

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 63825-4-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
STEVEN EUGENE ONG,)	
)	
Appellant.)	FILED: November 23, 2009
)	

Leach, J. — Ong appeals his convictions of assault in the second degree and assault in the fourth degree. Ong’s principal claims are that the trial court erred by admitting his prior convictions under ER 609(b) because his convictions were more than 10 years old and unconstitutionally commented on the evidence during defense counsel’s closing argument. Because we are unable to conclude that the improper admission of Ong’s prior convictions was harmless, we reverse.

Background

On June 8, 1995, a jury convicted Steven Ong of second degree kidnapping, delivery of a controlled substance to a person under 18, burglary in the second degree, and taking a motor vehicle without permission. Division Two of this Court of Appeals reversed in part, holding that insufficient evidence

supported the controlled substances conviction.¹ As a result, his offender score was reduced, and he was resentenced in October 1999 on the remaining charges. But because Ong had already served his time, he was resentenced after his period of confinement expired.

In May 2005, Ong was charged with one count of second degree assault with intent to commit a felony with sexual motivation, one count of second degree assault of a child with intent to commit a felony, and third degree theft. His trial was delayed due to the filing of 16 separate motions for continuance.² It was finally held at the end of February 2008.

At trial, the State moved, over defense counsel's objection, to impeach Ong with his 1995 convictions for burglary and taking a motor vehicle. The trial court reasoned that these prior crimes involved dishonesty under ER 609(a)(2), and therefore were automatically admissible unless restricted under ER 609(b), which limits the admissibility of prior convictions if more than 10 years old. The court determined that the commencement date for the 10-year window was the date of Ong's resentencing and admitted the convictions because 10 years had not yet elapsed from this date.

The jury convicted Ong of second degree assault with intent to commit a felony with sexual motivation (indecent liberties) and the lesser offense of

¹ State v. Ong, 88 Wn. App. 572, 945 P.2d 749 (1997).

² The record does not disclose which party filed each motion. But there is sufficient detail in the record to show that some motions were filed by the State and others by Ong.

assault in the fourth degree. The jury found him not guilty on the theft charge. After determining that Ong qualified for sentencing under the Persistent Offender Accountability Act, the court sentenced Ong to life imprisonment without possibility of parole. Ong appeals his convictions.

Analysis

Ong contends that the trial court improperly admitted his prior convictions for impeachment purposes under ER 609. The aim of ER 609 is to achieve the proper “balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of the accused who chooses to testify.”³ Overarching this balance is the need to curb jurors’ tendencies to impermissibly infer that since “the defendant has sinned in the past . . . he is more likely to have committed the offense for which he is being tried.”⁴

The rule’s solution is to allow prior convictions on a limited basis until the passage of time significantly diminishes the probative value of the evidence. ER 609(a) allows admission of prior convictions for the limited purpose of impeaching a witness if

the crime (1) was punishable by death or imprisonment in excess

³ 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 609.1, at 471 n.14 (5th ed. 2007).

⁴ United States v. Sims, 588 F.2d 1145, 1147-48 (6th Cir. 1978) (summarizing legislative history) (quoting United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975)). Because Washington’s ER 609(b) is taken verbatim from the federal rule, Fed. R. Evid. 609(b), Washington courts may look to federal law for guidance.

of 1 year . . . and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

ER 609(b) then limits how far back opposing counsel may reach into a witness's criminal history.⁵ The rule provides:

Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

ER 609 authorizes admission of convictions for impeachment purposes if the elements in either subsection (a)(1) or (2) are met. But as time passes, the probative value of prior convictions generally diminishes. And after 10 years, any remaining probative value may be so diminished that its prejudicial effect outweighs its probative value.⁶ Thus, before convictions are admissible under ER 609(b), the trial court must determine that the probative value of a prior conviction, supported by specific and articulated facts, substantially outweighs its prejudicial effect.⁷

We must decide whether Ong's prior convictions were remote enough to

⁵ See 5A Teglund, at 496-97 (explaining that ER 609(b) controls the admissibility of all remote convictions regardless of whether they fall under (a)(1) or (a)(2)).

⁶ See, e.g., State v. Jones, 117 Wn. App. 221, 233, 70 P.3d 171 (2003); see also State v. Russell, 104 Wn. App. 422, 437, 16 P.3d 664 (2001) (noting that remote convictions are admissible "very rarely and only in exceptional circumstances") (quoting United States v. Beahm, 664 F.2d 414, 417-18 (4th Cir. 1981)).

⁷ Jones, 117 Wn. App. at 233.

trigger the presumption of inadmissibility in ER 609(b). And if so, whether the “court determined, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweigh[ed] its prejudicial effect.”⁸ The following three-step analysis answers these questions. First, we determine the appropriate dates upon which 10 years elapses. If 10 years has expired, we next assess whether the trial court properly balanced the probative value of the evidence against its prejudicial effect. Lastly, if we find a balancing error, we inquire whether it was otherwise harmless.⁹ An evidentiary error is harmless if, “within reasonable probabilities, it did not affect the outcome of the trial.”¹⁰

Deciding when the 10-year period begins and ends is a matter of court rule interpretation subject to de novo review.¹¹ The trial court determined that the 10-year period commenced when the revised judgment and sentence entered on remand following Ong’s appeal. Ong claims the 10-year period commenced either on the date of his original conviction or the date when he completed confinement, whichever is later. The State, contrary to its position at trial, now concedes that Ong is correct.

We agree with Ong. A plain reading of the rule compels the conclusion

⁸ ER 609(b).

⁹ Russell, 104 Wn. App. at 432-35.

¹⁰ Russell, 104 Wn. App. at 434.

¹¹ State v. O’Connor, 155 Wn.2d 335, 343, 119 P.3d 806 (2005); State v. O’Dell, 70 Wn. App. 560, 564, 854 P.2d 1096 (1993) (stating that the meaning of ER 609 is a pure issue of law).

that the commencement date for the 10-year period is either the date of the original verdict or the date on which confinement for that conviction terminated, whichever is later. The rule states that the 10 years is measured from “the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.”¹² As Ong points out, “conviction” is “[t]he act or process of judicially finding someone guilty of a crime” or “[t]he judgment (as by a jury verdict) that a person is guilty of a crime.”¹³ This is reflected in the determination by Washington courts that the term “conviction” includes guilty pleas for which a defendant has not yet been sentenced.¹⁴ Thus, for purposes of ER 609(b), a “conviction” does not occur at a resentencing after appeal. Because Ong was convicted of burglary and auto theft in 1995 and completed his sentence in 1997, we hold the 10-year period commenced in 1997.¹⁵

Deciding when the 10 years ends is more difficult; ER 609(b) does not state the date to which the 10 years is measured. The trial court did not reach this issue because it determined an incorrect start date. Relying on Washington case law, Ong asserts that the relevant date is the date of witness testimony, here February 2008. The State, relying on Minnesota case law, claims the

¹² ER 609(b).

¹³ Black’s Law Dictionary 335 (7th ed. 1999).

¹⁴ State v. Tate, 2 Wn. App. 241, 245, 469 P.2d 999 (1970) (guilty plea admissible without sentence under prior controlling statute RCW 10.52.030).

¹⁵ The parties dispute the month but not the year Ong was released from confinement on the burglary and auto theft charge. Because the month does not affect our decision, we need not resolve this dispute.

pertinent date should be the date of the currently charged offense. This would be May 2005.¹⁶

Case law identifies three possible dates: the date of the current offense, the date when trial commences, or the date the witness testifies.¹⁷ In Russell, Division Two held that “[t]he 10-year period ends when the conviction is admitted at trial.”¹⁸ Russell follows the apparent trend of measuring to the date the witness testifies at trial.¹⁹ The State asserts that Russell should be reconsidered because public policy favors the rule adopted in State v. Inhot.²⁰ In Inhot, the Minnesota Supreme Court held that the 10 years is measured to the date of the alleged offense, justifying this date with the following reasons. Both the trial date and date of testimony are subject to manipulation and no policy reason supports the use of either date.²¹ It further reasoned that “[i]f prior convictions lose their probative value for impeachment purposes because of ten years of ‘good behavior,’ that is the period we should measure—the period of unquestioned good behavior.”²²

The Inhot court’s reasoning is not persuasive. A relatively small

¹⁶ The State urges this result because Ong completed his sentence in 1997, less than 10 years from the date of the alleged offense. Because Ong’s prior convictions fall under ER 609(a)(2), they would be automatically admissible.

¹⁷ Whiteside v. State, 853 N.E.2d 1021, 1027 (Ind. Ct. App. 2006).

¹⁸ Russell, 104 Wn. App. at 432.

¹⁹ 5A Teglund, at 498 n.10.

²⁰ 575 N.W.2d 581 (Minn. 1998).

²¹ Inhot, 575 N.W.2d at 585.

²² Inhot, 575 N.W. 2d at 585 (quoting United States v. Cathey, 591 F.2d 268, 277 n.2 (5th Cir. 1979) (Fay, J., dissenting)).

proportion of prior convictions would become inadmissible through manipulation of the date of trial or testimony.²³ Using the current offense date presumes that an accused charged with a crime is guilty.²⁴ This presumption conflicts with the constitutionally mandated presumption of innocence. Further, the lnnot rule has no utility when the witness to be impeached is not an accused standing trial.²⁵ ER 609 makes no distinction between a party and a non-party witness. Even Minnesota does not follow lnnot when the witness is not a party.²⁶ Finally, after 10 years convictions are not per se inadmissible; rather, the trial court balances whether the probative value of the evidence substantially outweighs its prejudicial effect. Though a presumption of inadmissibility exists, this is not the same as an outright ban. Thus, “it is highly unlikely that such tactics would successfully prevent the opposing party from introducing evidence of a prior conviction that possessed significant probative value,”²⁷ especially if the 10-year period has expired by only a day or two. We therefore follow Russell and hold that Ong’s prior convictions were more than 10 years old when he testified.²⁸

Conviction evidence more than 10 years old is admissible under ER 609(b) to impeach the credibility of a witness only if the trial court enters

²³ Whiteside, 853 N.E.2d at 1027.

²⁴ Charles Alan Wright & Victor James Gold, 28 Federal Practice and Procedure § 6136 (1993 & Supp. 2009) (citing Whiteside, 853 N.E. 2d at 1028).

²⁵ Wright & Gold, supra, § 6136.

²⁶ State v. Munger, 597 N.W.2d 570, 572 (Minn. Ct. App. 1999).

²⁷ Whiteside, 853 N.E.2d at 1027.

²⁸ Ong’s confinement on the burglary and auto theft convictions ended in 1997 while his trial in this case started in 2008.

“specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact.”²⁹ To perform the balancing test required by ER 609(b) a trial court must weigh on the record the following non-exclusive Rivers factors: “(1) the length of the defendant’s criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.”³⁰

In this case, the trial court made a conclusory statement of probative value. It said, “And I also want to put on the record that with regard to that I don’t think I actually weighed the probative versus prejudice, I think it was inherent in my ruling that I found that it was more probative than prejudicial and I’m making that finding.” It made no specific findings whatsoever, let alone ones that would support its conclusion that the probative value of Ong’s prior convictions substantially outweighed their prejudicial impact. The State concedes that the court did not make the required findings. Thus, we hold that the trial court erred by failing to balance the required factors on the record.

A failure to conduct the balancing test on the record is harmless if, “within

²⁹ Russell, 104 Wn. App. at 433 (quoting S. Rep. No. 1277, at 15 (1974)); see also State v. Rivers, 129 Wn.2d 697, 705-06, 921 P.2d 495 (1996) (stating court’s obligations under 609(a)(1) to balance factors and make specific findings of fact on the record).

³⁰ Rivers, 129 Wn.2d at 705 (quoting State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980)).

reasonable probabilities, it did not affect the outcome of the trial.”³¹ Our courts take one of two separate approaches under this test. Under one approach, the appellate court asks “whether the trial court would have admitted if the trial court had properly balanced on the record.”³² If the answer is yes, then failing to conduct the balancing test did not affect the outcome of the trial.³³ Under the alternative approach, the appellate court “assumes or determines that the trial court would not have admitted if the trial court had properly balanced; then, in light of all the evidence . . . asks whether the conviction affected the outcome ‘within reasonable probabilities.’”³⁴ At the heart of this analysis is the strength of the other evidence.³⁵

Because both parties argue the issue of harmless error exclusively under the second approach, we use it here. The State labors to draw parallels with Russell, claiming that, like Russell, the error in admitting the prior convictions had no effect on the outcome of the trial as evidence against the defendant was “virtually airtight.”³⁶ We disagree. The evidence against Russell was much stronger than the evidence against Ong.

In Russell, the defendant and victim were living together in a long-term romantic relationship that the victim ended shortly before the defendant set fire

³¹ Russell, 104 Wn. App. at 434 (citing State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997)).

³² Russell, 104 Wn. App. at 434.

³³ Russell, 104 Wn. App. at 434.

³⁴ Russell, 104 Wn. App. at 434-35 (citations omitted).

³⁵ Russell, 104 Wn. App. at 438.

³⁶ Russell, 104 Wn. App. at 439.

to her apartment. The record contained police reports and eye-witness testimony that the defendant had grown jealous and hostile. He threatened the victim on multiple occasions, including hours before he committed arson. Also, a friend of the defendant testified that the defendant confessed to the arson though the defendant later claimed he was in the shower at the time the fire broke out.

Here, Ong's case came down largely to complainant's word against his. She and Ong did not know each other, and there is no record of any acrimony between the two. Also, there is no evidence that Ong confessed to assaulting her or her son. None of the State's witnesses testified as to having seen any physical altercation between them, though a few witnesses did testify that complainant had marks around her neck. However, she refused medical treatment for herself and her son, and the investigating officer did not report any visible bruising.

Considering that this case turned largely on the credibility of the alleged victim and Ong, and the extremely prejudicial nature prior convictions have on a jury, there is a "reasonable probability" that the improper admission of Ong's criminal history unfairly prejudiced the jury against Ong. For this reason, we reverse.

Conclusion

The trial court incorrectly determined the starting date for measuring the 10-year window under ER 609(b). The trial court also failed to make specific

findings on the record of those particular facts and circumstances it considered when it determined that the probative value of admitting Ong's prior convictions outweighed any prejudicial impact. Because it is reasonably probable that these errors affected the outcome of the case, we reverse.

Leach, J.

WE CONCUR:

Appelwick, J.

Grosse, J.