SUPREME COURT NO. 97368-7
C.O.A. No. 50316-6-II
Cowlitz Co. Cause No. 16-1-00867-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ERIC BURTON

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals erred in finding the trial court abused its discretion. The Petitioner respectfully requests this Court accept review of the May 29, 2019, Court of Appeals' opinion in *State of Washington vs. Christopher Burton*, Court of Appeals No. 50316-6-II.

Under ER 403, relevant evidence is only to be excluded as prejudicial when the probative value of that evidence is substantially outweighed by the danger of unfair prejudice. At trial, evidence of a 911 call and a jail call, both made on the date of the crime, were admitted as res gestae and under ER 404(b). The Court of Appeals found the trial court abused its discretion in admitting this evidence. Slip Opinion at 10, 11.

With regard to the 911 call, the Court of Appeals held: "Assuming without deciding whether the 911 call fell under an ER 404(b) exception or was res gestae evidence, we hold the danger of unfair prejudice from the 911 telephone call recording substantially outweighed its probative value." Slip Opinion at 9. While the Court of Appeals' opinion discussed the

prejudicial effect of the 911 call, it provided no analysis of the probative value of that evidence.

Additionally, the Court of Appeals found the jail call could not contain res gestae evidence because it was made many hours after the incident, and that any basis for admitting the jail call under ER 404(b) was "attenuated and speculative at best." Slip Opinion at 10. After failing to see any probative value in the jail call, the Court of Appeals found the jail call was inadmissible under ER 403 stating: "[A]ny probative value offered by the jail call recording was substantially outweighed by the risk of unfair prejudice." Slip Opinion at 11. Without providing any reasoning regarding the probative value of the 911 call and failing to see any probative value in the jail call, the Court of Appeals found the trial court abused its discretion in admitting the evidence and that these evidentiary rulings did not result in harmless error.

An abuse of discretion requires a reviewing court to find that no reasonable court could have found as the trial court did under ER 403. A balancing test necessarily entails consideration of items weighed on each side of a scale. The Court of Appeals' opinion only appears to consider the danger of unfair prejudice. It does not discuss the probative value of the evidence, which of course would require consideration of the significance of this evidence within the context of the trial.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err by applying ER 403 without considering the probative value of the evidence?

IV. STATEMENT OF THE CASE

In the early morning of July 5, 2016, a distressed Virginia Lord called King County dispatch saying she had been assaulted by her boyfriend, Christopher Burton, in her house at 622 Othello Street in Seattle. RP 383-384, 389, 546. Lord explained she was trying to get away from Burton, and that he was still in the living room. RP 384. Lord became frustrated with the dispatcher's lack of concern and began crying. RP at 384. The conversation was interrupted by Burton assaulting Lord, with the sounds of her being struck and screaming audible on the call. RP at 385. After she was assaulted, the dispatcher asked if Lord was still there, and she could be heard screaming and crying. RP at 385. A neighbor then spoke to the dispatcher noting Lord was hurt quite badly and there was quite a bit of blood. RP at 385-86. Lord told the neighbor Burton was no longer there and had left in a 1989 Nissan pickup truck. RP 386. Eventually, Lord returned to speaking with the dispatcher and identified Burton. RP at 389.

Later that morning, Burton wrecked the truck while driving on Coal Creek Road in Longview around the 900 block. RP 596-98, 399. On the road between the interstate and Coal Creek Road is a sign that says "To

Oregon." RP 471. If a vehicle exits the interstate and remains in the right lane it would pass this sign but not be in the correct lane to enter Oregon. RP 471-72. Instead the vehicle would be on Ocean Beach Highway. RP at 471-72. Ocean Beach Highway intersects Coal Creek Road. RP 472. Coal Creek Road is located in a rural area in Cowlitz County. RP 390. Burton's truck had rolled over one time and was sitting in a ditch. RP 434. The canopy on the truck and the roof were crushed, and the truck appeared to be incapable of being driven again. RP 434, 439.

Evelyn Plant lived alone at 1005 Coal Creek Road. RP 390-91. Plant was 59-years-old, suffered from kidney failure with below 25 percent function, and had degenerative disc disease. RP 390, 396. Because of her medical condition, Plant was dying. RP 447. Her ability to walk was also affected. RP 396. To assist her in maintaining the ability to walk, Plant would swim for physical therapy. RP 396.

On the morning of July 5, 2016, Plant went swimming at the YMCA in Longview. RP 397-98. Once she finished swimming, she returned home. RP 398. As she drove home, Plant observed Burton's wrecked pickup truck. RP 399. Both Plant and another woman stopped but were unable to locate the driver of the truck. RP 399. The other woman who stopped called 911 and reported the collision. RP 399. After this Plant continued to her home, parked her car, and entered her house through the front door. RP 399-400.

Upon entering the kitchen, Plant noticed a plastic two-liter Dr. Pepper bottle on the counter that had not been there when she left her home. RP 400. The bottle was half-full of water. RP 401. The kitchen had a door that led to the utility room. RP 401. Plant observed that the door from the utility room was ajar. RP 401. Plant took a deep breath and entered the utility room. RP 401. In the utility room Plant observed Burton walking up the stairwell from her basement. RP 401-02.

Plant was frightened. RP 402. She ordered Burton out of her house. RP 402-03. Burton told Plant he was "trying to hide from the police." RP 403. Burton also told Plant that he was running from the police, his girlfriend had framed him and abused him, and that he needed to get away from the house and the location where he wrecked the truck immediately. RP 403. Burton told Plant he was talking to his mother in California, and she told him she did not want him to come down there just before he wrecked the truck. RP 404. Burton also asked Plant where Oregon was. RP 404. Burton offered Plant money to take him to the bus depot. RP 404.

While she was speaking with Burton, Plant's boyfriend, 63-year-old, Ward Linden, drove up. RP 405. Linden did not live with Plant but would visit her three days a week. RP 406. When Linden arrived, Plant whispered to Linden that she was going to call 911 and to keep Burton busy.

RP 449. Plant then dashed into the bathroom, grabbed a phone, and called 911. RP 406.

Burton told Linden, "I got to get away from the cops. Can you take me to the bus station? I'll pay you." RP 450. About this time, Sgt. Jeremy Tonissen of the Cowlitz County Sheriff's Office drove by, and Burton went to hide in the trees. RP 450, 460. Linden motioned to Sgt. Tonissen and pointed toward the direction Burton had gone. RP 460-61. Sgt. Tonissen exited his patrol vehicle and paralleled Burton's direction of travel. RP 461.

Sgt. Tonissen told Burton to stop. RP 461. Burton complied and told Sgt. Tonissen he had been at another house at 1011 Coal Creek rather than at Plant's house. RP 461. Sgt. Tonissen told Burton he had observed him in Plant's driveway. RP 461-62. Burton told Sgt. Tonissen it had not been him. RP 462. Another sheriff's deputy, Jason Hammer, arrived to assist. RP 462. Sgt. Tonissen told Burton he was investigating the accident that had occurred down the road. RP 462. As soon as Sgt. Tonissen completed this sentence, Burton ran from him. RP at 462.

As he ran, Burton threw his wallet to the ground. RP at 462. Sgt. Tonissen chased after Burton for about 50-55 yards. RP at 463, 468. Eventually, Sgt. Tonissen told Burton if he did not stop he would tase him. RP at 463. At this point, Burton stopped and was placed under arrest. RP

at 463. Deputy Hammer searched Burton incident to arrest. RP 523. In his waistband, Deputy Hammer located a large knife in a sheath. RP 523.

The knife found on Burton belonged to Plant. RP 408. The knife blade had a shape that resembled a feather. RP 409. About 10 years earlier, Linden had replaced the original handle on the knife with a piece of a deer horn antler. RP 409-10. Plant kept the knife in a wood bin in her house just outside her bedroom. RP 407, 425. The blade of the knife was sharp and measured seven-and-a-half inches long. RP 408, 444.

Deputy Hammer transported Burton to the jail; however, due to his involvement in the motor vehicle collision, the jail required medical clearance before he could be booked. RP 529. Deputy Hammer took Burton to the hospital and obtained medical clearance, then transported him to the jail. RP 526. At the hospital, Dr. Theodore Leslie diagnosed Burton with a concussion without loss of consciousness. RP 550. Burton denied losing consciousness and did not exhibit any signs of amnesia. RP 556-57. Burton was adamant that he did not want lab tests done. RP 557. Burton was oriented to time, place, and person. RP 558.

Later that evening at the jail, Burton called his mother. RP 538, 546. Burton told his mother he had wrecked his truck that morning. RP 539. Burton then told his mother that after the wreck he went to a neighbor's "to call the cops." RP 539. Burton claimed he walked to the back of the house.

RP 539. He said he heard a car pull up then "came back out, knocked on the door." RP 539. Burton then stated: "The lady was acting super weird. Then her husband pulls up and I'm talking with her husband....So they're trying to get me for residential burglary. I'm in a little town in the middle of Washington[.]" RP 539-40.

Referring to the incident in Seattle, Burton told his mother: "She's been trying to set me up for a while[.]" RP at 540. Burton told his mother: "So I take it she went to the police and called the court and blah, blah, blah?" RP 541. Burton asked his mother to bail him out, and she told him she lived "down here." RP 541. Burton then told his mother that he and Lord had sex, she smelled, and it was gross, so he said something to her. RP 542. Burton said Lord then "called the f***ing cops." RP 542. Burton said: "I'm trying to get the f*** out, but she attacks me, starts screaming and then it ends up in an altercation." RP 542. Toward the end of the call, Burton's mother asked him where he was. RP 545. Burton asked someone in the jail: "[W]hat town is this?" RP 545. After learning he was in Longview, he told his mother. RP 545.

Burton was charged with residential burglary with a deadly weapon enhancement, hit-and-run, and obstructing a law enforcement officer in Cowlitz County. RP 52, CP 49-51. Burton was charged with rape in the second degree, assault in the second degree, and interfering with domestic

violence reporting in King County. RP 9. On December 1, 2016, the Cowlitz County case proceeded to trial. RP 26. The jury found Burton not guilty of hit-and-run and guilty of obstructing, but was unable to reach a unanimous verdict on the residential burglary. RP 297-98.

On April 11, 2017, the case proceeded to trial for a second time on the residential burglary charge. RP 333. The State moved in limine to admit the 911 call and the jail call. RP 360-68. The parties stipulated to the authenticity of the calls. RP 545-46. Burton objected to admitting the calls, claiming it would force him to testify about his pending rape charge in King County and violate his Fifth Amendment right to remain silent regarding the King County charges. RP 368. Burton argued there was no connection between the sexual assault and the residential burglary. RP 368-69. He also argued that the crimes in Seattle were not crimes of dishonesty. RP 368. Finally, Burton argued that the 911 call was more prejudicial than probative because of the alleged sexual assault.[1] RP 369-71.

After identifying the purpose of the evidence, recognizing it went toward proving intent both for the residential burglary and the circumstances involving the knife—which was the basis of the deadly weapon enhancement, and performing an ER 403 balancing test, the Court

[1] Burton did not argue for exclusion of the jail call as unfairly prejudicial under ER 403 at trial. RP 369-370. Thus, any ER 403 issue with the jail call should not have been considered for the first time on appeal.

ruled the calls were admissible both as *res gestae* evidence of the crime and under ER 404(b). RP 376-79. When performing the balancing test, the court found the lack of mention of the sexual assault on the 911 call tempered any unfair prejudice. RP 379. The court also ordered the mention of the rape allegation be redacted from the jail call. RP 502. The court included a limiting instruction regarding the admission of the calls in its instructions to the jury. RP 632.

During trial, Burton called Nicholas Shepherd to testify that he had invited Burton to visit him in Longview on July 5, 2016. RP 594. Burton called Dr. Leslie to testify that Burton had suffered a concussion from the motor vehicle collision. RP 550. Burton testified to wrecking his truck on Coal Creek Road. RP at 597. Burton testified that he did not recall his conversation with Plant, running from Sgt. Tonissen, or going to the hospital. RP 601, 603. However, Burton contradicted this by recounting a portion of his contact with Plant and claiming he had been put into a machine for a CT scan. RP 602, 604. Burton claimed he did not recall his jail call to his mother. RP 604. Burton claimed he did not remember the inside of Plant's residence. RP 6112. Burton also claimed he had no reason to possess Plant's knife and thought it was "a piece of junk." RP 607.

During closing argument, Burton's attorney stressed that the issue in the case was "intent." RP 659. Burton's attorney told the jury it had to

answer the question of "at any point either before or after Mr. Burton went into Ms. Plant's residence did he intend to commit a crime[?]" RP 659. Burton's attorney directly attacked his motive and ability to form intent:

- "What's his motive?"
- "What's his knowledge of what's he doing?
- "How aware is he of what's going on at that time?"

RP 659. Burton's attorney argued that Burton was disoriented and lost track of what was going on. RP 662. Burton's attorney argued he entered Plant's house and took the knife because he was not thinking clearly from suffering a concussion when he wrecked his truck. RP 666. Burton's attorney also argued he had come to Longview to visit Shepherd and was not fleeing to California. RP 668. Burton's attorney concluded by arguing that even if Burton committed a trespass by entering Plant's home, he did not intend to commit a crime. RP 670-71.

The jury found Burton guilty of residential burglary with a deadly weapon enhancement. RP 684. The Court of Appeals reversed, holding the trial court abused its discretion under ER 403 by admitting the calls. Slip Opinion at 10, 11.

V. THIS COURT SHOULD ACCEPT REVIEW THE COURT OF APPEALS' DECISION

This Court should review the Court of Appeals' decision. Under RAP 13.4(b), a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

When analyzing abuse of discretion in the application of ER 403 at trial, prior decisions of the Supreme Court and Court of Appeals weigh the probative value of evidence to determine whether it was substantially outweighed by the danger of unfair prejudice. The Court of Appeals did not do so here. Because the court's decision conflicts with these prior decisions it is appropriate for review under RAP 13.4(b)(1)(2). Further, the court's failure to consider the application of ER 403 after Burton placed his intent and motive at issue impacts its harmless error analysis and raises an issue of substantial public interest under RAP 13.4(b)(4).

A. THE COURT OF APPEALS' DECISION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING ER 403 CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND THE COURT OF APPEALS.

Because the Court of Appeals did not consider the probative value of the evidence when finding the trial court abused its discretion in applying

ER 403, its decision conflicts with prior decisions of the Supreme Court and the Court of Appeals.

> Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Because of the court's considerable discretion in administering this rule, reversible error is found only in the exceptional circumstance of manifest abuse of discretion.

State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990) (internal citations omitted). The Court of Appeals' opinion contained no analysis of the probative value of the evidence, rather it merely considered the potential for prejudice. This was an improper application of ER 403 that failed to defer to the trial court's considerable discretion in administering the rule.

A reviewing court departs from the abuse of discretion standard when it dismisses a trial court's determination of relevancy and substitutes its own analysis. *State v. Lane*, 125 Wn.2d 825, 835, 889 P.2d 929 (1995). "The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse." *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984)). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). When applying this standard, "the Court considers

whether any reasonable judge would rule as the trial judge did." *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002).

Res gestae and ER 404(b) both permit evidence of uncharged offenses or wrongs when relevant. "Where another offense constitutes 'a link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in 'order that a complete picture be depicted for the jury.'" *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 532 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d322 (1998)). "The test of admissibility is whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Mott*, 74 Wn.2d 804, 806, 447 P.2d 85 (1968). "'(A) party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.'" *Id.* (quoting *Kansas v. King*, 111 Kan. 140, 206 P. 883, 885 (1922)). ER 404(b) permits evidence of other wrongful acts to show motive or intent. *See State v. Johnson*, 159 Wn. App. 766, 773, 247 P.3d 11 (2011).

Of course, res gestae and ER 404(b) evidence are both subject to ER 403. "However, proper evidence will not be excluded because it may also tend to show the defendant committed another crime unrelated to the one charged." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). The

text of the rule requires the probative value of the evidence to be substantially outweighed by the danger of unfair prejudice. ER 403. "In determining whether or not there is prejudice, the linchipin word is 'unfair.'" *State v. Bernson*, 40 Wn. App. 729, 736, 700 PJ.2d 758, *review denied*, 104 Wn.2d 1016 (1985). Thus, ER 403 does not prohibit prejudicial evidence but is concerned with unfairly prejudicial evidence.

"Trial courts enjoy 'wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)). Even when there is danger of unfair prejudice, only when that danger substantially outweighs the probative value is evidence to be excluded. ER 403. "The balance may be tipped toward admissibility if the evidence is highly probative[.]" *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). To make a determination regarding the probative value of evidence a "court must consider the relevance of that evidence." *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). To accomplish this, the court "must decide whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable." *Id.* at 361-62.

Here, while the calls did carry some danger of unfair prejudice they were highly probative to precisely what was at issue in the case: Burton's

intent in entering the house and obtaining a weapon. It was undisputed that Burton was unlawfully in Plant's home, had taken her knife, and placed it on his person. The State had the burden of proving that when Burton unlawfully entered Plant's home, he had the intent to commit a crime against person or property therein, and that when he placed the knife on his person, he was arming himself with a deadly weapon.

The calls were res gestae evidence of a continuing criminal episode and made it obvious his reason for breaking into the home and stealing the knife was to further his flight from the assault in Seattle. The violence heard during the 911 call and alluded to in the jail call—though disturbing—showed that his flight was from a crime of serious magnitude that had just happened earlier that morning. Had his only crime involved a driving offense, breaking into a house and obtaining a weapon would seem to be extreme. However, these decisions made sense in light of the recent and more serious crime in Seattle. Put another way, *but for* his flight from Seattle, he would never have broken into Plant's home or stolen her knife more than 100 miles away in Longview. Because the calls were evidence of the crime itself as part of a singular criminal episode, their probative value weighed heavily. The Court of Appeals finding, that the jail call could not contain res gestae evidence because it was made after the crime, was incorrect. Burton's discussion of both the assault in Seattle and the

encounter with Plant connected the crimes as part of the same episode. The timing of the jail call did not bear on whether or not its content was res gestae evidence.

Also, the calls were highly probative of Burton's motive and intent. The 911 call and jail call both provided evidence that Burton was aware Lord had contacted the police and was in active flight from Seattle when he wrecked his truck. Thus, entering the house and placing the knife in his belt were not accidents due to a head injury. Nor were his statements to Plant about his girlfriend setting him up and being on the run from police merely the ramblings of a concussed driver. Rather, he intentionally entered the home and armed himself with the knife to avoid police or anyone else that would interfere with his flight.

The trial court—which had presided over the case once before and was well aware of the issues—considered the evidence. To avoid unfair prejudice the court redacted the rape allegation. With the rape allegation removed, the trial court found the probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals provided no such analysis. It considered the emotional response the jury could have had to hearing the calls but expressly declined to decide whether the 911 call was res gestae or was admissible under ER 404(b). And it failed to see any probative value in the jail call—which showed the burglary

occurred while in flight from the assault in Seattle, and that Burton had his faculties about him when confronted by Plant. The Court of Appeals erred in finding unfair prejudice without weighing this danger against the probative value of the evidence. Without doing so the Court of Appeals was not positioned to find the trial court had manifestly abused its discretion. The failure to properly apply ER 403, conflicts with prior decisions of the Supreme Court and Court of Appeals. Thus, it is appropriate for review.

B. AFTER BURTON PLACED HIS MOTIVE AND INTENT AT ISSUE, THE PROBATIVE VALUE OF THE CALLS INCREASED, THUS EVEN IF THE INITIAL ADMISSION WAS ERROR IT WAS HARMLESS AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Even if the trial court's initial decision under ER 403 was an abuse of discretion, once Burton placed intent and motive at issue, the probative value of the evidence far outweighed the danger of unfair prejudice, making the initial decision harmless error at most; the Court of Appeals failure to consider this distinction raises an issue of substantial public interest. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Burton put forward a defense denying motive or intent. Upon raising this defense, the probative value of the calls increased dramatically, because they were necessary to rebut material assertions.

"To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), *overruled on other grounds* by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). A trial court has discretion to admit otherwise inadmissible evidence when a party raises a material issue, and the evidence in question bears directly on that issue. *State v. Berg*, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). Our Supreme Court has held that a prosecutor may elicit testimony that would otherwise be inadmissible when the defense opens the door to such testimony. *State v. Jones*, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988). For example, in *State v. Medrano*, 80 Wn. App. 108, 112-14, 906 P.2d 982 (1995), evidence of prior burglary convictions was properly admitted in a residential burglary case when the defendant admitted to burglarizing a home but claimed due to his intoxication he did not possess intent.

Here, Burton called Shepherd to testify he invited Burton to Longview to show he was not in flight. Further, Burton claimed due to the concussion he had no memory of entering the house, taking the knife, or telling Plant he was fleeing from police.[2] This greatly increased the

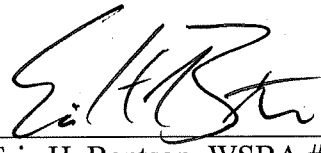
[2] Further, had Burton presented different evidence, the State would have been able to use testimony from prior trial to show Burton's story had changed.

probative value of the calls. The calls showed he was in flight from a crime of serious magnitude and was not simply responding to his friend's invitation. The jail call demonstrated that on the date of the crime, after the collision, he remembered events, including his conversations with Plant and Linden. This contradicted his testimony. It also showed he was unaware of his location—further rebutting the claim that he came to Longview to visit Shepherd. When a person commits a violent crime, breaks into a home, and arms himself with a weapon, there is a public safety interest in having the case decided on admissible evidence. To allow Burton to claim a benign reason for breaking into Plant's home when there was highly probative evidence to the contrary would result in a disservice to that public safety interest. Therefore, the failure to consider harmless error in light Burton's defense creates an issue of substantial public interest.

VI. CONCLUSION

Because the Court of Appeals did not consider the probative value of the evidence in finding that the trial court abused its discretion its decision should be reviewed under RAP 13.4(b) (1)(2)(4).

Respectfully submitted this 28th day of June, 2019.



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Filed
Washington State
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Division Two

May 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER ERIC BURTON, Appellant.	No. 50316-6-II UNPUBLISHED OPINION

SUTTON, J. — Christopher E. Burton appeals his conviction and sentence for residential burglary with a deadly weapon sentencing enhancement. Burton argues that the trial court abused its discretion by admitting recordings of a 911 telephone call from Burton's girlfriend and a telephone call from Burton to his mother while he was in jail. We hold that the trial court abused its discretion by admitting the 911 and jail call recordings. Accordingly, we reverse and remand for a new trial.[1]

[1] In his opening brief and a statement of additional grounds (SAG), Burton raises several additional issues. Because we reverse based on the erroneous admission of the 911 and jail telephone call recordings, we do not address any issues other than Burton's claim that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to disclose evidence.

Appendix 1

FACTS

I. BACKGROUND FACTS

At 2:46 A.M. on July 5, 2016, Virginia Lord[2] called 911 from Seattle to report being assaulted by her boyfriend, Burton. At one point during the call, Burton resumed beating Lord. The call ended after Burton left Lord's home. Lord and another person identified Burton by name and described his clothing and his truck. Later that morning, Burton wrecked his truck in a ditch while driving in a rural area near Longview.

Evelyn Plant encountered the wrecked truck when she was returning to her nearby home. Plant stopped to investigate the wreck but could not locate the driver. Another driver who had stopped to check on the wreck called 911 and reported the crash. Plant then returned to her home. Upon entering her home, Plant noticed a plastic Dr. Pepper bottle on the counter that had not been there when she left. Plant then noticed that the door to her utility room was ajar. When Plant entered the utility room, she encountered Burton walking up the stairwell from her basement with his hands in the air.

Plant ordered Burton to leave her home. Burton told Plant he was trying to hide from the police because his girlfriend had abused him and framed him, and that he needed to get away immediately. Burton explained that he had crashed his car while trying to look at Facebook on his phone and that he did not want to return to the crash because he did not want to get caught by police. Burton offered Plant money to drive him to the bus depot. Plant observed Burton as "[u]pset, scared, almost panicky," and nervous. Report of Proceedings (RP) at 403. After about

[2] Lord's surname has since changed to Burton. Because she and the appellant share a last name, we refer to her by her former name for clarity. We intend no disrespect.

ten minutes, Plant's significant other arrived at her home and began talking to Burton. Plant went inside her home and called 911.

When law enforcement arrived at Plant's home, Burton hid in nearby trees. A police officer saw Burton and told him to stop. Burton complied and briefly spoke with the police officers. When one of the officers told Burton he was investigating the accident that had occurred nearby, Burton ran. After a pursuing officer threatened to use a stun gun on him, Burton stopped. The officers arrested Burton and searched him for weapons.

An officer located a large knife in a sheath in Burton's waistband area. The knife belonged to Plant and was typically stored in a bin outside of her bedroom.

An officer then took Burton to a hospital where he was diagnosed with a concussion without loss of consciousness. Burton was then transported to jail.

Later that evening, Burton called his mother from jail. Burton told his mother that he had gone to Plant's house to call the police after his crash. Burton and his mother also discussed the incident in Seattle. When Burton's mother asked him where he was, Burton had to ask another person in the jail.

II. PROCEDURAL FACTS

The State charged Burton with residential burglary with a deadly weapon sentencing enhancement, hit and run, and obstructing a law enforcement officer.

A jury found Burton not guilty of hit and run and guilty of obstructing a law enforcement officer. But the jury could not reach a verdict on the residential burglary with a deadly weapon sentencing enhancement. The trial court declared a mistrial on the residential burglary charge and

deadly weapon sentencing enhancement. The case proceeded to a second trial on the residential burglary charge and deadly weapon sentencing enhancement.

At the second trial, the State brought a motion in limine to admit recordings of Lord's 911 call and Burton's call from jail to his mother. The State argued that the recordings were admissible under ER 404(b) to show that when Burton entered Plant's home, it was with intent and motive to commit a crime by stealing a knife for its potential use in his flight from the alleged assault in Seattle. The State further argued that the recordings were admissible as res gestae evidence because Burton's knowledge of the prior allegation of assault and his subsequent flight represented "a link in the chain" of an unbroken sequence of events. Clerk's Papers (CP) at 123. Burton argued that the recordings were "much more prejudicial than probative in terms of what the effect would be on the jury." RP at 369.

The trial court admitted both the 911 call and the jail call "under both the res gestae exception and also the 404(b) exception." RP at 379. The trial court commented that it did not "think that the unfair prejudice rises to a level where it overpowers and becomes an issue of such a magnitude that the probative value shouldn't be seen by the jury." RP at 379. The trial court instructed the jury that it could only consider the calls "for the purposes of providing a complete picture and immediate context to the events of July 5, 2016, or for assessing motive, credibility, intent, knowledge, absence of mistake, or to rebut a material assertion." CP at 167.

Following opening statements, before calling any witnesses, the State played the 911 call for the jury. The recording began with Lord telling the 911 operator "I've been assaulted. My boyfriend came into my house. He's–well, my ex-boyfriend. He's intoxicated. . . . [H]e punched me in my ribs. He punched me in my back." RP at 383-84. Lord warned the operator that Burton

remained in her home. The recording then captured sounds of Lord screaming and crying, "Stop. Stop. Stop," and hitting sounds. RP at 385. The recording continued with the sound of Lord screaming and crying until another person spoke to the operator, explaining that Lord appeared to be "hurt quite badly," noting "[t]here's quite a bit of blood." RP at 386. The other person asked the operator to respond "as fast as possible" because she was "a little nervous" and gave the operator a description of Burton and his truck. RP at 386. The recording concluded with Lord back on the line, saying, "It was Christopher Burton. . . . He was hitting me really hard at first. Yeah, he was beating me[.]" RP at 389.

Later in trial, before the State played the recording of the jail call between Burton and his mother, Burton renewed his objection to the admission of the jail call. Burton argued that because his mother, during the call, referred to a rape allegation stemming from the Seattle incident, the call was "even more inflammatory." RP at 497. The State argued that the jail call should be admitted because the call showed Burton was in flight, knew Lord made allegations against him in Seattle, "and the magnitude of that situation is part of why we argue that he broke in[to] a house, armed himself with a weapon, [and] was so desperate to get away from the police." RP at 500. The trial court admitted the jail call but required the State to skip any reference to rape on the recording.

On the recording, Burton told his mother he had wrecked his truck and walked to a nearby house to call the police. Burton and his mother also discussed the incident in Seattle. Burton told his mother, "That stuff is absolutely not true." "She's been trying to set me up for a while and she finally (unintelligible) it." RP at 540. Burton asked his mother, "So I take it she went to the police and called the court and blah, blah, blah?" RP at 541. Burton's mother replied, "I sent you the

information. She sent me pictures of her at the hospital beat up." RP at 541. Burton asked his mother to bail him out of jail, but she refused. The call continued:

> [Burton]: I'm going to tell you about something. So when we had sex first, right, and she smelled (unintelligible), right, and it was gross and I said something and she lashed out, went to the phone and called the fucking cops. I'm trying to get the fuck out, but she attacks me, starts screaming and then it ends up in an altercation. That's exactly what happened, mom.
>
> [Mother]: Well, then you tell it to the judge. Like I say, I mean, it is what it is. Would I bring the money to help you? I don't have the time to come up here. That is a conversation that you have with the judge. I don't know what to tell you. I mean, any man that would (unintelligible) me and then have the nerve to say that, I'd want to bash your face in.
>
> [Burton]: Ma, it was gross, it was (unintelligible).
>
> [Mother]: It doesn't matter. It doesn't matter. Wasn't too dirty for you to have sex with her.
>
> [Burton]: All right. I can't believe she's doing that to me.
>
> . . . .
>
> Her goal is to completely bury me, you know that? Completely bury me.
>
> [Mother]: Christopher, everyone within a thousand miles told you to stay away from her.
>
> . . . .
>
> [Burton]: I guess I'm just going to fight this and fight that and it ruins everything and just sit here. I was literally coming home. I was on my way home. I just couldn't take any more. I was coming home.
>
> . . . .
>
> [Mother]: What? Where are you?
>
> [Burton]: I'm out in the middle of – hey, what town is this? Longview, thank you. Longview.

RP at 542-45.

Burton testified that he wrecked his truck because he was trying to turn on his cellular phone to call a friend. After the wreck, he walked away from the truck and encountered a home, later identified as Plant's home. He testified that he did not remember having a conversation with

Plant, but he also testified that he encountered Plant on her porch and that she told him to leave. Burton recalled a man arriving, but Burton did not remember talking to him. Burton also testified that he did not remember running from law enforcement, being taken to the hospital, or possessing the knife.

The jury found Burton guilty of residential burglary and entered a special verdict finding that he was armed with a deadly weapon at the time of the burglary. The trial court sentenced Burton to 77 months confinement, including 12 months for the deadly weapon sentencing enhancement.

Burton appeals.

ANALYSIS

Burton argues that the trial court abused its discretion by admitting recordings of the 911 telephone call and the jail telephone call. We agree.

I. LEGAL PRINCIPLES

We review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion if it admits evidence contrary to law, or when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Quaale*, 182 Wn.2d 191, 196-97, 340 P.3d 213 (2014).

Evidence of a defendant's prior misconduct is generally not admissible "to demonstrate the accused's propensity to commit the crime charged." *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); ER 404(b). However, ER 404(b) allows for the introduction of evidence of prior misconduct for other purposes, such as showing motive or intent. *Fisher*, 165 Wn.2d at 744.

"We read ER 404(b) in conjunction with ER 403," which "requires the trial court to exercise its discretion in excluding relevant evidence that would" unfairly prejudice the accused. *Fisher*, 165 Wn.2d at 745. Prior to admitting misconduct evidence, the trial court "must (1) find by a preponderance of the evidence [that] the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence [in proving] an element of the crime, and (4) weigh the probative value [of such evidence] against [its] prejudicial effect." *Fisher*, 165 Wn.2d at 745. Even if evidence is admissible under one of ER 404(b)'s exceptions, it must still be excluded if the unfair prejudice substantially outweighs the evidence's probative value. *State v. Fuller*, 169 Wn. App. 797, 829-30, 282 P.3d 126 (2012). "'[U]nfair prejudice' is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

Res gestae evidence is evidence that completes the story of the crime on trial by proving the context of events near in time and place to the commission of the crime. *State v. Grier*, 168 Wn. App. 635, 647, 278 P.3d 225 (2012). Res gestae evidence also allows the party presenting the evidence to depict a complete picture for the jury. *Grier*, 168 Wn. App. at 647. Res gestae evidence "constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense." *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Collateral prior crimes are admissible as res gestae when they complete the story of a crime "'by proving its immediate context of happenings near in time and place'." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (quoting E. Cleary, McCormick's Law of Evidence s 190, 448 (2d ed. 1972)).

We review res gestae evidence under ER 401, 402, and 403. If the res gestae evidence is relevant under ER 401, then it is generally admissible under ER 402, unless its potential prejudice outweighs its probative value under ER 403. *Grier*, 168 Wn. App. at 646, 649; *State v. Briejer*, 172 Wn. App. 209, 225, 289 P.3d 698 (2012). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. If a logical nexus exists between the evidence and the fact to be established, evidence is relevant. *Briejer*, 172 Wn. App. at 225-26. But relevant evidence may nonetheless "'be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Briejer*, 172 Wn. App. at 226 (quoting ER 403).

II. ABUSE OF DISCRETION

A. 911 TELEPHONE CALL

Here, the State offered the recording of the 911 telephone call to show that Burton's intent and motive for unlawfully entering Plant's home and stealing her knife was to run away from law enforcement following the serious incident in Seattle.

Assuming without deciding whether the 911 call fell under an ER 404(b) exception or was res gestate evidence, we hold that the danger of unfair prejudice from the 911 telephone call recording substantially outweighed its probative value. To be admitted under either an ER 404(b) exception or as res gestae evidence, evidence must be more probative than prejudicial. *Fuller*, 169 Wn. App. at 829-30; *Grier*, 168 Wn. App. at 649. Such is not the case here.

The 911 telephone call recording, played for the jury before any witness took the stand, contained the sounds of Burton violently beating his girlfriend while she screamed and begged

him to stop. The recording contained reports from another person that "[t]here's quite a bit of blood," and pleas for the medics to come "as fast as possible." RP at 386. The recording painted Burton as a violent and dangerous man and likely inflamed the passions of the jury. Thus, any probative value the 911 call may have had relating to Burton's intent and motive for entering Plant's house was substantially outweighed by the danger of unfair prejudice arising from the contents of the call. Accordingly, the trial court abused its discretion by admitting the highly prejudicial 911 call recording.

B. JAIL TELEPHONE CALL

We further hold that the trial court also abused its discretion by admitting the jail telephone call recording as ER 404(b) and res gestae evidence. The jail call recording does not qualify as res gestae evidence because it was made many hours after the incident and was not part of an "unbroken sequence of events surrounding the charged offense." *Brown*, 132 Wn.2d at 571. And the jail call was also inadmissible as ER 404(b) evidence.

The State offered the jail telephone call to show how serious the incident was in Seattle and also to show Burton's intent in stealing Plant's knife. As previously discussed, ER 404(b) evidence is admissible to show motive and intent. *Fisher*, 165 Wn.2d at 744. However, the conversation on the jail call recording consisted primarily of Burton telling his mother his version of the events in Seattle, mitigating the incident, and discussing his dysfunctional relationship with Lord. Any connection between Burton's conversation with his mother and his intent and motive for unlawfully entering Plant's home was attenuated and speculative at best.

Moreover, the jail call further focused the jury on the Seattle assault, and the cavalier discussion Burton had with his mother about "gross" sex with Lord likely only accentuated the prejudicial effect of the evidence. Thus, any probative value offered by the jail call recording was substantially outweighed by the risk of unfair prejudice. Consequently, the trial court also abused its discretion by admitting the jail call recording.

III. NOT HARMLESS ERROR

We further hold that the erroneous admission of the recorded 911 and jail telephone calls was not harmless.

A trial court's improper admission of evidence generally is a nonconstitutional error that requires reversal only if the evidence materially impacted the trial's outcome. *State v. Beadle*, 173 Wn.2d 97, 120-21, 265 P.3d 863 (2011). Erroneous admission of evidence is harmless unless there is a reasonable probability that, but for the error, the verdict would have been materially different. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016). In addition, improper admission of evidence constitutes harmless error if the evidence is of only minor significance in reference to the evidence as a whole. *State v. Rodriguez*, 163 Wn. App. 215, 233, 259 P.3d 1145 (2011).

These improperly admitted telephone call recordings were not of minor significance. The 911 call contained graphic audio of a violent crime in progress that would only invoke an emotional response from the jury. The spectre of the violent incident in Seattle permeated the entire trial, taking a central role in the State's theory of the case. The jail call recording, which captured Burton cavalierly recalling having sex with Lord to his mother, likely accentuated the jury's emotional response to the violent 911 call. Given the highly prejudicial impact of the telephone calls, and the prominent role the calls played in the prosecution, there is a reasonable probability that the

erroneous admission of the 911 and jail calls materially impacted the trial's outcome, and therefore, the trial court's errors were not harmless.

Accordingly, we reverse Burton's conviction for residential burglary with a deadly weapon sentencing enhancement and remand for a new trial.[3]

[3] In his SAG, Burton also argues that the State committed *Brady* violations by suppressing photographs during the first trial that the State later offered for admission in the second trial, including a photograph of Burton's wrecked truck, various photographs of Plant's home and neighborhood, and a photograph of a street sign. Because this is a constitutional argument that could arise again on remand, we exercise our discretion and address this argument. We hold that Burton's claims fail because the record does not support his argument that any *Brady* violations occurred.

We review an alleged *Brady* violation de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). *Brady* imposes a duty on the State to disclose material evidence favorable to the defendant. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). To establish a *Brady* violation, a defendant must demonstrate the existence of each of three elements: "'[(1)] the evidence at issue must be favorable to the accused . . . ; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.'" *Mullen*, 171 Wn.2d at 895 (some alternations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. 2d. Ed. 286 (1999))

Burton fails to make any argument that the unintroduced photographs meet any of the elements of a *Brady* violation. Burton offers no argument, and this court can think of none, as to how the photographs would have been favorable to Burton or how their absence from the first trial caused him any prejudice. In the first trial, the jury found Burton not guilty of the hit and run charge and hung on the residential burglary charge. In the retrial for residential burglary, when these various additional photographs were admitted, the jury found Burton guilty. We hold that Burton's claims fail because the record does not support his argument that any *Brady* violations occurred.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

A.C.J.
LEE, A.C.J.

Jack Nevin JPT
NEVIN, J.P.T.

Washington Rules of Evidence

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appendix 2

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Supreme Court portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 28th, 2019.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

June 28, 2019 - 3:39 PM

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