

No. 72608-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE WRIGHT III,

Appellant.

FILED
Feb 12, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Elizabeth L. Berns

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The evidence of the California robbery was not admissible.**

The trial court admitted evidence of the California robbery based upon the State's argument that the California robbery and the offenses in Washington were so similar that the criteria for admission under ER 404(b) had been met. But, the only similarity between the offenses in California and those in Washington was Clarence Wright, thus admission of the evidence of the California robbery was inadmissible propensity evidence: Mr. Wright robbed the retail store in California therefore he attempted to rob the Tillmans.

The two occurrences could not be more dissimilar.¹ The California robbery was of a retail store where Mr. Wright entered the store with a firearm and demanded money. 9/4/2014RP 49. The Washington offenses involved a private residence that Mr. Wright apparently chose at random. Mr. Wright said nothing to the Tillmans and demanded nothing from them. The State points out that Mr. Wright's actions in California were "goal-directed behavior;" an apt

¹ Mr. Wright readily admitted his responsibility for the California offense when interviewed by the San Rafael detective following his arrest on the Washington offenses. 9/4/2014RP 61-69.

description that describes nothing about his actions in Washington.

Brief of Respondent at 14.

The State properly concedes that no one knows why Mr. Wright attempted to enter the Tillman's residence. Brief of Respondent at 10.

The State attempts to diminish this point, by claiming without any evidentiary support, that Mr. Wright's actions were "attributable to some interaction with one or more members of that family." *Id.* A quick review of the evidence presented in this case shows this presumption is a complete fantasy.

Additional unsupported claims regarding the similarity of the offenses in the two states is found in the State's claim that Mr. Wright's acts regarding the Tillmans was based upon his "desperate need of money." Brief of Respondent at 11. Again, this assumption is unsupported in the record.

Finally, the State parrots its argument from trial regarding the *res gestae* exception, but fails to explain how the California robbery fits within the "immediate context" requirement for admission. Under the *res gestae* exception to ER 404(b), admission of evidence of other crimes or bad acts is allowed to complete the story of a crime or to provide the context for events close in time and place. *State v. Powell*,

126 Wn.2d 244, 254, 893 P.2d 615 (1995). The purpose of the evidence is not to demonstrate the defendant's character but to show the "sequence of events surrounding the charged offense." *State v. Hughes*, 118 Wn.App. 713, 725, 77 P.3d 681 (2003). Such evidence is "restricted to proving the *immediate* context within which a charged crime took place." *State v. Brown*, 132 Wn.2d 529, 576, 940 P.2d 546 (1997) (emphasis in original).

As argued in the opening brief, the California robbery was not within the immediate context of the Tukwila incident. The two incidents occurred approximately two months apart and involved separate victims who did not know one another; the evidence did not relate to a single sequence of events, but to two unrelated events in two different states. As argued, the two incidents could not be more different; in the California robbery it was clear Mr. Wright was trying to take money; in the Tukwila case it was unclear why Mr. Wright tried to enter the apartment.

The evidence of the California robbery was admitted at Mr. Wright's Washington trial solely as evidence of propensity, an improper use of that evidence. ER 404(b). The trial court erred in

admitting this evidence and Mr. Wright is entitled to reversal of his convictions and remand for a new trial.

2. There was a substantial likelihood the prosecutors' misconduct affected the jury's verdict.

Initially, the State claims Mr. Wright “does not frame the matter in the appropriate context of appellate review.” Brief of Respondent at 19. The State is simply wrong; Mr. Wright plainly framed the issue as one of prosecutorial misconduct. Thus the standard of review is not an abuse of discretion, as the State wishes, but whether the prosecuting attorney's misconduct had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

The State properly concedes that “the challenged remarks of the prosecutors were poorly chosen and could have been worded more carefully or left unsaid.” Brief of Respondent at 20. The State also concedes that several of the challenged remarks by the prosecutor “are problematic insofar as they convey, explicitly or implicitly, the personal opinions of the State's counsel as to Wright's guilt.” Brief of Respondent at 21. But the State concludes with a harmless argument;

that there was substantial evidence of Mr. Wright's guilt. Brief of Respondent at 21-22.

[D]eciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

In re Personal Restraint of Glasmann, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). Thus, whether there was substantial evidence of Mr. Wright's guilt misses the point; the issue is whether there was a substantial likelihood the misconduct affected the verdict.

Again, as argued in the opening brief, the prosecutor's improper comments went directly to Mr. Wright's defense. Dr. Beaver was the primary witness for Mr. Wright and who opined that Mr. Wright did not have the capacity to form the requisite intent for the charged offenses. The prosecutor's comments about the credibility of Dr. Beaver provided the imprimatur of the State opining not only that Dr. Beaver was not credible, but further opining that Mr. Wright was guilty.

The prosecutor's attack on Dr. Beaver and his comments on Dr. Beaver's credibility were clearly improper and there was a substantial

likelihood those comments affected the jury's verdict. Mr. Wright is entitled to reversal of his convictions and remand for a new trial.

B. CONCLUSION²

For the reasons stated in the previously filed Brief of Appellant and this reply brief, Mr. Wright asks this Court to reverse his convictions and remand for a new trial.

DATED this 12th day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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² Mr. Wright relies on his briefing in the Brief of Appellant on the sentencing issues to urge this Court to reverse his life without the possibility of parole sentence.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DEBORAH DWYER, DPA [paoappellateunitmail@kingcounty.gov] [deborah.dwyer@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
<input checked="" type="checkbox"/> CLARENCE WRIGHT III 215148 MARIN COUNTY JAIL 13 PETER BEHR DR SAN RAFAEL, CA 94903	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF FEBRUARY, 2016.

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