

NO. 64259-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAKE D. RIDER,

Appellant.

REC'D
MAY 28 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by admitting under ER 404(b) evidence indicating the appellant kept animals on his property solely so he could claim it as a farm for beneficial tax purposes.

Issue Pertaining to Assignment of Error

Did the trial court err by admitting evidence in this animal cruelty trial that the appellant told a former tenant in 2002 he kept farm animals on his property so he could claim it as a farm for beneficial tax purposes under the theory the evidence tended to provide a motive for why the appellant mistreated the animals?

B. STATEMENT OF THE CASE

1. *Trial testimony*

Jack and Rebecca Persons lived in Covington near a farm owned by the appellant, Jake D. Rider, and drove past the farm several times a day. 3RP 40-42, 46, 58-61. Rider's farm drew the Persons's attention in August 2007 because they saw some goats, calves, chickens, and horses on the portion of fenced property that ran along the road. 3RP 42-44, 59-62. The animals appeared fit but over time began to look thinner and lethargic. As the rainy season came, the grassy pasture turned to mud and the animals began to gnaw on the wooden fences. 3RP 46-49, 61-63.

In late December the Persons saw a horse lying on its side in the mud so they called King County Animal Control (KCAC). 3RP 47-49, 63-64. KCAC officers Jenee Westberg and David Morris responded to Rider's farm and saw a horse lying down in the muddy, barren, front pasture on its side with a blanket over it. 3RP 131-34, 4RP 123-25. Three other horses were standing in the pasture. 3RP 134. A dilapidated, chewed-up wooden fence enclosed the area. 3RP 134-36, 4RP 127-29. The nearby trees were stripped of their bark to a height of about seven feet, which indicated the possibility the horses were underfed. 4RP 72-73, 130.

Rider approached and explained the down horse, called Missy, fell the night before and could not get up. He said he called a veterinarian, who told him to feed the horse and let her rest until she regained enough strength to get up. 3RP 125. Missy was extremely thin. 3RP 84-88, 136, 4RP 130. Two of the other horses were also very underweight. 3RP 136-140, 4RP 54-56, 130-32.

Rider agreed with Westberg that a veterinarian should be called, so Westberg called Dr. Heather Stewart. 5RP 104-06. Stewart examined Missy when she arrived. The horse appeared to have no infections or diseases. 5RP 106-13. Rider told them he fed the horses local grass hay once per day, as well as cob and high-protein grain pellets. The local grass

hay had low nutritional value. Westberg said the hay was "like cardboard . . . just one step up from straw." 4RP 15-18, 40-41, 131-32, 5RP 109-10, 150-51. Morris testified the horses should have been fed a higher grade hay twice a day. Rider told Morris he could not afford the higher grade at the time. 4RP 18-19. He told Westberg he planned to deworm the animals when he had more money. 4RP 134-35.

The officers and Dr. Stewart tried several times to get Missy to stand up but were unsuccessful. 5RP 117-19. Dr. Stewart provided Rider with instructions to care for Missy through the night. 4RP 138, 5RP 119-20. By this time Morris had walked around the farm and looked at one llama, three goats, two sheep, and two calves. All the animals were underweight. 4RP 23-27, 62-63, 88-92, 5RP 51-68, 126-27, 150-54. Morris saw only about three bales of local grass hay on the farm and no other feed. 4RP 18, 29, 39-41, 48-50, 57, 60, 75.

The parties agreed to meet the next morning, December 18, 2007, on Rider's farm. 4RP 30, 138-39, 5RP 119. The officers and Dr. Stewart arrived, but Rider had a court appointment in Centralia that he notified Westberg and Dr. Stewart about that morning. 4RP 139, 5RP 122-23, 6RP 57-58, 139. He did not get back to the farm before the others had left. 4RP 139, 6RP 58, 139. While they were there, Morris, Westberg, and Dr.

Stewart tried again to get Missy on her feet. 4RP 30, 139, 5RP 124-25. After several unsuccessful attempts, Dr. Stewart decided to transport Missy to her clinic. 4RP 140, 5RP 124-26. The horse died several hours later before it had been removed from the transport trailer. 5RP 128, 144-45.

The next day Morris, Westberg, and individuals from local animal rescue agency Pasado's Safe Haven returned to Rider's farm and seized the remainder of the animals. They also exhumed a dead calf from a grave on the farm. 4RP 31-33, 86-87, 141-42. Rider was not on his property that day. 4RP 141-42.

Missy was almost 29 years old when she died. 4RP 107-08, 6RP 67. A necropsy and laboratory results indicated she died of malnutrition, pneumonia, and inflammation of the colon. 3RP 84-90. The dead calf was also very thin. 3RP 78-80. The calf's probable cause of death was pneumonia. 3RP 82.

Rider's partner, Richard Vrban, moved onto the farm at the end of April 2007, or about eight months before the above events occurred. 6RP 17, 115. The two men gradually bought the animals during the summer and fall of that year. 6RP 24-42, 116-32. Rider said he bought the animals from an auction to spare them from being killed. 6RP 116. He

gave each animal antibiotics upon arrival at the farm. 6RP 32. He planned to deworm all the animals at once after he was done adding stock to the farm. Rider said he wanted to minimize deworming because it was toxic to the animals. 6RP 127, 142-45. He did not recall telling the KCAC officers he was waiting to deworm the animals until he saved enough money. 6RP 146. He bought the lower grade hay because it was significantly cheaper than the top grade. 6RP 146-47.

They bought the dead calf in late fall when it was only a day old. 6RP 37, 137. The calf began to gain a bit of weight, but the weather got colder and he developed a cough. 6RP 37-39, 138. About two weeks later, after a very cold night and some snow, the calf died. 6RP 38-40, 138.

Vrban and Rider obtained the horses last, toward the end of November 2007. 6RP 40-44, 68-70, 128-30. Missy's previous owner, Lana Frisvold, testified Missy was "old" and "not doing well" when Rider and Vrban decided to take her in along with two other horses, one of which was also thin. 6RP 67-68, 73-74. At the time the pasture had grass for the horses to eat, but they quickly chewed it down to dirt. 6RP 44, 71, 132. By then the rains had arrived and the pasture turned to mud. 6RP 48, 133-34.

Like all the animals on the farm, the horses had a steady supply of hay as well as a grain mixture. 6RP 26-31, 44-46, 48-49, 119-20, 123-26, 130-32, 136-37. Nevertheless, they were not gaining weight very quickly. 6RP 132, 137. On December 17, Vrban and Rider became aware Missy had gone down. They called a local veterinarian and followed her direction to try to feed the horse. 6RP 51. Animal Control officer Westberg arrived soon thereafter and the events described above unfolded. 6RP 52-53, 138-39.

The next day when Vrban and Rider returned from court in Centralia, Missy was gone. Westberg left a notice stating Dr. Stewart took the horse to her clinic. Vrban testified he and Rider considered this "a good thing" because Missy would receive needed treatment. 6RP 58, 139. They tended to the rest of the animals for the rest of the day. 6RP 58, 139.

The following day, after returning to the farm from having coffee, Vrban and Rider saw equipment from two television stations, as well as police, KCAC, and Pasado's, on their farm. 6RP 59-60, 139-40. People were grabbing and chasing animals all over the property. Rider and Vrban did not stop. 6RP 59, 140. Rider testified he felt he was adequately feeding the animals and found his treatment by Animal Control "insulting" enough; he did not want to make matters worse by going on television.

6RP 140. At no point was Rider unable to afford feed for the animals.

6RP 140.

As a result of these incidents, the state charged Rider with two felony counts of first degree animal cruelty – one each for Missy and the dead calf – and nine misdemeanor counts of second degree animal cruelty, based on infliction of "unnecessary suffering or pain" upon other specified animals seized from the farm. CP 14-18.

2. *Evidence of Rider's past acts*

In a pretrial motion in limine, the state requested admission of evidence Rider neglected animals in 2002 to establish a motive for committing the instant offenses under ER 404(b), as well as in 2006 to establish he knew how to properly care for the animals. Supp. CP __ (sub. no. 110, State's Trial Memorandum, at 9-17, filed 7/6/2009). With respect to the 2002 incident, the state asserted Jessica Ashley would testify she was a former tenant of Rider's. She observed Rider fed his animals only enough to keep them alive and would go weeks without feeding them. Ashley offered to care for the animals and to pick up feed for them, but Rider refused. At one point Ashley asked Rider "why he even had animals if he was not going to feed them." *Id.*, at 9-10. Rider answered that he had

animals so he could classify his property as a farm for advantageous tax purposes. Id. at 10; 3RP 3-4.

Ashley would also testify to a time she complained to KCAC because one of Rider's horses acted colicky. A KCAC officer responded and told Rider he would seize the horse if he did not provide veterinary care within 24 hours. But the horse died before receiving care. Id. at 10.

Rider objected to admission of the evidence. He contended the state would be unable to prove by a preponderance of the evidence that the incidents occurred. 2RP 36-39, 3RP 11-13. And even if the court found there was sufficient proof, evidence indicating Rider kept the animals on the property for tax reasons tended to show why he had animals, but it did not establish a motive for why he may have underfed them. 3RP 13-14, 16.

The prosecutor disagreed, stating the evidence would show Rider's motive for underfeeding the animals in the present case was the same as for having the animals in the first place – to save money. 3RP 20.

The court accepted the state's rationale. It first found the state proved the incident by a preponderance of the evidence. 3RP 21. Second, the court found Ashley's testimony with respect to her experience with animals, her offers to help, her concern the animals were underfed, and

Rider's statement about taxes, were relevant to show Rider's motive for both having animals and not feeding them was to save money. 3RP 21, 24-25. The court, however, precluded admission of Ashley's complaints, the KCAC officer's response, and evidence the horse died. 3RP 22-23.

The Court also permitted admission of evidence of a 2006 visit by a KCAC officer, as well as the officer's discussion with Rider about proper feeding techniques, to establish Rider knew how to care for animals. 3RP 23.

As a result of these rulings, Ashley testified she lived with her husband in a travel trailer on Rider's farm in 2001 and 2002. 4RP 111-12. Rider had one horse, four goats, and four chickens on the property. 4RP 112. Rider fed the animals every two to three weeks. 4RP 112-13. Ashley offered to take care of the animals, as well as to bring back hay from Ellensburg where she often visited, but Rider declined. 4RP 113. Ashley asked why he had animals. Rider said the animals allowed him to characterize his property as a farm for favorable tax purposes. 4RP 113.

King County Animal Control Officer Steve Fuchser testified that he observed a "very thin" young calf on Rider's farm in September 2006. 3RP 126-27. A young woman who was caring for the animals because Rider was out of town met Fuchser on the property. 3RP 129. Fuchser

learned the calf was being fed regular powdered milk from a grocery store rather than the recommended "actual mixture of vitamins and calf food" from a veterinarian or feed store. 3RP 126. He spoke with Rider on the phone and informed him about methods of proper animal care. 3RP 127-29. Rider explained to Fuchser he bought the powdered milk because it was what he could afford at the time. 3RP 127-28.

3. *The verdicts and sentences*

A King County jury found Rider guilty of one count of first degree animal cruelty (Missy), a lesser included count of second degree animal cruelty (deceased calf) and the remaining nine counts of second degree animal cruelty. CP 85-97. The trial court sentenced Rider to six months for the unranked felony, and a total of 24 months suspended jail time for the misdemeanors, as well as 24 months probation. CP 139-44 (felony judgment and sentence); Supp. CP __ (sub. no. 148, misdemeanor judgment and sentence, filed 9/10/2009).

C. ARGUMENT

THE TRIAL COURT ERRED UNDER ER 404(b) BY ADMITTING EVIDENCE THAT RIDER SAID IN 2002 HE KEPT ANIMALS ONLY FOR TAX PURPOSES.

Evidence of other bad acts is generally inadmissible. ER 404(b).¹

Exclusion is based on the principle that the accused must be tried for the crimes charged, not for uncharged conduct. State v. Emmanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953); see State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, review denied, 106 Wn. 2d 1003 (2006) (rejecting "once a thief, always a thief" rationale for admitting evidence of other acts). ER 404(b) deters admission of testimony that would lead a reasonable juror to believe the defendant is a bad person because of past acts. State v. Scott, 151 Wn. App. 520, 529, 213 P.3d 71 (2009), review denied, 168 Wn.2d 1004 (2010).

Before admitting evidence under ER 404(b), a trial court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the

¹ ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

In Rider's case, the trial court erred by concluding the 2002 evidence that Rider kept animals solely for tax purposes was relevant to provide a motive for why he may have underfed the animals in 2007. Under ER 404(b), the identified fact must first be of consequence to the outcome of the trial, and second the evidence must tend to make the existence of the identified fact more or less probable. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). "In doubtful cases, the evidence should be excluded." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

In Rider's case, the identified fact was the motive for underfeeding the animals. Proving motive can be relevant even where, as here, motive is not an element of the crime charged. State v. Yarbrough, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009). But as trial counsel aptly argued, evidence that Rider had animals to qualify for tax breaks in and of itself did not tend to make it more probable he would underfeed them. The trial court's common link between these tenuous propositions – a desire to save money

– is not only an improper way of proving motive, it is also based on nothing more than speculation on the record before the court.

The court's reasoning is improper because it ignores the limits of the "motive" exception to ER 404(b). A motive is an inducement that tempts the mind to commit a criminal act. Saltarelli, 98 Wn.2d at 365; State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). In practice, this means the earlier act must therefore have induced, or instigated, or prompted, commission of the charged act. State v. Bowen, 48 Wn. App. 187, 191, 738 P.2d 316 (1987), overruled on other grounds, State v. Lough, 125 Wn.2d 847, 861, 889 P.2d 487 (1995); see Saltarelli, 98 Wn.2d at 365 ("It is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later."); State v. Hieb, 39 Wn. App. 273, 283, 693 P.2d 145 (1984) (earlier assaults on victim and another not admissible as motive for later assault on victim where there was no assertion the assault at issue was carried out in order to conceal prior assaults), reversed on other grounds, 107 Wn.2d 97 (1986); cf., State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545, 548-49 (1986) (defendant's prior discovery and theft of money from victim was relevant to her motive for being in the victim's house on day it was ransacked and the victim murdered).

As applied to Rider's case, his earlier reason for having animals was to classify his property as a farm for tax purposes. Desiring to qualify for a tax break in 2002 is not a motive for underfeeding different animals in 2007. At most, as defense counsel argued, such a desire induced Rider to obtain the animals. The 2002 evidence was therefore not relevant to establish any elements of the 2007 charges.

Moreover, the trial court's rationale – that the 2002 tax break and 2007 underfeeding indicated a common desire to save money -- is improper insofar as it implies Rider suffered from financial woes and was thus motivated to save money by depriving the animals. Evidence of poverty alone is generally not admissible to show motive. State v. Kennard, 101 Wn. App. 533, 541, 6 P.3d 38 (2000). A court may, however, admit evidence of impecuniosities when there is also other evidence to show something beyond the forbidden inference that poverty causes crime. Kennard, 101 Wn. App. at 541. For example, "evidence regarding a defendant's financial state is admissible if accompanied by . . . evidence of an unexplained, abrupt change in financial circumstances, or evidence that tends to show that the defendant was living beyond his or her means." Kennard, 101 Wn. App. at 541-42 (citing cases).

Several cases are illustrative. This Court in State v. Matthews upheld the trial court's admission of evidence showing the defendant had filed for bankruptcy shortly before commission of a robbery. 75 Wn. App. 278, 284, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022 (1995). The bankruptcy evidence served as a foundation for other evidence that Matthews was living beyond his means, which in turn was held to reasonably provide a motive for robbery. Matthews, 75 Wn. App. at 284. See United States v. Williams, 264 F.3d 561, 575 (5th Cir. 2001) (evidence that defendant recently lost his home was relevant to establish motive to commit conspiracy to commit extortion and solicitation of bribery payments; "[t]estimony regarding a specific change in [d]efendant's financial circumstances goes beyond showing 'the mere fact that he is poor.'")

In State v. Suttle, this Court upheld admission of evidence that the defendant had escaped from a work release program to establish a motive to participate in a robbery. 61 Wn. App. 703, 711, 812 P.2d 119 (1991). This Court held jurors were entitled to consider whether the defendant, as a recent escapee, "needed to get out of Washington to avoid detection, and therefore had a more compelling need for money" than another named individual. Suttle, 61 Wn. App. at 711-12.

And in State v. Newton, the court upheld admission of testimony that the defendant, charged with forgery and possession of a stolen credit card, had (1) assumed the identity of the deceased owner of the credit card and racked up about \$3,800 on the card, including rent for a stay at a motel, and (2) been locked out of another motel on an earlier occasion for nonpayment after registering in his own name. State v. Newton, 42 Wn. App. 718, 724, 714 P.2d 684 (1986), reversed on other grounds, 109 Wn.2d 69 (1987). The court held the evidence was relevant to prove identity and motive, "that of his need for money with which to pay for his lodging at motels." Newton, 42 Wn. App. at 724-25.

These cases highlight the trial court's error in admitting the 2002 tax statement in Rider's case under the motive exception. Unlike in Matthews, Suttle, and Newton, here the state offered nothing more than an inference of poverty. It did not show, for example, that Rider's financial circumstances had quickly changed for the worse, that he had an immediate need for quick cash, or that he suddenly began to spend money in excess. Because mere poverty is insufficient to establish a motive to commit crime, the trial court erred by admitting the tax break evidence.

For these reasons, the trial court abused its discretion by permitting the state to present the 2002 evidence. The erroneous admission of

evidence under ER 404(b) can be harmless, but only if, within reasonable probability, it did not materially affect the verdict. Scott, 151 Wn. App. at 529. The trial court's error was not harmless here.

It was only natural for a reasonable juror to search for a reason why a person would obtain a host of animals only to systematically starve them. See Matthews, 75 Wn. App. at 284 ("The human mind searches for a rational explanation for an irrational act of murder of a shopkeeper in his store in a shopping mall at high noon on a seemingly normal working day."). Rider's jury was thus especially vulnerable to the prejudicial effects of evidence of past acts erroneously miscast as "motive" evidence.

For example, it was reasonably probable that jurors concluded Rider underfed the animals because he viewed them only as tax deductions, despite its logical irrelevance to the issues at trial. Alternatively, jurors would likely use the evidence simply to conclude Rider was cold, thoughtless, and blinded by his desire to save money – in other words, that he was a bad man. Jurors probably also used the evidence to speculate Rider must have been in dire financial straits. In fact – and not until after Vrban and another defense witness testified – one juror asked whether the jury could be told what the witnesses' occupations were. The trial court did not answer the question. 6RP 79. Regardless,

the question is tangible proof the 2002 "tax break" evidence played a role in the jury's deliberations.

And despite the general consensus that most of the animals were underweight, it was undisputed that Missy and at least one other horse was thin upon arrival at Rider's farm only a few weeks before they were seized. Furthermore, Morris testified the llama and one of the goats were friendly, fluffy, cute, and walked right up to him. 4RP 22, 49. Westberg also saw the two running around and they also approached her. 4RP 123. Neither animal resisted their touch. Nor did any of the other animals on the farm protest when Morris probed their body structures. 4RP 23-28. This was not consistent with a veterinarian's testimony that extremely thin animals tended to be lethargic and resistant to being touched or groomed. 3RP 85.

Moreover, Vrban and Rider gradually obtained all the animals at a local animal auction within about six months before the seizure. 6RP 24-25, 27, 35, 116, 120. Morris seized a receipt indicating Rider bought a ram at the auction (count 9) only about 6 weeks before the animals were seized. 4RP 34-35. Rider said the animals would have been slaughtered if they stayed at the business and were not purchased. 6RP 116.

Dr. Stewart said she had seen a lot of animals obtained at the auction business because "this is a place in our area that people rescue

animals from." 5RP 154. Dr. Stewart said the general condition of the animals coming from the auction was "[n]ot very good." 5RP 155.

Lana Frisvold, the former owner of Missy and two of the other horses, testified Vrban and Rider "fell in love with Missy," and described them as "big-hearted guys." 6RP 67.

From this evidence a reasonable juror would likely have concluded Rider humanely obtained mistreated animals intending to bring them back to good health and was in the process of doing that when the animals were prematurely seized. Until, at least, the jury learned Rider had animals in 2002 solely to claim his property as a farm for tax purposes. Because this evidence was logically irrelevant, yet extremely prejudicial, it likely affected the verdict. The evidence was therefore not harmless. For these reasons this Court should reverse Rider's convictions and remand for a new trial.

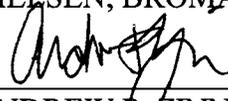
D. CONCLUSION

The trial court erred by admitting evidence under ER 404(b) that likely affected the jury's verdict. This Court should reverse Rider's convictions for first degree and second degree animal cruelty and remand for a new trial.

DATED this 29 day of May, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64259-6-1
)	
JAKE RIDER,)	
)	
Appellant.)	

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 28TH DAY OF MAY, 2010, 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] JAKE RIDER
26819 156TH PLACE SE
COVINGTON, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MAY, 2010.

x *Patrick Mayovsky*