

NO. 69258-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOEY WAYLAND,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

FILED
APR 11 2011
CLERK OF COURT
KATHLEEN A. SHEA

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

The trial court abused its discretion in admitting
evidence that Mr. Wayland mimed a shooting prior
to the alleged incidents.....1

a. Evidence that Mr. Wayland mimed a shooting was
not properly admitted under ER 404(b).....1

i. The evidence was not relevant.....1

ii. The evidence was unduly prejudicial.....4

b. Evidence that Mr. Wayland mimed a shooting was
not properly admitted under the *res gestate* doctrine.....5

B. CONCLUSION..... 6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) 5

Washington Court of Appeals Decisions

State v. Briejer, 172 Wn.App. 209, 289 P.3d 698 (2012)..... 4

State v. Friederick, 34 Wn.App. 537, 663 P.2d 122 (1983) 2, 3

State v. Gatalski, 40 Wn.App. 601, 699 P.2d 804 (1985) 2

Rules

ER 401 4

ER 404(b) 2, 3

A. ARGUMENT IN REPLY

The trial court abused its discretion in admitting evidence that Mr. Wayland mimed a shooting prior to the alleged incidents.

- a. Evidence that Mr. Wayland mimed a shooting was not properly admitted under ER 404(b).
 - i. The evidence was not relevant.

Mr. Wayland was charged with first degree attempted theft and second degree malicious mischief. CP 11-12. The defense's theory at trial was that Mr. Wayland did not possess the intent required to commit these crimes because he was in a state of delirium at the time of the incident. 6/11/12 RP 42. A jury convicted him on the charge of malicious mischief and was unable to reach a verdict on the charge of attempted theft. CP 114, 118.

At trial, the court permitted one of the State's witnesses to testify that prior to committing the alleged crimes, Mr. Wayland had mimed shooting her and two others through the window of the Guild 45th Theatre. 6/5/12 RP 216. The State argues this was properly admitted under ER 404(b) because Mr. Wayland raised a diminished capacity defense and, as the court found, this evidence demonstrated his "ability to form intent." Resp. Br. at 8.

For support, the State relies on State v. Gatalski, 40 Wn.App. 601, 699 P.2d 804 (1985) and State v. Friederick, 34 Wn.App. 537, 663 P.2d 122 (1983). However, in both Gatalski and Friederick, the evidence at issue provided a possible explanation for the defendant's actions and was therefore directly relevant to the defendant's intent when committing the crimes charged. Gatalski, 40 Wn.App. at 609; Friederick, 34 Wn.App. at 544-45.

In Gatalski, the defendant gave a woman a ride home and after arriving at the woman's apartment, attempted to rape her. 40 Wn.App. at 603. In a separate incident, the defendant agreed to drive a woman home but then began driving somewhere else instead. Id. at 604. When she tried to jump out of the car, he grabbed her by the hair and hit her. Id. This Court reasoned that evidence of each incident was admissible under ER 404(b) because the defendant's conduct during each alleged crime supplied evidence of the defendant's intent during the other alleged crime. Id. at 609 (finding "[t]he use of physical force against both women to overcome resistance in such comparable circumstances and the sexual overtones present in both episodes clearly add support to the State's effort to prove Gatalski's intent on both counts").

Similarly, in Friederick, the defendant followed a woman out of an elevator, held her at knifepoint in a parking garage, and ordered her into her car. 34 Wn.App. at 538-39. At her first opportunity, she jumped out of the car and escaped. Id. at 539. Weeks later, the defendant raped a woman in a stairwell at knifepoint and was observed following women onto elevators. Id. This Court admitted some evidence of the subsequent acts, although not testimony about the rape itself, to show that the defendant abducted the victim with the intent to facilitate a commission of a felony, which was a necessary element of the crime charged. Id. at 544-45.

In both cases, the evidence admitted under ER 404(b) provided information about the defendant's intent when committing the charged crimes. In contrast, here the trial court admitted the evidence after finding not that it illuminated Mr. Wayland's intent during the incident, but that it went to Mr. Wayland's "ability to form" intent. 6/4/12 RP 38.

After Mr. Wayland mimed the shooting, a theatre employee locked the door, and when the manager attempted to get in, Mr. Wayland approached the manager, placed his hands in the manager's pockets, and said "where is the cash, man." 6/6/12 RP 35. He pulled a

glove out of the manager's pocket but returned it and told the manager he was kidding. 6/6/12 RP 38-39. Mr. Wayland then picked up a stanchion and broke the theatre's box office window. 6/7/12 RP 99.

Evidence that Mr. Wayland mimed a shooting prior to these incidents does not provide the jury with information about whether he intended to deprive the manager of property or whether Mr. Wayland acted knowingly and maliciously when he used the stanchion to break the window. See CP 100, 107. It also offers no unique insight regarding Mr. Wayland's ability to "form" intent, as it is just as irrational and random of an act as his actions that followed. Because it makes no fact that is of consequence to the determination of the case more or less probable, it is irrelevant. ER 401; State v. Briejer, 172 Wn.App. 209, 225, 289 P.3d 698 (2012).

ii. The evidence was unduly prejudicial.

The evidence that Mr. Wayland mimed a shooting is also substantially more prejudicial than probative. The State argues that the court sanitized the evidence by precluding any witness speculation that Mr. Wayland's hand gestures were "gang symbols." Resp. Br. at 7. While the court did preclude any mention of "gang symbols," it also recognized that this issue was separate from the issue of whether

testimony regarding the miming of a gun should be admitted. 6/4/12 RP 38. After determining that testimony regarding “gang symbols” was unduly prejudicial, it simply found that the gun miming was “predicate behavior that to [Mr. Wayland’s] ability to form intent,” and failed to weigh the probative value against the prejudicial effect. Id. Yet, much of the court’s analysis regarding the gang symbols held true for the miming of a gun: both are likely to cause instinctive, negative reactions in jurors, who will view Mr. Wayland as a dangerous, violent person. In addition, because the witness would be permitted to testify that she felt intimidated, its probative value was lessened. 6/4/12 RP 38. Thus, the gun miming, just like the gang symbols, was substantially more prejudicial than probative and should have been excluded. See State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

- b. Evidence that Mr. Wayland mimed a shooting was not properly admitted under the *res gestae* doctrine.

The State also argues the evidence that Mr. Wayland mimed a shooting was admissible to establish the *res gestae* of the charged crimes. Resp. Br. at 9. For the reasons set forth in Mr. Wayland’s opening brief, the evidence was not admissible under this doctrine.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Wayland respectfully asks this Court to reverse his conviction and remand this case for a new trial.

DATED this 9th day of September 2013.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69258-5-I
v.)	
)	
JOEY WAYLAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF SEPTEMBER, 2013, 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:

<p>[X] BENJAMIN CARR, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] JOEY WAYLAND 4540 15TH AVE NE SEATTLE, WA 98105</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF SEPTEMBER, 2013.

X _____ 

SEP 9 2013 4:56 PM

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710