68814-6

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NO. 68814-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD LEE GRAY, III

Appellant.

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

The Honorable Leroy McCullough, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

APPELLANT WAS DENIED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

In his opening brief, appellant Ronald Gray asserts his constitutional right to present a defense was infringed upon when the trial court excluded reverse 404(b) evidence that was offered in support of his defense. Brief of Appellant (BOA) at 5-19. In response, the State first suggests the central issue presented here is whether the trial court abused its discretion when applying ER 404(b). BOR at 13-15. This misses the point, however. The heart of the debate over reverse 404(b) evidence – and the threshold question here – is whether a criminal defendant's constitutional right to present a complete defense is violated when the trial court uses 404(b) to exclude reverse 404(b) evidence that is offered by a defendant as a means of negating his guilt. As such, this case involves a question of constitutional law and the interpretation of an evidentiary rule in light of that constitutional question. Consequently, the standard of review is de novo. State v. Griffin, 173 Wn.2d 467, 268 P.3d 924 (2012).

Next, the State devotes considerable briefing space to its discussion of cases that stand for the proposition that "the right to

present a defense has not been read to trump the rules of evidence." BOR at 5-17. From this, it suggests that since ER 404(b) facially excludes propensity evidence, the defendant's constitutional right to present a complete defense cannot possibly include the right to present reverse 404(b) evidence which is inadmissible under ER 404(b). Id.

The State's argument is fundamentally flawed because it fails to recognize that even established evidence rules are subject to constitutional review. Ignoring this basic principle, the State engages in a backward analysis. Case law is clear, however, that evidence rules yield to legitimate constitutional rights, not vice-versa. E.g., Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006) (concluding a rule that excluded evidence implicating third parties violated the defendant's right to have a meaningful opportunity to present his defense); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (holding unconstitutional a rule prohibiting hypnotically refreshed testimony); Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (overturning a decision that prevented the defendant from attempting to show at trial that his confession was unreliable); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct.

1038, 35 L.Ed.2d 297 (1973) (finding unconstitutional Mississippi's evidentiary rules which denied the defendant the right to impeach his own witnesses and admit statements against penal interest); see also, State v. Hedge, 297 Conn. 621, 653-54, 1 A.3d 1051 (2010) (holding exclusion of reverse 404(b) evidence resulted in an unconstitutional restriction of the defendant's right to present his "other suspect" defense).[1]

The State rests a large part of its argument on the fact that a defendant's right to present relevant evidence is not unlimited. BOR at 14-15. While this is true, the State overlooks the fact that any legitimate restriction placed upon this right must be reasonable. United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). As one Washington Court has recently explained:

> The right to present a complete defense, including a third party culpability defense, does not mean that a defendant may introduce whatever evidence he wishes, but it does mean that state-law evidentiary restrictions that are arbitrary or disproportionate to the purposes they are designed to serve must yield to a defendant's right to present a defense.

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[1] The decisions cited in this paragraph (some of which were cited in appellant's opening brief) should sufficiently answer the State's unfounded claim that Gray did not "offer a single case in which the rules of evidence were suspended so that a defendant could present his defense." BOR at 17.

State v. Sanchez, 171 Wn. App. 518, 554, 288 P.3d 351, 368 (2012) (citation and internal quotations omitted); see also, Holmes, 547 U.S. at 324. Thus, if a court rule unreasonably restricts a defendant's constitutional right to present a defense, the rule is unconstitutional and inapplicable. In such circumstances, admissibility will be fairly determined through the application of ER 401 and 403. As the United States Supreme Court has summed up:

> While the Constitution thus prohibits the exclusion of defense evidence under rules ... that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes, 547 U.S. at 326 (citations omitted).

Applying these principles here, the threshold question is whether ER 404(b)'s exclusion of a other-crimes evidence that is offered in support of an other-suspect defense is disproportionate to the purpose ER 404(b) is designed to serve. While the State correctly points out in its brief that federal case law pertaining to reverse 404(b) evidence has been neither consistent nor precise in answering this question (BOR at 17, 20-16), contrary to what the

State suggests, a survey of the cases demonstrates that the majority of reviewing courts have properly followed the analytical structure set forth by the Unites States Supreme Court.

First, the majority of reviewing courts have examined the purpose underlying courts rules that exclude propensity evidence. These courts found the prohibition against propensity evidence is generally designed to bar evidence of a defendant's other crimes because there is a fear the jury might convict a person who has a propensity to commit crimes without worrying too much about whether the government has proved his guilt of the crime of which he is currently accused.[2] See, e.g., cases cited in appellant's opening brief. BOA at 12, n.13

Having identified the policy, these courts next appear to examine whether this policy is served by the exclusion of reverse 404(b). They explain that when the government, rather than the defendant, invokes Rule 404(b) the policy concern with the poisonous effect on the jury is negligible. Therefore, the majority of

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[2] The Washington Supreme Court has recognized a similar policy, concluding ER 404(b) is designed "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).

courts have found that since the jury is not being asked to judge the other-suspect's guilt, the primary evil that may result from admitting bad-acts evidence – i.e. tainting the defendant's character and securing a conviction based on propensity alone – is not present. Thus, the policy behind the rule does not support its application to exclude reverse 404(b) evidence. And with that rule inapplicable, the majority of courts have concluded the only legitimate bar to admission of reverse 404(b) evidence is whether the probative value of the evidence is slight, which should be addressed with a straight-forward ER 401/403 analysis.[3] Id.; see also, United States v. Gonzalez–Sanchez, 825 F.2d 572, 582 n. 25 (1st Cir.1987) ("Inasmuch as [Reverse 404(b)] evidence does not concern past criminal activity of [the defendant], Rule 404(b) is inapplicable"); United States v. Reed, 259 F.3d 631, 634 (7th Cir.2001) ("In deciding whether to admit such evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and

[3] When considering the probative value of the evidence, courts might consider the list of exceptions under ER 404(b) as part of its analysis; however, the rule may not be applied "mechanistically" to defeat the defendant's efforts to present a complete defense. See, Chambers, 410 U.S. at 302.

confusion of the issues under Rule 403.")[4] United States v. Aboumoussallem, 726 F.2d 906, 911-12 (2d Cir. 1984) (When reverse 404(b) evidence is at issue, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense"); Krezdorn, 639 F.2d at 1333 ("When the evidence will not impugn the defendant's character, the policies underlining 404(b) are inapplicable").

In sum, although not directly stated, the majority of courts looking at reverse 404(b) evidence have instinctively worked within

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[4] The State takes specific issue with appellant's representation of the Seventh circuit's position on reverse 404(b) evidence. BOR at 22, n. 9. It suggests the Seventh Circuit applies a "standard FRE 404(b) analysis." Id. However, the Seventh Circuit's most recent review of the issue shows otherwise. In U.S. v. Alayeto, 628 F.3d 917 (2010), the Seventh Circuit reviewed a trial court's decision to exclude "propensity evidence" and concluded, while the admission of such evidence is generally prohibited, a defendant may introduce propensity evidence regarding a third party's other crimes or conduct to support his defense if it tends, alone or with other evidence, to negate his guilt of the crime charged. Id. at 921. Thus, it did not mechanistically apply 404(b), but instead concluded the proffered propensity evidence was properly excluded under ER 403 because of the evidence's scant probative value in that case. Id. at 921-22; see also, United States v. Murray, 474 F.3d 938, 939 (explaining that the primary evil sought to be avoided by 404(b) is not present in the context of reverse 404(b) evidence and concluding that a straightforward balancing under 403 is "all one needs to keep 'other crimes' evidence within bounds").

the framework set forth by the United States Supreme Court for assessing when the right to present a defense trumps the application of an exclusionary evidence rule. Holmes, 547 U.S. at 326. In so doing, they have concluded that ER 404(b)'s bar against propensity evidence must yield to the defendant's constitutional right to present a defense. Instead, the admissibility of reverse 404(b) is governed by ER 401 and 403.

Finally, the State claims that any error was harmless. BOR at 25-28. However, the State applies the wrong harmless error standard. BOR at 15. The error at issue here is constitutional in nature because it limited Gray's exercise of his constitutional right to present a complete defense and to confrontation. Hence, the constitutional harmless error standard applies. State v. Austin, 59 Wn. App. 186, 195, 796 P.2d 746 (1990). Additionally, as the Washington Supreme Court has concluded, an error which affects a defendant's self-defense claim is constitutional in nature and thus subject to the constitutional harmless error standard. State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983).

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v.

Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) The State bears the burden of establishing harmless error in this context. Id. It did not do so here.

Essential questions here were who was the first aggressor – Leroy Travers or Gray – and whether Gray had a good faith belief he was in danger. The State's evidence was far from overwhelming in this regard. First, the record establishes the existence of mutual aggressive verbal assaults and the mutual combat between Gray and Travers. 3RP 16- 18, 20 38, 41-43, 58, 69, 71, 794; RP 114-17, 146, 159. Second, only Travers said Gray hit him first. 4RP 144. Even Travers' girlfriend Coral Williams could not back this up. And no other witness testified that Gray struck first. Third, the videotape does not resolve the issue because it is not a complete record of the ongoing interactions between Travers and Gray and does not document the beginning of this altercation. Exhibit 6. It is simply too incomplete to constitute proof beyond a reasonable doubt as to whom the first aggressor was or the level of danger Gray reasonably perceived.

Given this record, which is far from overwhelming, and given the balance between aggressions, Travers' criminal history could have tipped the scales in Grays favor. As such it cannot be said

that the erroneous exclusion of this evidence was harmless beyond a reasonable doubt.

In conclusion, for the reasons stated above and those in appellant's opening brief, this Court should apply the analytical framework provided by the United States Supreme Court for determining when a defendant's right to present a defense trumps an exclusionary evidence rule and hold that ER 404(b) cannot be applied mechanistically to exclude reverse 404(b) evidence. Additionally, this Court should find the trial court erred in excluding Travers' criminal history and that this error was not harmless beyond a reasonable doubt.

B. CONCLUSION

For reasons stated herein and all those stated in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 22nd day of April, 2013

Respectfully submitted,

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD GRAY
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WASHINGTON STATE PENITENTARY
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WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF APRIL, 2013.

X Patrick Mayovsky