No. 32824-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CARL MATHENY,

Appellant.

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

The Honorable Robert G. Swisher

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The evidence of the Viagra was admitted solely to prove propensity.**

a. *Mr. Matheny's objection was sufficient to preserve the issue for appeal.*

The State contends that since Mr. Matheny never objected that the evidence of the Viagra, for which he had not been charged, was inadmissible under ER 404(b), he has not sufficiently preserved his objection for appeal. The State is simply wrong and the issue is sufficiently preserved for appeal.

Mr. Matheny objected that the evidence was not relevant and that its prejudice outweighed any probative value. RP 10-11, 24-26. In *State v. Mason*, the Supreme Court found this objection sufficient to preserve an issue concerning ER 404(b) on appeal. 160 Wn.2d 910, 933, 163 P.3d 396 (2007) ("An objection based upon 'prejudice' is adequate to preserve an [objection for] appeal, based on ER 404(b), because it suggests the defendant was prejudiced by the admission of the prior bad acts.").

Since Mr. Matheny's objection was based upon prejudice, under *Mason* he has preserved his ER 404(b) claim on appeal.

b. *The error in admitting the Viagra evidence was not a harmless error.*

The State contends that the evidence of the Viagra powder was nevertheless harmless. While the State contends the prosecutor's mention of this evidence in closing argument "amounted to about one page," both that argument and the State's argument in its response brief show the evidence was admitted solely as propensity evidence and harmed Mr. Matheny so that only a new trial could remedy it.

When a court erroneously admits prior bad acts evidence under ER 404(b), reversal is required where, "within reasonable probability, materially affected the outcome of the trial." *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The State's argument on appeal and at trial is that since Mr. Matheny possessed the Viagra, *ergo* he necessarily also possessed the methamphetamine:

> Now, concerning that, let me talk about a few things the defendant talked about, the defense attorney. This Viagra that was on the seat. Weird, weird deal. You know, we hadn't really talked about what was going on there, but I would argue to you the one thing that you can conclude by the fact that the defendant has his hands behind him, Corporal Schwarder hadn't transported anybody, made sure his car was clean, and when he gets to the station, all this residue is there, and it turns out it's Viagra. Okay. You know, weird, weird deal. Strange deal.
>
> But the one thing you can conclude is that the defendant was secreting something on his person. That's the one

> thing we know. And he was trying to hide things. That's -- you know, who knows why he didn't just come clean about that and say, "You know, I've got some Viagra on me," instead of trying to crush it up and make some secret about it. But that's what he did. That's what he did with respect to Viagra. He couldn't crush up that pen. It's a pen. He couldn't crush it up like he could with a pill. But he's definitely trying to secrete things on his person. That's the importance of the Viagra.

RP 133-34. This argument stressed the evidence was admitted solely as propensity evidence.

Further, as argued in the opening brief, the jury was never instructed the evidence could only be used for a limited purpose, what that purpose was since the trial court failed to articulate it, thus allowing the jury to use it for whatever purpose it wished, including an improper purpose such as propensity. As a result, there is a reasonable probability the admission of this evidence materially affected the outcome of the trial. The error in admitting the evidence of the unrelated Viagra was not a harmless error. Mr. Matheny's convictions should be reversed.

2. **The court's cursory reference to Mr. Matheny's job status did not fulfill the "individualized inquiry into the defendant's current and future ability to pay" as required by *Blazina.***

a. *Mr. Matheny may raise the issue for the first time on appeal.*

The State posits that since Mr. Matheny did not object to the imposition of costs when they were imposed, he may not raise it for the first time on appeal. This argument shows a stunning failure to understand the import of the decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Neither of the named defendants in *Blazina* objected at the time of imposition of the costs. 182 Wn.2d at 834-35, 839. Nevertheless, the Court reviewed both sentences and reversed the imposition of costs because of a failure of the sentencing judge to make the inquiry into the defendant's ability to pay:

> At sentencing, judges ordered Blazina and Paige-Colter to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, *we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.*

Id. (emphasis added).

Here, although Mr. Matheny did not object at sentencing, the sentencing court failed to make any finding regarding his ability to pay. In light of the decision in *Blazina*, Mr. Matheny may raise the court's failure to inquire into his ability to pay, he may raise this issue for the first time on appeal. *Id.*

b. *The sentencing court's perfunctory questioning regarding Mr. Matheny's past employment as a firefighter was not the inquiry into ability to pay the Blazina court demanded.*

The *Blazina* court was very clear in the sentencing court's responsibility prior to imposing Legal Financial Obligations (LFOs):

> We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an *individualized inquiry into the defendant's current and future ability to pay* before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 839 (2015) (emphasis added).

The discussion between the court and Mr. Matheny at sentencing centered on the fact he was a firefighter for four years and wanted to get his job back. RP 161-64. Lacking in this discussion was any questioning about Mr. Matheny's current income, his debts and obligations and his overall ability to pay; both now and in the future. *See* RCW 10.01.160(3) ("The court shall not order a defendant to pay

costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.)." This inquiry is not advisory, it is required.

The sentencing court's failure to make the individualized inquiry into Mr. Matheny's ability to pay requires remand for a new sentencing hearing. *Blazina*, 182 Wn.2d at 838-39.

3. **Other issues**

Mr. Matheny relies on his opening brief for the arguments on whether it was unconstitutional to place the burden of proving unwitting possession on Mr. Matheny, citing *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), and on whether the trial court erred when it refused to sentence Mr. Matheny to a DOSA.

B. CONCLUSION

For the reasons stated in the opening brief and this reply brief, Mr. Matheny asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Matheny asks that this Court to reverse his sentence and remand for a new sentencing hearing.

DATED this 19th day of June 2015.

Respectfully submitted,

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Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION THREE

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RESPONDENT,	)	
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v.	)	NO. 32824-4-III
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CARL MATHENY,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JUNE, 2015.

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