NO. 92836-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN KAYSER,

Appellant.

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

The Honorable Deborra Garrett, Judge

REPLY/ANSWER TO CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

A. STATEMENT OF CASE IN REPLY 1

B. ISSUE RAISED IN CROSS-PETITION FOR REVIEW 4

C. ARGUMENT IN REPLY 4

1. THE ISSUE DOES NOT MEET THE REQUIREMENTS OF RAP 13.4(b). . . . 4

2. THE COURT OF APPEALS DECISION OF THIS ISSUE IS CORRECT. 5

D. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Gates,
28 Wash. 689 (1902) 8

State v. Saltarelli,
98 Wn.2d 358, 655 P.2d 697 (1982) 9

State v. Wade,
98 Wn. App. 328, 989 P.2d 576 (1999) 6, 9

STATUTES AND OTHER AUTHORITIES

ER 404(b) 5, 8

RAP 13.4(b) 4, 5

A. STATEMENT OF CASE IN REPLY[1]

There was no dispute that shots were fired. Mr. Adams testified that the three shots were all fired into the air. RP 343. Two neighbors passing by saw the gun aimed to the sky. RP 373, 377.

After arresting Mr. Kayser on his property, the police obtained a warrant to search his warehouse office to seize the shotgun. RP 423-25.

During the search, among many papers all over Mr. Kayser's very large office, police also photographed a handwritten note taped on the inside of a window shutter. The note began with "Stop" drawn in something like a stop sign shape. "Do not ... without permission of owner and an appointment. This is a very dangerous place." The exhibit is a photograph. It did not capture the original text covered by post-it notes, which added "armed response." RP 456-58, 482; Ex. 90-91. The note faced into the office, not outside. Mr. Adams never saw it. RP 427-32.

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[1] Petitioner provided a Statement of the Case in his Petition for Review. This Statement in Reply addresses only the issue raised by the State in its Answer. RAP 13.4(d).

The defense objected to admitting this exhibit under ER 404(a) and (b). Counsel also objected that it was not within the scope of the search warrant, as it was not a long gun, shells, or a document of dominion or control. RP 429-32. The court ruled it was in plain view during a lawful search, and so admissible. RP 432.

Deputy King told the jury they found signs that were "interesting and relevant:" "Stop. This is a very dangerous place. Armed response." RP 456.

After Deputy King testified to this note, the defense again objected and moved for a mistrial. The judge acknowledged she had misunderstood: she thought the note was visible from the exterior of the office door. The State admitted it was only visible inside the office. RP 640-46. The court acknowledged it had allowed the testimony and could not "unring the bell." It concluded the note was not a "bad act" and not prejudicial. The court adhered to its original ruling and denied a mistrial. RP 661-65.

In closing, the prosecutor argued at length what is involved in determining one's intent, RP

1062, and challenged Mr. Kayser's credibility that he was afraid of this man, RP 1065-71. He completed this argument with the sketch.

> [S]peaking of all those things that he kept, you're going to see a photograph of the, what I would suggest to you looks like a sign that he was preparing to make that says writing that was taped up in his office [sic]. It has an outline around it, some words across it and little holes where it could be screwed in, at least that's how it's drawn, and it says "this is a very dangerous place. No trespassing". "This is a very dangerous place" and a little sticky note attached "armed response". That's presented to show you the defendant's intent. It's trespassing, that's what he thought was his plan, that's what he was thinking about.

RP 1071-72. There was no evidence Mr. Kayser intended to make a permanent sign or post it. This argument was not "only mentioned [] in passing." It certainly was not "cautioning the jury this evidence was **relevant only** in evaluating Kayser's intent," nor "asserting the sign was **relevant solely** for the limited [sic] of assessing of Kayser's intentions during the incident." Answer at 2, 10 (emphases added).

The Court of Appeals reversed the conviction on this issue. It observed that ER 404(b) prohibits the use of any kind of "other" act as

propensity evidence. It found the erroneous admission was an abuse of discretion and prejudicial. COA Opinion at 5-8.

B. ISSUE RAISED IN CROSS-PETITION FOR REVIEW

The State presents this single issue: the improper admission of evidence under ER 404(b).

C. ARGUMENT IN REPLY

1. THE ISSUE DOES NOT MEET THE REQUIREMENTS OF RAP 13.4(b).

The State claims "This Court has a substantial interest in ensuring multiple trials are not required at public expense." Answer/Cross Petition for Review ("Answer") at 5.

The State's sole citation to RAP 13.4(b) asserts:

> the public has a substantial interest in ensuring trials aren't reversed based on reasonable discretionary decisions of the trial court; particularly where the admitted evidence is relevant, did not play a significant role at trial and the evidence was not presented or argued as impermissible character evidence pursuant to ER 404(b). RAP 13.4(b)(4).

Answer at 11. But this Court's review is appropriate only under RAP 13.4.

> **(b) Consideration Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:
> ...

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(4).

If the need for a new trial upon reversible error were "an issue of substantial public interest that should be determined by the Supreme Court," every case reversed by the Court of Appeals would warrant this Court's review.

The State can control expending public funds on a new trial. The prosecuting attorney has the discretion not to try the case again.

The Court of Appeals applied the proper rule of law, ER 404(b). It applied the proper standard of review, abuse of discretion. It considered whether the error was harmless, as the law requires, and found it was indeed prejudicial in the facts of this case. COA Opinion at 5-8. The Court of Appeals opinion on this issue, therefore, does not warrant this Court's review.

2. THE COURT OF APPEALS DECISION OF THIS ISSUE IS CORRECT.

> If the State offers evidence of a prior act to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior act connects to the intent required to commit the charged offense.

COA Opinion at 6-7, quoting *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). The State argued the sketch in Mr. Kayser's office "was an indication from Kayser that he intended to deal with uninvited trespassers with an armed response." COA Opinion at 7. But as the Court noted: "There was no evidence that Kayser himself made the sketch, what its purpose was, or how long it had been hanging in his office." *Id.*

The Court of Appeals applied the proper standard of review: abuse of discretion. *Id.*

> "Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a nonpropensity based theory, there must be some similarity among the facts of the acts themselves." *Wade*, 98 Wn. App. at 335. The State did not identify for the trial court any similarity between Kayser's act of firing shots outside the office and his "other" act of keeping the sketch inside the office. When the issue first arose, the prosecutor said, "I think the jury can make of it what they will." What the jury was then allowed to "make of it" was that Kayser had a propensity to use arms to scare off strangers. We conclude the trial court abused its discretion by admitting the sketch.

COA Opinion at 7. The Court further found the error was prejudicial because Mr. Kayser's defense was that he perceived Mr. Adams to be a trespasser

who was menacing his wife and did not leave when asked.

> The exhibit enabled the State to argue that an "Armed Response" was Kayser's preplanned response to unwelcome visitors in general. Thus, the exhibit cast doubt on Kayser's claim that his use of force in this incident was lawful.
>
> The trial court reasoned that the note was not "all that prejudicial" to Kayser because it simply reflected that he was a careful and private man, concerned about the confidentiality of his trade secrets and the safety of himself and his wife. The sketch was more than that. It included the statement "This is a very dangerous place" and the note "Armed Response." This material was prejudicial. It suggested that Kayser was a dangerous individual inclined to resort to firearms without legitimate reason.

COA Opinion at 8.

The State still offers no evidence connecting the sketch to Mr. Kayser other than it was in his office -- with enormous amounts of other papers and sketches. It offers nothing to show he made this sketch or endorsed what it said, or considered it at all in connection with this incident.

Indeed, the State persists in arguing precisely the impermissible propensity purpose of this evidence.

> The language on this sign suggests Kayser had a pre-designed plan to deal with perceived trespassers as further

> corroborated by the shotgun ready for use in Kayser's office ... .

Answer at 1.

> The language suggests Kayser had a plan to deal with illegal trespassers with an armed response ... .

Answer at 14. A pre-existing plan to use weapons is a propensity to do so.

In fact, Mr. Kayser did not initially confront Mr. Adams with a shotgun. He only got it from the office after Mr. Adams failed to identify himself and refused to leave as asked and ordered more than once. RP 824-29, 262-68, 334-35, 341-42, 738, 763-65.

The State remarkably cites a single case, from 114 years ago, before ER 404(b) and before the Rules of Evidence, to claim that

> prior threats are admissible even if they are not directed toward a particular person pursuant to ER 404(b). *State v. Gates*, 28 Wash. 689 (1902).

Answer at 15. It makes no effort to distinguish the more recent cases the Court of Appeals relied on addressing ER 404(b). Instead, it argues again that the evidence goes to prove Mr. Kayser's intent.

> That a prior act "goes to intent" is not a "magic [password] whose mere

> incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].

State v. Wade, 98 Wn. App. at 334, citing *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982).

D. CONCLUSION

This Court should deny review of the issue the State raises in its answer, and grant review of the issues in Mr. Kayser's Petition for Review.

DATED this 7th day of April, 2016.

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ALEXANDRA FAST declares:

On this date I caused a copy of this document to be served on the following entities by depositing them in the United State Mail Service, postage prepaid, as well as via email, address as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

4·7·2016-SEATTLE, WA
Date and Place

ALEXANDRA FAST

OFFICE RECEPTIONIST, CLERK

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Please accept for filing the attached "Reply/Answer to Cross-Petition for Review". A certificate of service is attached to the pleading.

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