

No. 43782-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TODD JAMES WIXON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-00197-1
The Honorable Frederick Fleming, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted evidence of Todd Wixon's prior convictions for impeachment purposes under ER 609.
2. The trial court erred when it determined that Todd Wixon's prior convictions for crimes involving dishonesty were not more than 10 years old.
3. The trial court erred when it admitted evidence of Todd Wixon's prior convictions for crimes involving dishonesty without first balancing their probative value against their prejudicial effect.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it determined that Todd Wixon's prior convictions for crimes involving dishonesty were not more than 10 years old, where he was sentenced in 1979 to concurrent five year terms of confinement for those crimes, but remained incarcerated until 2005 because he received another concurrent 26-year sentence for a different crime?
(Assignments of Error Nos. 1 & 2)
2. Did the trial court err when it admitted evidence of Todd Wixon's prior convictions for crimes involving dishonesty without first determining on the record whether their

probative value substantially outweighed their prejudicial effect? (Assignments of Error Nos. 1 & 3)

3. Did the trial courts erroneous admission of Todd Wixon's prior convictions for crimes involving dishonesty, within reasonable probabilities, affect the outcome of the trial where Wixon's credibility was at issue? (Assignment of Error 1)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Todd James Wixon by Information with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024), one count of driving under the influence of intoxicants (RCW 46.61.502), one count of reckless driving (RCW 46.61.500), and one count of resisting arrest (RCW 9A.76.040). (CP 1-2)

Following a CrR 3.5 hearing, the trial court ruled that, with one exception, all statements made by Wixon before he invoked his right to counsel would be admissible at trial. (RP1 91-92; CP 74-81)¹ A statement Wixon made to medical personnel indicating he had consumed one beer was not initially admitted in the State's

¹ The transcripts containing trial proceedings will be referred to by their volume number ("RP#"). The transcript containing the sentencing hearing will be referred to as "SRP."

case in chief, but was later admitted to rebut Wixon's testimony that he had not been drinking alcohol on the night of the charged incident. (RP1 RP 91-92; RP4 46-48, 52)

The trial court denied Wixon's motions to dismiss the resisting arrest charge for lack of proof. (RP4 55-57) The jury convicted Wixon as charged. (RP4 102-03) The trial court sentenced Wixon to a total of 818 days of incarceration. (SRP 12-15; CP 56, 63, 65-69) This appeal timely follows. (CP 70)

B. SUBSTANTIVE FACTS

Catherine and Alexander Earl were driving on Highway 512 towards Tacoma at about 9:30 on the night of January 12, 2012. They saw an older-model pickup truck approach other motorists at a high rate of speed and then slam on the brakes, repeatedly swerve in and out of lanes without using a signal, and come almost to a stop while still in a lane of travel. (RP2 35, 36 (RP2 17-19, 22, 34, 35, 36) They saw several other motorists swerve out of the way to avoid colliding with the truck. (RP2 19)

Damian Younger was also driving on Highway 512 at the same time, when he saw a truck approaching quickly from behind. (RP2 43-44, 45) The truck came very close to Younger's car, then slowed abruptly, fishtailed, and swerved into the adjacent lane.

(RP2 46-47)

The Earls and Younger followed the truck as it exited Highway 512 onto South Tacoma Way. (RP2 21, 47) They saw the truck stop at a green light, then as the light turned red the truck sped through the intersection. (RP2 21, 37, 49) The truck then pulled quickly into a gas station, nearly hitting a flower pot and gas pump before coming to a stop. (RP2 21-22, 48) They saw a white male get out of the truck and walk inside. (RP2 22, 49-50) Catherine Earl and Younger both called 911 and reported what they had seen. (RP2 22-23, 44, 47) Catherine Earl also took note of the truck's license plate number, and reported it to the 911 operator. (RP2 23)

Tacoma Police Officer Jeffrey Maahs was on duty and driving his fully marked patrol car on this same night. (RP2 64, 66) He heard the sound of an engine revving loudly, then saw a truck speed past him going the opposite direction on South Tacoma Way. (RP2 68-69) Officer Maahs turned his vehicle around and attempted to catch up to the truck. (RP2 69) After he observed the truck speed through a red light, Officer Maahs activated his vehicle's overhead lights and siren in an attempt to conduct a traffic stop. (RP2 69) The truck did not pull over or stop, but instead

continued to drive at speeds in excess of 60 miles per hour in a 25 mile per hour zone. (RP2 67, 68-69, 71-72, 75, 88)

As he followed the truck, Officer Maahs repeatedly saw it weave in and out of traffic and drive through red lights. (RP2 71-72, 75) However, there were several open businesses and significant vehicle and pedestrian traffic on that stretch of South Tacoma Way, so in the interest of public safety Officer Maahs decided to end his pursuit. (RP2 66-67, 75) He turned off the vehicle's lights and siren, and reported the truck's location to other patrol units in the area. (RP2 76, 77)

Other units eventually intercepted and stopped the truck. (RP2 102-03, 117-18, 122; RP3 20-21, 22) Several units surrounded the truck, and officers yelled commands for the driver to exit the truck, turn, walk backwards, and lay on the ground. (RP2 104, 107; RP3 23, 46-47) The driver, identified as Todd Wixon, was slow to follow commands and did not perform exactly as directed. (RP2 103, 125; RP3 23-24, 25, 47-48) But he did exit the truck and kneel on the ground. (RP3 25) Wixon did not get into a prone position on the ground, however, so Officer Jewell Lerum approached Wixon and pushed him to the ground. (RP3 25) Officer Lerum testified that Wixon refused to put his hands at his

sides, so he had to struggle with Wixon to get his arms together and handcuffed. (RP3 26, 27, 35, 51)

Several officers testified that Wixon smelled of intoxicants, had watery and bloodshot eyes, and his speech was slurred. (RP2 81, 108; RP3 65, 67) A bottle of what appeared to be rum was found inside Wixon's car. (RP3 64) Wixon also performed poorly on several field sobriety tests. (RP3 76-77, 80, 81, 83)

The officers noticed that Wixon had suffered an abrasion over his eye from the struggle with Officer Lerum, so they called for medical aid. (RP2 108; RP3 27-28) As he was being treated, Wixon became verbally abusive to the officers and aid personnel. (RP2 82, 109-10; RP3 28-29, 31) Wixon was transported to the hospital, where he continued to be loud and profane. (RP2 82, 83, 84, 93) Wixon did not consent to a blood draw to test his blood alcohol concentration. (RP3 87, 92)

Wixon testified in his own defense, and denied that he drank alcohol that night.² (RP4 22, 31) After playing pool at Freddie's Casino near Highway 512, he agreed to give an acquaintance a ride home. (RP4 22-23) But Wixon is not familiar with Tacoma, so

² On rebuttal, the State recalled Officer Lerum to testify that he overheard Wixon tell medical aid personnel that he drank one beer earlier in the evening. (RP4 52)

he got lost and was confused about how to return to the freeway. (RP4 24) He went through some yellow lights as he tried to find his way home, but denied driving through any red lights. (RP4 25)

Wixon testified that he was not aware that an officer was signaling him to stop on South Tacoma Way. (RP4 25) He also denied intentionally disobeying the officers' orders after he stopped his truck; he testified that several officers were yelling at the same time and he could not understand what he was supposed to do. (RP4 27) He testified that he yelled at the officers and aid personnel because he was upset at how rough the officers had treated him and because he was in pain from being pinned to the ground. (RP4 27, 28, 38)

IV. ARGUMENT & AUTHORITIES

The State sought to introduce four of Wixon's prior convictions involving crimes of dishonesty in order to impeach his credibility after he took the stand in his defense. (RP4 8, 15, 17-19) Wixon was convicted and sentenced for the four crimes—possession of stolen property and three counts of taking a motor vehicle without permission—in 1979. (RP4 14-15; Sup. CP 88) Wixon was sentenced to five years of confinement for each of the crimes, to run concurrent with each other, and concurrent with a 26-

year sentence for a contemporaneous murder conviction. (RP4 14-15, 21, 43-44; Sup. CP 88) Wixon was released from confinement in 2005. (RP4 9, 14; Sup. CP 88)

The State argued that the convictions were admissible under ER 609, which states, in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, 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.

(b) Time Limit. 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.

The State asserted that because the convictions were for crimes involving dishonesty, they were automatically admissible under ER 609(a)(2). (RP4 12, 14-15) The State asserted that the 10-year time limit did not begin to run until Wixon was released from prison in 2005. (RP4 12, 14-15, 20)

Wixon objected, arguing that (1) his lengthy incarceration, ending in 2005, was not due to the convictions for the crimes of dishonesty so the convictions were beyond the 10-year limit of ER 609(b); (2) because of the age of the crimes, the court should balance their probative value against their prejudicial effect; and (3) their prejudicial effect outweighed any probative value. (RP4 9-10, 11, -14)

The trial court agreed with the State that the 10-year time limit did not begin to run until Wixon's 2005 release, and therefore the convictions were automatically admissible, without any balancing of probative value versus prejudice needed. (RP4 11-12, 13-14, 17) Accordingly, during the State's cross-examination of Wixon, the prosecutor questioned Wixon about the four prior convictions. (RP4 43-44) The trial court erred because the convictions were beyond the 10-year limit of ER 609(b), because a prejudicial effect versus probative value balancing should have been undertaken, and because the prejudicial effect far outweighed any probative value.

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.” 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 609.1, at 471 n. 14 (5th ed.2007). 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.” United States v. Sims, 588 F.2d 1145, 1147-48 (6th Cir.1978) (quoting United States v. Harding, 525 F.2d 84, 89 (7th Cir.1975)).

ER 609(a) controls the admissibility of a conviction that is not more than 10 years old. Under that section, a crime involving dishonesty is automatically admissible, without any need to balance probative value versus prejudicial effect, if the conviction is less than 10 years old. State v. Russell, 104 Wn. App. 422, 433-34, 16 P.3d 664 (2001).

ER 609(b) controls the admissibility of a conviction that is more than 10 years old. Under that section, any conviction that is more than 10 years old, even crimes of dishonesty, are subject to a balancing of probative value versus prejudicial effect before the conviction may be admitted against a testifying witness. Russell, 104 Wn. App. at 433-34.

The 10-year period is judged separately for each conviction.

Russell, 104 Wn. App. at 432. Deciding when the 10-year period begins and ends is a matter of court rule interpretation and is subject to *de novo* review. 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). In determining the meaning of a court rule, courts should first consider the plain language of the rule. O'Connor, 155 Wn.2d at 343.

The ten year period starts at conviction or “release from confinement for *that conviction*,” whichever is later. ER 609(b) (emphasis added); Russell, 104 Wn. App. at 432. The plain language of the rule thus dictates that the 10-year period begins to run at the conclusion of confinement imposed for the specific conviction that a party wishes to admit. In this case, the State was permitted to elicit evidence of Wixon’s 1979 convictions. Wixon served concurrent five year sentences for each of those convictions. The “confinement imposed for [those] conviction[s]” therefore ended in 1984, nearly thirty years ago. After that year, he was no longer confined for those convictions. The trial court therefore erred when it determined that the 10-year time period did not begin to run until Wixon’s 2005 release.

Because confinement for the four crimes of dishonesty ended more than 10 years ago, the trial court was required to balance the probative value against their prejudicial effect. Russell, 104 Wn. App. at 433-34 (“A trial court is always required to balance on the record when a conviction is more than ten years old, regardless of whether the conviction involves dishonesty or false statement.”). The trial court’s failure to do so in this case was error. Russell, 104 Wn. App. at 433-34.

ER 609(b) provides that a trial court shall not admit any conviction more than 10 years old “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.” Russell, 104 Wn. App. at 436-37. By its plain terms, ER 609(b) requires a finding that probative value outweighs unfair prejudice not just slightly, but substantially. Russell, 104 Wn. App. at 433. The record in this case is devoid of any “specific facts and circumstances” from which to conclude that these convictions possessed probative value that substantially outweighed unfair prejudice despite their age.

Furthermore, 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. *See, e.g., State v. Jones*, 117 Wn. App. 221, 233, 70 P.3d 171 (2003); *see also Russell*, 104 Wn. App. at 437 (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)). Therefore, it is unlikely that the trial court in this case would have admitted these convictions, whose sentences were completed nearly 30 years ago, if it had properly conducted an on-the-record balancing.

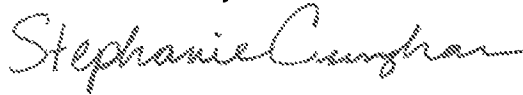
An evidentiary error is harmless if, “within reasonable probabilities, it did not affect the outcome of the trial.” *Russell*, 104 Wn. App. at 438. This case turned largely on whether the jury found Wixon credible when he testified that he had not been drinking earlier in the night, that he did not notice Officer Maahs’ patrol vehicle signaling him to stop, and that he did not purposefully disobey the officers’ directions and resist arrest because he could not understand what he was supposed to do. (RP4 22, 25, 26, 27) Considering that Wixon’s credibility was an issue, and the extremely prejudicial effect that prior convictions have on a jury, there is a “reasonable probability” that the improper admission of Wixon’s criminal history unfairly prejudiced the jury against Wixon.

Accordingly, Wixon's convictions should be reversed.

V. CONCLUSION

Wixon was no longer in custody for the crimes involving dishonesty after 1984, and therefore these crimes were more than 10 years old. They were not automatically admissible under ER 609, and the trial court should have balanced their probative value against their prejudicial effect. If the court had done so, it is likely that the convictions would have been excluded. The trial court's error likely prejudiced the outcome of Wixon's trial, and his convictions should be reversed.

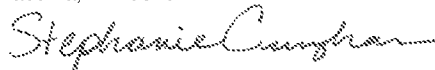
DATED: January 18, 2013



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CERTIFICATE OF MAILING

I certify that on 01/18/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Todd J. Wixon, Bk. #2012206043, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



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