

NO. 63419-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ORLEN DARDEN, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JULIE SPECTOR

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

WILLIAM L. DOYLE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUE PRESENTED

Evidence is relevant if it has a 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. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Here, the defendant was charged with felony harassment for threatening to kill a community corrections officer ("CCO") and a police officer. The court admitted evidence that, at the time the defendant made the threats, the officers knew that the defendant was a convicted felon on community custody. The court found that this evidence was not unfairly prejudicial and was relevant (1) to show that the officers reasonably feared the defendant's threats to kill, and (2) to explain the circumstances of the defendant's arrest for a community custody violation. By admitting this evidence, did the court properly exercise its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS AND PRETRIAL RULINGS.

The defendant, Orlen Darden, was charged by second amended information with two counts of felony harassment, for

threatening to kill CCO Michael Schemnitzer and King County Sheriff's Deputy Jeffrey Hancock. CP 15-16. The State also charged two aggravating factors for each count — that (1) the offense had a "destructive and foreseeable impact on persons other than the victim" and (2) Darden committed the offense against a law enforcement officer performing his official duties at the time of the offense, and that Darden knew that the victim was a law enforcement officer. CP 15-16; RCW 9.94A.535(3)(v); RCW 9.94A.535(3)(r).

Before trial, Darden moved to exclude evidence regarding his gang affiliation and prior felony convictions. 1RP 118-21, 137-38, 2RP 8.¹ The State sought to admit this evidence to prove the element of the officers' reasonable fear. 1RP 112-18, 121-22. After hearing testimony and argument, the court allowed the State to introduce testimony that Darden admitted he was a member of the West Side Crime Family, that Darden was a known gang member, and that the West Side Crime Family was a real gang. The court also permitted testimony about the significance of swearing on one's own gang. 1RP 135-39; 2RP 3-11.

¹ The State's designation of the verbatim report of proceedings is as follows: 1RP (March 12, 2009); 2RP (March 16, 2009); 3RP (March 17, 2009); and 4RP (April 24, 2009).

In addition, the court allowed evidence that, at the time Darden made his threats, the officers were aware that Darden was a convicted felon on community custody status. 1RP 135-39; 2RP 7-11. The court found that this evidence was relevant to show the victims' state of mind at the time of the threats. 2RP 8-11. Further, the court found that this evidence explained why Darden was arrested for a community custody violation. 2RP 134. But the court limited the scope of this evidence as well, ruling that the witnesses could refer to Darden only as a "felon," and not a "violent felon." 2RP 8-9. In limiting this testimony, the court found that evidence that Darden was a "violent" felon was relevant, but too prejudicial. 2RP 9.

Following a jury trial, Darden was found guilty as charged. CP 57, 60. The jury also found by special verdict the two aggravating factors. CP 58-59, 61-62. Based on the aggravating factors, the court sentenced Darden to an exceptional sentence of 58 months on each count, to be served concurrently. CP 76-85; 4RP 18-23.

Darden now appeals his convictions. CP 71-72.

2. SUBSTANTIVE FACTS.

As of October 2008, KCSO Deputy Jeffrey Hancock worked as the primary storefront officer in White Center in King County. 3RP 63-64. Hancock took over this position from the late Deputy Steve Cox, who was killed in the line of duty in December 2006; Cox was shot by a gang member named Raymond Porter. 3RP 66-67, 69. When Cox was a storefront officer in White Center, one of his partners was Department of Corrections ("DOC") Officer Michael Schemnitzer. 2RP 56-57; 3RP 66. After Cox's death, Schemnitzer became partners with Hancock. 2RP 39-42; 3RP 65.

On October 24, 2008, around 11:23 p.m., Hancock and Schemnitzer were riding together in Hancock's patrol car when they assisted another officer with a traffic stop in White Center. 2RP 42-43; 3RP 75-76. Hancock and Schemnitzer recognized one of the passengers in the back seat of the stopped car; it was the defendant, Orlen Darden. 2RP 43, 49; 3RP 78, 80-81, 92. At the time, both Hancock and Schemnitzer knew Darden as a prominent member of the West Side Crime Family street gang. 2RP 49-50; 3RP 81, 92-95.

When Hancock approached the car, Darden became belligerent, and then reached into his jacket as if he were about to draw a weapon. 2RP 44-45; 3RP 78-79. Based upon the potential

threat that Darden was posing, officers held Darden at gunpoint. 2RP 44-45. While the officers watched him, Darden continued to berate Hancock, calling him a "bitch," and taunting that Hancock was too afraid to shoot him. 2RP 45-46; 3RP 79-80. After backup arrived, Schemnitzer and KCSO Deputy Blackard placed Darden into handcuffs and took him out of the car. 2RP 46-47; 3RP 81.

At that time, Darden was arrested for community custody violations. 2RP 47. During a search incident to arrest, Darden quickly turned around on Blackard. 2RP 47. In response, officers held Darden against a car; Darden told Schemnitzer that this was "sexy." 2RP 47. When Darden realized that Schemnitzer was a DOC officer, however, he changed his attitude and became compliant. 2RP 48.

Upon detaining Darden, the officers noticed that Darden smelled of alcohol. 2RP 51; 3RP 84-85. Darden claimed that he smelled of alcohol only because other people in the car had been drinking. 2RP 51. He also denied that he had just called Hancock a "bitch" or had reached into his pocket. 2RP 52.

Hancock secured Darden in his patrol car. 3RP 83. In the patrol car, a plastic divider separating the front seat from the back

was partially open. 2RP 53. Darden repeatedly asked Hancock and Schemnitzer not to take him to jail. 2RP 84; 3RP 83. At that time, Darden was calm and polite. 3RP 83. While Darden sat in the back of the patrol car, Hancock arrested another person in the White Center area for a drug charge. This person was placed in the back seat with Darden. 3RP 87.

Rather than letting Darden go, Hancock advised radio that he was en route to King County Jail to transport Darden and the other passenger. After hearing this, Darden's demeanor completely changed, and he became irate. 3RP 88. Darden lunged his head into the opening of the plastic divider, forcing his head into the front of the car. 2RP 54-55; 3RP 88-89. Darden then yelled at Hancock and Schemnitzer, calling them "crackers" and "faggit [sic] ass niggers" and said, "Fuck DOC." 2RP 54-55; 3RP 89. Referring to Deputy Cox, Darden yelled, "Fuck Cox", "my homey shot him in the head, he deserved it." 3RP 89. Darden added that Cox was shot because he harassed people, and that Hancock harassed people and was going to get a bullet in his head. 3RP 89. Darden then said that he was going to kill the officers the way "his boy Porter" had killed Deputy Cox. 2RP 56; 3RP 38.

Darden continued to spew a constant barrage of profanity and repeatedly threatened to kill Hancock and Schemnitzer. 2RP 55. For example, Darden warned that he would kidnap and “cap” the two officers.² 3RP 89-90. Darden then screamed to both Hancock and Schemnitzer that he would kill them, and then kidnap and rape their wives and children. 2RP 56; 3RP 89.

Hancock told Darden that if he did not like the officers so much that he should just stay out of White Center. 3RP 90. Darden responded by screaming, “Hancock, nigga, you better stay out of White Center, you're going to get a bullet in your head. That’s 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 91. Darden consisted with his threats until they arrived at the King County Jail. 3RP 125, 128.

Both Schemnitzer and Hancock believed that Darden would carry out his threats to kill them. 3RP 14, 108, 129. Both officers testified that, in their career, they had been threatened many times. 3RP 8-9, 14-16, 103. In fact, Schemnitzer testified that, as part of his

² “Cap” is a common street slang term for a “bullet,” and to put a “cap” in someone's head is to shoot them. 3RP 89.

job as a CCO, he was routinely assigned cases where felons have either threatened law enforcement or other CCOs. 3RP 16.

Schemnitzer even had a case in which someone on community custody had claimed that they put a "hit" on his life. 3RP 14-15. But until Darden's case, neither officer ever had sought criminal charges for such threats. 3RP 14-16, 103.

The officers took Darden's threats seriously for several reasons. First, the officers knew Darden as a member of the West Side Crime Family criminal street gang. 2RP 49-50; 3RP 49, 92. Both officers knew that the gang was an active gang in the White Center area. 2RP 38, 73. In addition, they knew that Darden referred to himself as a "leader" or "shot caller" in the gang, who could have younger gang members do violent acts for him. 3RP 12, 94. Most concerning to Schemnitzer and Hancock was that Darden swore on his gang, in front of another community member, that he would kill them. 2RP 59; 3RP 96, 107. Hancock viewed this threat as a "blood oath," and compared it to a "priest swearing on the Bible." 3RP 96. Schemnitzer testified that swearing on a gang probably was bigger than swearing on the Bible. 2RP 59. Third, at the time the officers were threatened, they knew that Darden was a felon on

community custody status. Hancock testified that this contributed to his safety concerns when Darden threatened him. 3RP 92.

Both officers told their wives about Darden's threats and developed safety plans for their families. 3RP 17-18, 103-05. Schemnitzer told his wife about the threats that night, and discussed what safety measures to take if Darden ever showed up at their house. 3RP 17. In addition, Schemnitzer testified that typically, a person who makes a threat would have been put on his case load. 3RP 16. Here, however, Schemnitzer was so afraid that he had Darden switched to a different case load. 3RP 16-17. Further, Schemnitzer had Darden's photo put up in the DOC office so that everyone was aware of him. 3RP 16-17.

Hancock showed his wife a photograph of Darden so that she would be able to recognize him if she saw him in his neighborhood or at his house. 3RP 105. He also went over safety plans with her. In his 12 years of experience, Hancock had never taken such measures. 3RP 105. Lastly, because of the threats, Hancock no longer patrolled White Center on foot alone, and even seriously considered leaving his White Center post altogether. 3RP 106-07.

C. ARGUMENT

- 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE THAT THE HARASSMENT VICTIMS WERE AWARE THAT, AT THE TIME OF THE THREATS TO KILL, DARDEN WAS A CONVICTED FELON ON COMMUNITY CUSTODY.**

Darden contends that the trial court erred by admitting evidence that, at the time Darden was alleged to have made the death threats, the victims were aware that Darden was a convicted felon on community custody. Darden argues that this evidence was irrelevant and unfairly prejudicial. His argument fails. This evidence was relevant because it supported an element of the offense, i.e., that the officers reasonably feared Darden's threats. In addition, the evidence provided the context of the night's events by explaining why Darden was arrested. It also provided context for Schemnitzer's reaction to the threats, namely, Schemnitzer requesting that Darden be taken off his case load and posting a warning to others in the DOC office. By admitting this evidence, the trial court did not abuse its discretion.

In any event, any error in admitting this evidence was harmless. The trial's outcome would not have been materially

different even without this evidence; the jury considered other overwhelming evidence of Darden's guilt.

- a. The Trial Court Properly Admitted Evidence That Darden Was A Convicted Felon On Community Custody At The Time He Made The Threats To Kill.

The decision to admit evidence is within the trial court's sound discretion and may be reversed only upon a finding of abuse of discretion. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. See Atsbeha, 142 Wn.2d at 913-14. Thus, the trial court's decision will be upheld unless it is manifestly unreasonable or is based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

To be admissible at trial, evidence must be relevant. State v. Luvone, 127 Wn.2d 690, 706, 903 P.2d 960 (1995) (citing ER 402). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Id. (citing ER 401). Relevant evidence still may be excluded if its probative value

is *substantially* outweighed by the danger of *unfair* prejudice, confusion of the issues, or misleading the jury. Id. (citing ER 403). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). Evidence is not unfairly prejudicial, however, simply because it is adverse to the opposing party. Id. Further, ER 403 does not provide a basis for objecting simply because the evidence is too good or too powerful. See Gould, 58 Wn. App. at 182-83. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Although inadmissible to prove criminal propensity, evidence of prior acts may be admissible for other purposes, including proof of motive, intent, and the circumstances surrounding the alleged crime. State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006), review denied, 159 Wn.2d 1010 (2007). For example, a defendant's prior misconduct,

if it was known to the victim, is admissible when it is relevant to show the victim's state of mind. See State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (holding that a defendant's prior misconduct was admissible to show the victim's state of mind in prosecution for harassment). To admit evidence of prior acts, a trial court must determine: (1) the prior bad act occurred by a preponderance of the evidence, (2) the evidence is offered for an admissible purpose, (3) it is relevant to prove an element or rebut a defense, and (4) the evidence is more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

To prove the crime of felony harassment, the State must show that a defendant knowingly threatened to kill a person and placed the person in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(1)(a)(i)(1)(b)(2)(b). An objective standard is applied to determine whether the victim's fear is reasonable. Barragan, 102 Wn. App. at 759. To prove harassment, threatening statements are not enough. The State must show that threats are not mere "puffery" or "idle talk." See, e.g., State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001). The nature of a threat depends on *all* the facts and circumstances

surrounding the threat; it is not fair to limit the inquiry to the actual words used. State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

Here, the trial court did not abuse its discretion by admitting evidence that, at the time Darden threatened to kill the officers, the officers were aware that Darden was a convicted felon on community custody. First, the trial court properly found that Darden's status as a known convicted felon was relevant to prove the victims' state of mind. See 2RP 8-11. To prove the charge of felony harassment, the State had to prove that it was reasonable for Schemnitzer and Hancock to believe that Darden would carry out his threats to kill them. Evidence that the officers knew that Darden was a convicted felon was relevant because it had a tendency to prove an element of the crime of felony harassment, i.e., their reasonable fear of Darden's threats to kill. In fact, Hancock specifically testified that Darden's status as a convicted felon contributed to his fear of Darden's threats to kill. 3RP 92.

Second, the trial court correctly found that evidence of Darden's DOC felony community custody status was relevant to explain why Darden was arrested and to explain the officers' familiarity with him. See 1RP 134; 2RP 7-11, 47. Without this

evidence, the jury would have had no context as to why Darden was arrested and no context for the events that followed. In addition, Darden's community custody status explained why Darden was familiar with DOC and why, as part of his onslaught of threats, Darden yelled, "Fuck DOC." See 3RP 89. Further, the fact that Darden was a felon on DOC supervision explained Schemnitzer's actions in response to the threats. Schemnitzer testified that, as a result of the threats, Darden's photo was put up in the DOC office so that everyone was aware of him. 3RP 16-17. In addition, Schemnitzer testified that typically, a person who makes a threat would have been put on his case load. 3RP 16. But here, Schemnitzer was so afraid that he had Darden switched to a different case load. 3RP 16-17. This evidence directly bolstered the element of reasonable fear.

The State had to show that Darden's threats were "true threats," and not merely puffery. Given this burden, evidence that the victims knew Darden was a convicted felon on DOC supervision had the tendency to make Darden's threats more credible. Moreover, this evidence explained the circumstances leading up to the threats to kill. For these reasons, the evidence's probative value far outweighed any unfair prejudicial effect. Therefore, the

trial court's admission of this evidence was not manifestly unreasonable.

b. Any Error In Admitting Evidence Of Darden's Felony Conviction and Community Custody Status Was Harmless.

Even if the trial court erred in admitting evidence of Darden's status as a convicted felon on community custody, the error was harmless. Had the court excluded this evidence, it still is not reasonably probable that the trial's outcome would have been materially different. Any prejudice was minimal.

Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error in the admission of evidence is harmless unless it is reasonably probable that the trial's outcome would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, because there was no testimony of what Darden's felony conviction was, it is difficult to conceive how Darden was unfairly prejudiced by this evidence. More important, even had the court excluded evidence of Darden's status as a convicted felon on community custody, there was still very strong evidence from which

a jury could conclude that Darden committed the charged crimes. The jury heard evidence that Darden was in an active gang, was a self-professed "shot caller" in the gang, and that he swore on his gang in front of another community member that he would have Schemnitzer and Hancock killed. 2RP 49-50, 56; 3RP 12, 81, 89-96. Both officers testified that swearing on a gang in front of another community member was a critical factor in their fear that Darden would carry out his threats to kill. 2RP 59; 3RP 96.

In addition, the jury was provided with a limiting instruction that Darden's community custody status could be considered only for the purpose of assessing the officers' state of mind and whether the officers reasonably feared that the alleged threats would be carried out. CP 39 (Instruction 9). This alleviated any purported prejudice, and the jury is presumed to follow the court's limiting instructions. See State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

Darden's brief is devoid of almost any analysis of how evidence of Darden's status as a convicted felon on community custody caused reversible prejudice. Darden merely argues that the evidence "strongly suggested that Darden had a propensity to commit criminal acts" and that this evidence had the power to alter

the trial's outcome even in the face of the court's limiting instruction. Appellant Brief, at 9. But contrary to Darden's unsupported claims, because the elements of harassment were established by other evidence, it is not reasonably probable that the admission of evidence of Darden's status as convicted felon on supervision materially affected the trial's outcome. Even had this evidence been excluded, both felony harassment charges easily would have been proven beyond a reasonable doubt. Thus, any error in admitting this evidence was harmless.

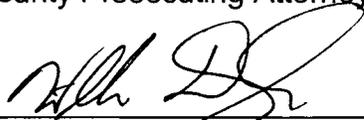
D. CONCLUSION

For the foregoing reasons, this Court should affirm Darden's convictions for felony harassment.

DATED this 19th day of October, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
WILLIAM L. DOYLE, WSBA #30687
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ORLEN DARDEN, JR., Cause No. 63419-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Wenita Schwantes

Name

Done in Seattle, Washington

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