IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LYNDA RAE HOLMAN, aka JANET R. FREEMAN, LINDA R. HOLMAN, LYNDA R. SCHAUER, Appellant.	)	No. 66906-1-I DIVISION ONE UNPUBLISHED OPINION FILED: December 10, 2012

Grosse, J. — Appellant Lynda Rae Holman was charged with and convicted of second degree murder of her boyfriend, Mark McCollum. At trial, over Holman's objection, the court admitted evidence of discord and conflict in their relationship. The court admitted the evidence under ER 404(b) on the ground that it was relevant to prove motive, intent, and the absence of accident. On appeal, Holman argues that the admission of this evidence was error. We find no abuse of discretion in the trial court's admission of this evidence. Further, the issues Holman raises in her Statement of Additional Grounds are without merit. Accordingly, we affirm the trial court.

FACTS

During the afternoon of February 16, 2010, Whatcom County Sheriff's Deputy Peter Stevenson was dispatched in response to a 911 call to investigate a shooting at a house Holman and McCollum shared. When the deputy arrived at the scene, Holman and three others were standing outside the house. Deputy

Stevenson made sure that no one was inside the house except for the now-deceased McCollum and secured the house with crime scene tape.

Deputy Stevenson then spoke with Holman at the crime scene. She told him that she and McCollum had been together for about 13 years and that their relationship was strained because McCollum worked overtime. She said that McCollum had had February 15th off from work, so the couple went to a casino where they gambled, ate pizza, and drank beer. They went home, had more pizza and beer, and decided to go to bed. Holman woke up to use the bathroom and saw McCollum watching a science fiction movie. She told Deputy Stevenson that McCollum made a comment about killing ghosts and, in response, Holman took a shotgun off a rack in the bedroom, put the butt of the gun on the floor, and put the barrel up to her chin, and said, "Well, hell, I'll just kill myself, too." McCollum told her to put the gun down and, according to Holman, when she was putting the gun back on the rack it discharged, hitting McCollum.

Holman told Deputy Stevenson she saw that McCollum's shirt was becoming soaked with blood and heard gurgling sounds. The sounds stopped after a few minutes, and Holman knew that McCollum had died. She covered McCollum with a blanket and then called a friend who came to the house. Holman drove away with the friend.

Valentina Vasilchenko, an acquaintance of both Holman and McCollum, testified that at approximately 12:30 in the afternoon of February 16, 2010,

Holman appeared in the kidney dialysis center where Vasilchenko's fiancé was having his weekly dialysis. Holman was upset and crying and told Vasilchenko that she "did something bad." Vasilchenko asked Holman to walk to the parking lot, where Holman told Vasilchenko that she had shot and killed McCollum. Holman also told Vasilchenko that the shooting occurred the previous night, but that she had yet to call the police.

Holman was charged with second degree murder and first degree unlawful possession of a firearm. She pleaded guilty to first degree unlawful possession of a firearm. Prior to trial, the State offered evidence of discord and conflict in the relationship between McCollum and Holman.[1] The court held a hearing on the admissibility of the evidence under ER 404(b) and concluded that the evidence was admissible to prove Holman's intent, motive, and absence of accident and that the probative value of the evidence was substantial and outweighed its prejudicial effect.

After a trial, the jury found Holman guilty of second degree murder and found that she was armed with a firearm at the time of the commission of the murder. She appeals.

ANALYSIS

ER 404(b)

Holman argues that the trial court erred in concluding that evidence of discord and conflict in her relationship with McCollum was admissible under ER 404(b) to prove motive, intent, and the absence of accident.

[1] The evidence will be discussed in detail below.

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.

When such evidence is admitted for other purposes, the trial court must identify the purpose and determine whether the evidence is relevant and necessary to prove an essential element of the crime charged.[2] "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable."[3] Here, the trial court admitted the evidence on the ground that it was relevant to prove Holman's motive, intent, and absence of accident.

"We review [a] trial court's interpretation of ER 404(b) de novo as a matter of law."[4] If the trial court's interpretation is correct, we review the trial court's decision to admit or exclude evidence of prior bad acts for abuse of discretion.[5] We will affirm the trial court's decision to admit evidence under ER 404(b) if one of the court's cited bases is justified.[6]

The evidence at issue consisted of the following:

(1) A handwritten note on the bathroom mirror that said: "One more kiss could mean everything, but one more lie could end everything." Holman admitted writing the note.

---

[2] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).
[3] Powell, 126 Wn.2d at 259.
[4] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).
[5] Fisher, 165 Wn.2d at 745.
[6] Powell, 126 Wn.2d at 264.

(2) Three messages Holman left on McCollum's mother's answering machine the day before the murder. The first message was:

> Hey Shirley, I need you to please call the cops here, because I don't know, uh, Mark obviously didn't (approve) anything or anything, but, um, I want to report a stolen vehicle in the shop and all of (unintelligible). So you can call the cops on me or anything? Hello. Okay. Well I'm gonna call them on my own. I don't have a problem with that and you know what, you're involved in that, because you got your car in there and you're that – you're involved. You're protecting stolen fucking goods. So is Mark, so (unintelligible).

The second message was:

> Well I'm not promising or threatening. I'm promising, matter of fact, I'm not threatening. Because by morning, I want Mark's shit out of here, because I am calling the cops in here and you better call them on me first, because I do really want the cops here, so whoever is brave enough, bring it on little boys. Mark you started this, I'll finish it. Happy V-fucking D.

The third message was:

> Well Shirley, I'm glad that I don't qualify this family, but since you couldn't call the cops, I did. And I suppose that you and Mark don't have time to hide the car, but thanks.

Apparently, the car to which Holman was referring was a car that McCollum's brother owned and stored in a garage near McCollum's and Holman's home. The brother testified that he owned the car and it was not stolen.

(3) Testimony of McCollum's mother about her son's relationship with Holman. The mother testified that the relationship was bad and had worsened in the months prior to the murder. McCollum often stayed at his mother's house (which was near the house in which McCollum and Holman lived) to get some

sleep before getting up early for work. When McCollum was at his mother's house, Holman would come over and knock on the door or repeatedly call the mother's house. The calls became so frequent that McCollum's mother unplugged her telephone. Some nights, McCollum left his mother's house and stayed at a hotel because of Holman's knocks and calls. The mother also testified that when McCollum was with her, Holman would turn the volume on McCollum's stereo up so high that McCollum was forced to return to his house to turn the volume down so the speakers would not blow out.

(4) Testimony of McCollum's younger brother also about how, when McCollum was with his mother or brother, Holman would turn up the volume on McCollum's stereo to the point where McCollum would fear that the speakers were going to blow and was forced to return to his and Holman's house to turn down the stereo volume. As did McCollum's mother, his brother testified that McCollum's relationship with Holman worsened during the months before the murder.

Motive

Motive includes not only gain, but also an impulse, desire, or another moving power which causes an individual to act.[7] Prior misconduct evidence that demonstrates motive is of consequence to the action where, as here, only circumstantial evidence of guilt exists.[8]

"'[E]vidence of previous quarrels and ill-feeling is admissible to show

[7] State v. Mee, 168 Wn. App. 144, 157, 275 P.3d 1192 (2012).
[8] Powell, 126 Wn.2d at 260.

motive.'"[9] Here, the evidence at issue falls squarely within this principle and was properly admitted under ER 404(b) as evidence of motive.[10]

Intent

> It is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent. . . . Evidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, particularly where malice or premeditation is at issue. Such evidence tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice and premeditation.[11]

Prior misconduct evidence is necessary to prove intent only when intent is at issue.[12] Here, intent is at issue because Holman claimed that the shooting was an accident and that she did not intend to kill McCollum. The evidence at issue was properly admitted under ER 404(b) to show intent.

Absence of Accident

The use of prior bad acts to rebut a claim of accident is a well-established exception to ER 404(b).[13] For example, a prior incident of an assault was held admissible under ER 404(b) in the defendant's trial for assault of his ex-wife, where the defendant argued that the ex-wife's injuries were caused by an

---

[9] Powell, 126 Wn.2d at 260 (quoting State v. Hoyer, 105 Wash. 160, 163, 177 P. 683 (1919)).
[10] Even if, as Holman contends, the evidence admitted in Powell to show motive "pales in comparison" to the evidence in this case, this does not, as Holman argues, make the evidence here inadmissible.
[11] Powell, 126 Wn.2d at 261-62 (internal quotation marks and citations omitted).
[12] Powell, 126 Wn.2d at 262.
[13] State v. Roth, 75 Wn. App. 808, 818, 881 P.2d 268 (1994).

accident.[14] This court held that the evidence of the prior assault was relevant and probative because it rebutted the defense of accident by demonstrating the defendant's history of hostility and abusive conduct toward the victim.

Further, "a material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance or misfortune."[15] In such circumstances, evidence of prior conflicts and hostilities between the defendant and a murder victim are highly relevant to the defendant's material assertion of accident.[16]

Again, the evidence at issue here falls squarely within these principles and was properly admitted under ER 404(b) as evidence of the absence of accident. The trial court did not abuse its discretion in admitting the evidence at issue under ER 404(b) as relevant to prove motive, intent, and absence of accident.

Statement of Additional Grounds (SAG)

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant's trial.[17] The reasonableness inquiry presumes effective representation and

[14] State v. Gogolin, 45 Wn. App. 640, 646, 727 P.2d 683 (1986).
[15] Roth, 75 Wn. App. at 819.
[16] Roth, 75 Wn. App. at 819.
[17] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[18] To demonstrate prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[19] If one of the two prongs of the test is absent, we need not inquire further.[20] An attorney's legitimate trial tactics or strategy cannot serve as a basis for a claim by the defendant that he or she did not receive adequate assistance.[21]

Here, Holman asserts she was denied effective assistance of counsel because her counsel advised that testifying on her own behalf would not be in her best interest, her counsel did not explain to the court the circumstances of her prior conviction of second degree manslaughter and robbery, her counsel advised against her seeing a mental health provider, and her counsel did not call various witnesses on her behalf. These actions by Holman's counsel are presumed to constitute effective representation.[22] Holman does not meet her burden of showing the absence of legitimate strategic or tactical reasons for the challenged conduct. Her claim of ineffective assistance of counsel is without merit.

Mental Health Issues

Holman claims that because of various "stressors" in her life, she was

[18] McFarland, 127 Wn.2d at 336.
[19] Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[20] State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007) (Strickland, 466 U.S. at 697).
[21] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).
[22] See McFarland, 127 Wn.2d at 336.

entitled to be evaluated by a mental health expert in order to determine whether she was competent to stand trial. A defendant is entitled to the appointment of experts to examine and report on the defendant's mental condition if "there is reason to doubt" a defendant's competency to stand trial.[23] Here, there is nothing in the record to provide a reason to doubt that Holman was not competent to stand trial. She was not entitled to a competency evaluation.

Judicial Misconduct

Holman claims the trial judge committed misconduct by allowing the State during closing argument to tell the jury she "killed before," referencing her prior conviction of second degree manslaughter. Holman fails to cite to the place in the record where the prosecutor made this comment, and we are unable to locate it upon review of the transcript of closing argument. Moreover, even if the prosecutor did make the comment Holman attributes to him, we are convinced, given the evidence presented at trial, that the statement could not have affected the verdict.

Further, the trial court instructed the jury that it was to determine Holman's guilt or innocence based on "the evidence and the evidence alone." The court also instructed the jury that "[t]he lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence." We presume juries follow their instructions.[24] There is no reason to

[23] RCW 10.77.060.
[24] State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

believe that the jury did not follow the instructions to consider Holman's guilt or innocence based solely on the evidence and not to treat any comment by the prosecutor as evidence.

Holman includes in her SAG a 10-page narrative of her version of the events surrounding McCollum's death. This narrative is not part of the trial court record, and we will not consider it on appeal.

Affirmed.

Grosse, J.

WE CONCUR:

Dwyer, J.

Becker, J.