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NO. 63419-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D

JUL 24 2009

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ORLEN DARDEN, JR.,

Appellant.

2009 JUL 24 PM 3:56

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STATE OF WASHINGTON

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it permitted the State to introduce irrelevant, prejudicial evidence appellant was a convicted felon.

Issue Pertaining to Assignment of Error

The State charged appellant with felony harassment based on allegations he threatened to kill a community corrections officer (CCO) and deputy sheriff after they detained him for a community custody violation. Over defense objection, the court permitted the State to introduce evidence appellant was a “convicted felon on [Department of Corrections (DOC)] supervision” at the time of the offense. The trial court acknowledged such evidence was prejudicial, but concluded it would be too confusing to simply inform the jury that appellant was on community custody.

Did the trial court commit reversible error when it admitted irrelevant, prejudicial evidence appellant was a convicted felon?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charges, Pretrial Motions and Rulings

The State charged appellant Orlen Darden, Jr. with two counts of felony harassment<sup>2</sup> based on threats to kill CCO Michael Schemnitzer and

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 3/12/09; 2RP – 3/16/09; 3RP – 3/17/09; and 4RP – 4/24/09.

Deputy Jeffrey Hancock occurring while the officers transported Darden to jail for a community custody violation. CP 1-16. The State asserted Darden swore on his gang that he would shoot the officers in the same manner that Darden's acquaintance shot Deputy Steve Cox, an officer killed the line of duty.<sup>3</sup> CP 3-6. The State also alleged two aggravating factors applied to each count: (1) the offense had "a destructive and foreseeable impact on persons other than the victim" and (2) the victims were law enforcement officers and the defendant knew that fact. CP 15-16; RCW 9.94A.535(3)(r) and (v).

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<sup>2</sup> RCW 9A.46.020 provides:

- (1) A person is guilty of harassment if:
  - (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
    - ....
    - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
  - (2) A person who harasses another is guilty of a gross misdemeanor . . . except that the person is guilty of a class C felony if . . . (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

<sup>3</sup> Hancock replaced Cox as the White Center community-policing officer and had a photo of Cox taped to the Plexiglas divider in his patrol car. 3RP 63-68. CCO Schemnitzer rode with Cox during some patrol shifts and rode with Hancock after Cox's death. 2RP 40-41, 57.

Darden moved to exclude evidence regarding gang affiliation and prior felony convictions under ER 404(b) and ER 609. CP 9-14; 1RP 118-21, 137-38; 2RP 8. The State sought to admit the evidence, including evidence Darden swore on his gang in front of another arrestee that he would carry out the threat, to prove the element of the officers' reasonable fear. 1RP 116-17.

After a hearing, the court permitted the State to introduce testimony that Darden admitted he was member of the West Side Crime Family (WSCF), that Darden was a "known gang member," and that WSCF was a real gang. The court also stated it would permit testimony on the significance of swearing on one's gang. 1RP 135-39; 2RP 3-9. The court excluded testimony regarding WSCF's specific criminal activities and any suggestion WSCF was responsible for Cox's death. Id.

The court rejected Darden's argument the State should be prohibited from referring to Darden as a felon and be permitted only to mention he was on community custody at the time of the threats. 1RP 135-39; 2RP 7-11. The court ruled the witnesses could refer to Darden as a "felon" but not a "violent felon" because the latter term was too prejudicial. 1RP 136. The court reasoned that merely stating Darden was on "community custody" would confuse jurors and stating he was on probation would be inaccurate. 1RP 138.

2. Officers' Testimony, Verdict and Sentence

Deputy Hancock and CCO Schemnitzer encountered Darden while assisting at a traffic stop in White Center. 2RP 39; 3RP 75. As Hancock approached the car, he saw Darden, a backseat passenger, reach into his pocket as if he was concealing something. 3RP 78. Hancock asked Darden to show his hands. 3RP 79. Darden kept one hand in his pocket and said, "What are you going to do, . . . fucking shoot me? . . . Hancock, you ain't going to shoot . . . me; you can't do it." 3RP 79-80; see also 2RP 44-45 (Schemnitzer's similar account).

After Darden referred to Hancock by name, Hancock recognized Darden, whom he knew to be a gang member. 3RP 81. Schemnitzer likewise believed Darden was as gang member based on an encounter months earlier during which Darden claimed he was a "shot-caller" or leader in the WSCF. 2RP 49. The officers testified they had training and experience dealing with gangs and WSCF in particular. 2RP 37-38; 3RP 11-12, 72-73.

The officers arrested Darden for a DOC violation and placed him in the back of Hancock's patrol car. 2RP 47; 3RP 8. Darden then became more cooperative and tried to persuade the officers to release him. 2RP 48, 51; 3RP 83, 86. Darden's breath smelled of alcohol, but he did not appear intoxicated. 2RP 51; 3RP 84-85.

Meanwhile, another man was arrested on an unrelated DOC violation and placed in Hancock's patrol car with Darden. 3RP 88. Hancock radioed dispatch that they were going to jail. 3RP 88. At that point, Darden's demeanor changed again. 3RP 88. He stuck his head through the partially open Plexiglas panel dividing the front and back sections of the car and began yelling insults at the officers. 3RP 88. Hancock testified Darden yelled:

[F]uck you, fuck DOC, fuck Cox. . . . my homey shot him in the head, he deserved it, . . . he was shot because he harassed people . . . . Hancock, you harass people, you're going to get a bullet in the head . . . . [Darden said] he was going to kidnap us, he was going to put a [bullet] in our head.

. . . . He was going to kill us and then, quote, he was going to fuck my wife and kids . . . .

. . . .

He said, Hancock, . . . you better stay out of White Center, you're going to get a bullet in your head. That is on everything. That is on West Side Crime Fam. West Side Crime Fam till death, nigga; you'll never stop a grape, you stiletto-wearing . . . faggot.

3RP 89-91. Hancock described Darden's demeanor as "violent" and "disturbing." 3RP 89. In contrast, Schemnitzer described Darden as "cold-blooded." 2RP 56. Schemnitzer recalled Darden threatened to shoot the officers in the head while they kneeled, the manner in which Cox was shot. 2RP 56. Darden also bragged he would receive only 45 days for the DOC violation. 2RP 58.

The officers testified they were afraid because Darden swore on his gang, rendering the threats more serious. 2RP 58; 3RP 95. Hancock considered the threats still more concerning because he swore in front of a witness from the neighborhood. 3RP 95-93.

Hancock testified over objection he felt more fearful because he knew Darden was a felon on community custody. 3RP 92. In addition, both officers testified they had been threatened many times in the past but never sought criminal charges until the present case. 3RP 14-16. Due to the threats, Hancock had considered leaving the White Center post and no longer patrolled alone on foot. 3RP 106-07. Both officers told their wives about Darden's threats and developed safety plans for their families. 3RP 17-18, 103-05.

The jury convicted Darden as charged and found the State proved the aggravating factors. CP 57-60. The court sentenced Darden to concurrent exceptional terms of 58 months on each count. CP 76-85.

C. ARGUMENT

THE COURT DENIED DARDEN A FAIR TRIAL WHEN IT PERMITTED JURORS TO HEAR IRRELEVANT, PREJUDICIAL EVIDENCE DARDEN HAD A PRIOR FELONY CONVICTION.

Evidence of "other crimes, wrongs, or acts" is not admissible as proof of a criminal defendant's character to suggest he committed the current

offense in conformity with that character. ER 404(b). ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 402 prohibits admission of evidence that is not relevant. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence.” ER 401. Even relevant evidence is inadmissible, however, if its probative value is outweighed by unfair prejudice. ER 403.

Evidence of prior felony convictions is generally inadmissible against a defendant because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty. 5 Karl B. Tegland, Wash. Prac., Evidence § 404.10, at 498 (5<sup>th</sup> ed. 2007). The introduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the "forbidden inference," and the normal presumption of innocence is thereby stripped away. State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

Here the court ruled the officers' knowledge Darden was on community custody for a violent felony was relevant but inadmissible because it was too prejudicial. 1RP 135-39; 2RP 7-11. The court permitted, over defense objection, sanitized testimony Darden was a convicted felon on

DOC supervision. 2RP 7. Hancock thus testified he feared Darden's threats because he was a "felon on community custody." 3RP 92.

The trial court erred in admitting such testimony. It was not relevant to the reasonableness of the officers' fear. ER 401; RCW 9A.46.020(1)(b). A number of felonies are nonviolent and do not suggest a predisposition for violence toward police officers or the community. While Darden's conviction for a violent felony was arguably relevant, the court stripped it of its relevance when it sanitized the evidence. ER 402. In contrast, the trial court's sanitation did not strip away the prejudicial nature of the evidence because it informed jurors Darden had a prior felony conviction. Bowen, 48 Wn. App. at 196; 5 Teglund, § 404.10, at 498.

Consistent with the defense's proposed limiting instruction, the trial court instructed the jury it should not consider Darden's "community custody status" as evidence of his guilt. CP 39 (Instruction 9). But while juries are presumed to follow the court's instructions, an instruction to disregard evidence does not eliminate prejudice where the prejudicial evidence is "of such a nature as to likely impress itself upon the minds of the jurors." State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (citing State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Testimony that Darden was a felon was not only irrelevant in its sanitized form, it was also unduly prejudicial and "likely to impress itself"

on the jurors' minds because it strongly suggested Darden had a propensity to commit criminal acts. This had the power to alter the outcome at trial even in the face of the court's limiting instruction. Mack, 80 Wn.2d at 21, 24; see also State v. Hardy, 133 Wn.2d 701, 707-713, 946 P.2d 1175 (1997) (reversing Hardy's robbery conviction based on the admission of evidence he had a prior drug conviction because conviction undermined credibility with jurors).

Based on this prejudicial error, Darden's conviction should be reversed.

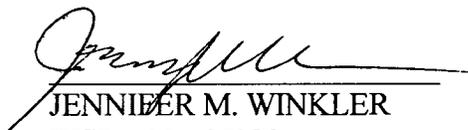
D. CONCLUSION

Because the admission of irrelevant evidence that Darden had a felony conviction was prejudicial error, his convictions should be reversed.

DATED this 24<sup>TH</sup> day of July, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	COA NO. 63419-4-I
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ORLEN DARDEN, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24<sup>TH</sup> DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ORLEN DARDEN, JR.  
DOC NO. 300261  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF JULY, 2009.

x *Patrick Mayovsky*

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STATE OF WASHINGTON