged prior abuse. RP 274. Thus, rather than lay a foundation of unreliability and contradiction, the court pointed to evidence of reliability and corroboration, which does not place Ms. Boring's credibility at issue under *Gunderson* and *Magers*.

Instead, the State contended, and the court agreed, Ms. Boring's credibility was relevant because Mr. Johansen denied the assault occurred. RP 97. But the mere fact that her account was disputed by Mr. Johansen cannot open the door to allegations of prior acts. As *Gunderson* explained

That other evidence from a different source contradicted the witness's testimony does not, by itself, make the history of domestic violence especially probative of the witness's credibility. There are a variety of reasons why one witness's testimony may deviate from the other evidence in a given case. In other words, the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable.

Gunderson, 181 Wn.2d at 924-25.

If the rule were otherwise any time a defendant entered a general denial defense or exercised her right to go to trial, the alleged victim's credibility would by definition be at issue and thereby open the door to past acts evidence. Witness credibility is at issue in every trial. But, only where the witness is shown to be unreliable can evidence of the defendant's past acts be relevant. *Id.* As the Court noted, the contrary conclusion would amount to a domestic violence exception to ER 404(b), an exception the Court refused to endorse. *Gunderson*, 181 Wn.2d at 925 n.3. It is clear from the record the trial court mistakenly employed such an "exception" in this case.

The trial court mistakenly believed that the analysis under ER 404(b) in domestic violence cases is less rigid than in other criminal matters: i.e., that a domestic-violence exception exists. The court bluntly stated as much when it said its analysis would be different if

this were merely a robbery as opposed to a domestic violence case. RP 253-54. *Gunderson* rejected that view.

At the end of the day, testimony of prior allegations of assault does not tend to make Ms. Boring or anyone more or less credible free of its use as propensity. The only way this evidence can assist in assessing anyone's credibility is by first concluding that because Mr. Johansen has assaulted her previously he must have done so on this occasion. In fact, the State argued the evidence was necessary to assure the jury knew this was not an isolated incident but rather "this is how he acts." It would be difficult to provide a more complete definition of the term "propensity evidence."² That is the singular improper purpose prohibited by ER 404(b)

The court also reasoned the evidence was admissible to explain why Ms. Boring had not previously reported the abuse. RP 95. Of course, if the evidence of prior acts is not admitted there is no question at all about why those prior acts were not reported. This circular logic concludes the admission of the evidence itself creates the relevance to admit the evidence. In any event, since that evidence does not prove or

² *Compare*, "[A] natural tendency to behave in a particular way."
<http://www.macmillandictionary.com/us/dictionary/american/propensity>.

make more likely any element of the offense it is not admissible.

Thang, 145 Wn.2d at 642.

The court reasoned further the evidence was relevant to show the absence of mistake. RP 98. But Mr. Johansen never claimed he accidentally choked Ms. Boring. He testified he did not commit any assault on her and denied prior acts of violence. RP 632. Because the absence of mistake was not at issue the prior acts could not be of consequence to that point. *Saltarelli*, 98 Wn.2d at 362 (“evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action”).

The evidence was not relevant to any fact of consequence. While the Court of Appeals did not reach this question, instead simply concluding there was no resulting prejudice, it is clear the admission of the propensity evidence in this case is contrary to *Gunderson*. This Court should accept review under RAP 13.4.

3. The prejudice greatly outweighed any potential probative value.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The trial court acknowledged there was “certainly a danger that this evidence could be misused as propensity evidence.” RP 98. Against this acknowledged risk of prejudice, the court weighed the evidence’s supposed probative value. The court concluded “[t]he jury cannot fairly weigh the evidence and make a determination concerning Ms. Boring’s credibility if they must assume that alleged assault on the night in question was an isolated incident that somehow came out of the blue.” *Id.* Put another way, the court concluded the risk that the jury would misuse the evidence as propensity was outweighed by the unfairness of preventing the jury from using the evidence as propensity. ER 404(b) does not permit admission of propensity evidence where offered for another purpose. Instead it categorically bars propensity for any purpose. *Gresham*, 173 Wn.2d at 420

The trial court also concluded the evidence was necessary to allow the jury to assess the “dynamics” of the relationship. RP 98. However, *Gunderson* rejected the notion that such evidence is broadly admissible for this amorphous purpose. Instead, the Court endorsed a far more limited rule, allowing such evidence “may be helpful to explain the dynamics of domestic violence *when offered in conjunction with expert testimony* to assist the jury in assessing such evidence.” *Id.*

at 925 n.4 (Emphasis added). Here, there was no effort to offer expert testimony to explain the dynamics. In its place, the State simply offered propensity.

Any probative value was outweighed by the real and identified risk that the evidence would be misused and prejudicially so. Again, while the Court of Appeals did not reach this question, instead simply concluding there was no resulting prejudice, it is clear the admission of the propensity evidence in this case is contrary to *Gunderson*. This Court should accept review under RAP 13.4.

4. The error in admitting the other-acts evidence requires reversal.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). A reviewing court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

This standard asks more than simply whether the remaining evidence is sufficient to sustain the convictions. *Gunderson* recognized in that case “[a]lthough the evidence may be sufficient to find

Gunderson guilty, it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." 181 Wn.2d at 926.

Here, the analysis of the Court of Appeals does not weigh the prejudice against the State's evidence. The opinion does not acknowledge the prejudice which exists in cases such as Mr. Johansen's as opposed to other prior acts cases. Indeed, the Court's analysis simply identifies the State's remaining evidence, and without regard to the obvious prejudice caused by the erroneously-admitted evidence, simply concludes the State had substantial remaining evidence upon which to seek a conviction. But *Gunderson* makes clear that the prejudice analysis must ask more than simply whether the State had sufficient remaining evidence to obtain a conviction. 181 Wn.2d at 926. In fact, in *Gunderson* there was undoubtedly sufficient evidence on which to sustain a conviction as there was direct testimony of a third-party witness who testified the alleged assault occurred. This Court nonetheless concluded a reasonable probability existed that the improper evidence affected the jury. The Court of Appeals' analysis here is contrary to *Gunderson*.

The trial court itself understood the prejudice posed by this evidence. It acknowledged that if this had not been a domestic violence charge it would not have admitted the evidence at all.

Here, the jury heard two different versions of the events. Ms. Boring testified Mr. Johansen strangled her. Mr. Johansen denied doing so. No other person was in the room at the time of the events. Kyle Wilson testified he was at the house, but not in the room. Mr. Wilson testified that when Mr. Johansen came out of the house, Ms. Boring came with him and while she was crying otherwise appeared fine. The State presented the testimony of others who corroborated details of Ms. Boring's testimony. But at the end of the day the jury's task was to weigh the two conflicting stories of the only two people present. Even with the evidence this was not an easy task. At the end of its first day of deliberations, the jury told the court they were unable to unanimously agree on a verdict. After the court instructed them to return the following day and continue deliberations, the jury did reach a verdict. But the jury's note indicates what a close case this was. Placing the improperly admitted evidence on the State's side of the scale had a substantial probability of affecting the verdict.

Indeed, it was precisely because the State wanted the jury to resolve this credibility dispute in Ms. Boring's favor that the State devoted so much energy to admitting the evidence. The prosecutor, intimately familiar with the facts of the case and based upon that knowledge, determined to admit that evidence precisely because she understood its value in obtaining a favorable verdict.

As in *Gunderson*, the error requires reversal. Because the opinion of the Court of Appeals is contrary to *Gunderson* this Court should accept review. RAP 13.4.

F. CONCLUSION

For the reasons above, this Court should grant review in this case and reverse Mr. Johansen conviction.

Respectfully submitted this 24th day of August, 2016.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 72922-5-1
)	
Respondent,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
v.)	
)	
JACOB DALTON JOHANSEN,)	
)	
Appellant.)	
_____)	

The appellant, Jacob Dalton Johansen, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 26th day of July, 2016.

FOR THE COURT:

Leach, J.
Judge

2016 JUL 26 PM 2:18
STATE OF WASHINGTON
COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 72922-5-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
JACOB DALTON JOHANSEN,)	
)	
Appellant.)	FILED: June 27, 2016
_____)	

LEACH, J. — Jacob Johansen appeals his conviction for second degree assault with an aggravating circumstance of domestic violence. He challenges the trial court's admission of evidence of his prior acts of domestic violence against the victim. He also claims that his trial counsel provided ineffective assistance when he proposed a jury instruction that contained an improper comment on the evidence. Without deciding if the trial court improperly admitted evidence of Johansen's earlier acts of domestic violence, we conclude that any error was harmless because the outcome of the trial could not have been materially affected by the challenged evidence. And we conclude that Johansen's counsel's performance was not deficient where the proposed

instruction at issue was a standard pattern jury instruction¹ that no court had concluded was improper until after the end of Johansen's trial. We affirm.

FACTS

Late one evening in December 2013, Johansen and his friend Kyle Wilson returned to the home Johansen shared with Alexandra Boring and their young son. Johansen and Boring began to argue. Boring testified that Johansen choked her twice while they were in the bedroom. The second time he choked her, she urinated on herself. When he let go, she immediately vomited near the bed and then got back up. Johansen pushed her onto a computer desk. She went back to the bed, and he broke a picture frame on top of her head. Then he left the house. Boring went out to where Johansen and Wilson were loading Johansen's car and demanded the house key, which he gave her.

Johansen testified that when he and Wilson arrived at the house, Boring came to the door angry, yelled at him, and threw things while he packed his bags and left without touching her. Wilson testified that Boring met them at the door and started yelling at Johansen, asking him where he had been all day and if he was cheating on her. He testified that Boring threw things when she got mad at Johansen. He testified that during their argument, he had gone in and out of the house several times and had heard only Boring yelling at Johansen and nothing

¹ 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.17, at 719 (3d ed. 2008) (WPIC).

more. Wilson also testified that when Boring and Johansen came out of the room, Boring was crying but appeared unharmed.

After the incident, Boring called her mother, Rhonda Boring. Rhonda told her that during Boring's exchange with Johansen, his phone had pocket-dialed her father, Scott Boring. Due to the pocket dial, Rhonda had called 911 and told Boring to call 911. Boring "thought about it for a minute and then I figured she already did, so I might as well."

Boring's father, Scott, testified that after the incident, he drove to Boring's home. On the way, he spoke with Johansen on the phone, who reported that he and Boring had had a violent fight. When Scott arrived at the house, he immediately went inside, where he found Boring crying. She had red compression marks on her neck, and he found a broken picture frame and broken glass on the bed.

When police arrived, Officer Jay West saw that Boring was distraught and had redness on her neck. West also saw that she was limping, her clothes were disheveled, and her pants were wet. In the bedroom he observed a computer monitor knocked over, vomit residue on the carpet, and a broken frame on the bed. While Boring told West her story, she told him that she would not make a formal statement because she was afraid Johansen would kill her.

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Rhonda arrived and observed that Boring appeared upset, had wet pants, and had bruises on her neck. She later took Boring to the hospital to address a leg injury from the incident that left Boring in a knee brace.

Detective David Shields spoke with Johansen the day after the incident. Johansen denied having physical contact with Boring. Shields met with Boring two days after the incident and saw a brace on her right knee, some red marks and scrapes on her neck, scratches on her leg, and bruising near her left eye and on the right side of her neck. She was tearful when she described the incident with Johansen to him. Shields is a domestic violence detective. Based on his personal experience responding to calls involving strangulation, he testified that the effects of strangulation can include redness on the neck, bruising, and loss of bladder control.

The State charged Johansen with second degree assault involving domestic violence, with the aggravating circumstance that the assault was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim over a prolonged period of time.

At trial, the State sought to admit testimony alleging that Johansen had engaged in domestic violence against Boring for several years. The State contended that the court should admit this evidence because it showed that "this is how Mr. Johansen acts." Johansen objected, asserting that this constituted

propensity evidence under ER 404(b). The trial court concluded that the testimony was admissible, reasoning that because Johansen would argue that Boring fabricated an assault, the jury needed information about earlier incidents of domestic violence.

The trial court permitted Boring to testify that Johansen was violent during the relationship and that his violence toward her escalated, but the court limited testimony about specific details of the alleged violence. She testified that he often choked her. Her parents testified that he was violent toward their daughter. The court instructed the jury that it could consider this evidence only for the purpose of evaluating Boring's credibility.

The jury convicted Johansen, and the trial court imposed an exceptional sentence. Johansen appeals.

STANDARD OF REVIEW

This court reviews a trial court decision to admit or exclude evidence for abuse of discretion. We reverse only if the trial court made a manifestly unreasonable decision or based its decision upon untenable grounds or reasons.²

² State v. Gunderson, 181 Wn.2d 916, 921-22, 337 P.3d 1090 (2014) (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

ANALYSIS

If a trial court improperly admits evidence of a defendant's earlier bad acts, this "error is harmless if the evidence is of minor significance compared to the overall evidence as a whole."³ But this court must reverse if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."⁴

Here, the trial court instructed the jury that it could consider the testimony of Johansen's earlier domestic violence against Boring for the purpose of establishing her credibility. Johansen asserts that Boring never gave conflicting statements or testimony and thus no relevant purpose existed to justify admitting the evidence. Johansen also asserts that the prejudicial effect of that evidence greatly outweighed any probative value it offered.

We do not decide if the trial court improperly admitted evidence of Johansen's prior acts of domestic violence because any error in admitting the evidence was harmless. Johansen argues that the prejudicial effect of the evidence of his prior acts necessarily affected the outcome of his trial because the jury decided the case by weighing the conflicting testimony of Johansen and

³ State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

⁴ State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012) (internal quotation marks omitted) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Boring. But the State presented the jury with substantial evidence besides Boring's testimony. It presented testimony from both of her parents, the responding officer, and the detective that interviewed her. Each observed red marks or scratches on Boring's neck. Officer West testified that Boring appeared to have urinated on herself. He also saw vomit residue next to the bed, broken glass and a picture frame in the bed, and a computer monitor turned over. All this evidence corroborated Boring's testimony. The State played the 911 tape to the jury and admitted photographs of Boring's neck. The defense presented testimony from Johansen and Wilson denying the incident, but those accounts revealed inconsistencies with Johansen's earlier statements. The record thus does not show with reasonable probability that any improper admission of evidence of Johansen's earlier acts of domestic violence materially affected the outcome of the case. Thus, any error was harmless.

Johansen further argues that his trial counsel provided ineffective assistance when he proposed an instruction that impermissibly commented on the evidence. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel.⁵ To show that he received ineffective assistance of counsel, Johansen must show that counsel's performance was deficient and that

⁵ Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

such deficient performance prejudiced him.⁶ To prove deficient performance he must show that his counsel's representation "'fell below an objective standard of reasonableness based on consideration of all the circumstances.'"⁷

Johansen asserts that his counsel's performance was deficient because the jury instruction he proposed constituted a comment on the evidence. Johansen and the State both proposed jury instructions to the court for the aggravated sentence of domestic violence based on the accepted WPIC jury instruction. Johansen's proposed instruction told the jury that for it to find that the crime constituted an aggravated domestic violence offence, the State must prove beyond a reasonable doubt:

(1) That the victim and the defendant were family or household members; and

(2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

The trial court gave this instruction to the jury in October 2014. In 2015, Washington's Supreme Court ruled in State v. Brush⁸ that the definition of "prolonged period of time" in the jury instruction was an improper judicial

⁶ See State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); see also Strickland, 466 U.S. at 687.

⁷ State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

⁸ 183 Wn.2d 550, 558-59, 353 P.3d 213 (2015).

comment on the evidence. The court held that what was a prolonged period of time presented a factual inquiry to be decided by the jury.⁹ It concluded that this prejudiced the defendant, warranting reversal of an exceptional sentence.¹⁰

But we conclude that State v. Studd¹¹ forecloses Johansen's assertion that his counsel provided deficient representation. The court in Studd reviewed its earlier opinion in State v. LeFaber.¹² There, it concluded that the generally accepted instruction for self-defense, WPIC 16.02, was erroneous.¹³ In Studd, counsel for one of the defendants had requested the same instruction at trial. After the Supreme Court published LeFaber, that defendant appealed, asserting ineffective assistance of counsel.¹⁴ The Studd court held that because it had not decided LeFaber at the time of the defendant's trial, "his counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02."¹⁵ Because the defendant's counsel's performance could not have been deficient, the Studd court concluded that the defendant's argument failed.¹⁶

⁹ Brush, 183 Wn.2d at 559.

¹⁰ Brush, 183 Wn.2d at 559-60.

¹¹ 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

¹² 128 Wn.2d 896, 913 P.2d 369 (1996), abrogated by State v. O'Hara, 167 Wn.2d 91, 101-02, 217 P.3d 756 (2009).

¹³ LeFaber, 128 Wn.2d at 902-03.

¹⁴ Studd, 137 Wn.2d at 551.

¹⁵ Studd, 137 Wn.2d at 551.

¹⁶ Studd, 137 Wn.2d at 551; McFarland, 127 Wn.2d at 334-35 (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Because Johansen fails to cite any case that would have put his counsel on notice of the improper nature of the challenged instruction and fails to distinguish Studd,¹⁷ his argument fails.

CONCLUSION

Without deciding if the trial court improperly admitted evidence of Johansen's earlier acts of domestic violence, we conclude that any alleged error was harmless because Johansen has not shown, within reasonable probabilities, that admission of this evidence materially affected the outcome of this case. And because Johansen's counsel presented a generally accepted WPIC instruction before any court had determined that that instruction constituted an improper comment on the evidence, we conclude that his counsel's performance was not unreasonable and thus not deficient. We affirm.

WE CONCUR:

Specman, J.

Seach, J.

COX, J.

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¹⁷ See State v. Kylo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009) (Where several cases should have indicated to counsel that a pattern instruction was flawed, counsel should have been aware of those cases.).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72922-5-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Attorney for other party



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Washington Appellate Project

Date: August 25, 2016

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