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MAY 06 2014

King County Prosecutor
Appellate Unit

NO. 70132-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

TOM CHUOL,

Appellant.

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

The Honorable Judith Ramseyer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S REQUEST TO SPECIFICALLY PROHIBIT JURORS' USE OF ER 404(B) EVIDENCE TO SHOW CRIMINAL PROPENSITY.

Citing the language in WPIC 4.64.01 and WPIC 5.30, the State argues there is no need to expressly instruct jurors they may not use evidence of uncharged acts as proof the defendant has a criminal character. Brief of Respondent, at 5-10. The State is mistaken.

Both pattern instructions predate the Supreme Court's decision in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). See Washington Pattern Jury Instructions, WPIC 4.64.01 and 5.30, at 126, 180 (Thomson/West 2008). So do the four cases cited by the State. See Brief of Respondent, at 7-8.

The State contends that rather than establishing a categorical minimum for ER 404(b) limiting instructions, the Gresham Court was simply addressing the particular circumstances of that case. Brief of Respondent, at 8-9. Were this true, however, the Gresham Court would not have described the essential elements of an ER 404(b) instruction using such broad language:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-424. The Supreme Court identified these minimal requirements in response to a defense-proposed instruction that did not include a request for the highlighted limitation. See Gresham, 173 Wn.2d at 424 (discussing defense proposal). Since that limitation must be included even where the defense does not request it, it certainly must be included where, as here, the defense expressly requests it.

It is not surprising the Gresham Court ruled as it did. ER 404 does not list the proper purposes for which evidence of other bad acts may be used and then merely warn “the evidence is to be considered for no other purpose.” Rather, while noting the existence of proper purposes for this category of evidence, the rule expressly warns that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). A limiting instruction may do no less.

The State also argues that including an express prohibition would have been potentially confusing to jurors. Brief of 10. This is not the case. Using instruction 5 (CP 54) as an example, and in light of defense counsel's request, the last two lines could have said:

You may not consider this evidence to conclude that the defendant is a "criminal type" and has acted in conformity with that character. Nor may you consider it for any other purpose not identified above. Any discussion of the evidence during your deliberations must be consistent with these limitations.

The court's oral limiting instructions could have been worded similarly. There is nothing confusing about this, and it was the only sufficient manner in which to ensure jurors did not use evidence for a propensity purpose, the one prohibition expressly found in ER 404(b).

2. THE TRIAL COURT'S REPEATED COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED CHUOL A FAIR TRIAL.

It was the *prosecution* that drafted the language for the oral and written limiting instructions concerning the other bad acts evidence. 2RP 3. In response, defense counsel objected to the omission of an express prohibition against using this evidence to

conclude that Chuol was a criminal type, but did not otherwise object to the State's chosen language. See CP 35.

Orally, the trial court then used the prosecution's instruction on five separate occasions, each time referring to "these threats" as if there were no doubt the threats had been made to Tracy Robinson. See 3RP 74, 120, 131; 4RP 16, 26. The State does take issue with the fact Chuol may challenge these references as improper judicial comments even without an objection to the offending language. Nor could it. See State v. Levy, 156 Wn.2d 709, 719-720, 132 P.2d 1076 (2006); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

Instead, the State claims that defense counsel invited the judicial comment in the court's written instruction with his email of March 6, 2013, in which counsel indicated those proposed instructions to which he objected and those to which he did not. In doing so, defense counsel once again objected to the court giving an ER 404(b) instruction that omitted an express prohibition against using evidence for a propensity purpose. See CP 36. Counsel wrote, "I request that my proposed modification to the state's 'evidence for a limited purpose' be given with the instruction that the court has been

giving throughout the trial. The language was provided in my prior email.” CP 36.

On appeal, the State gloms on to the fact that, in making his objection to the State’s proposed written instruction, defense counsel used the words “the instruction that the court has been giving throughout the trial” as part of his request. The State says this is invited error. See Brief of Respondent, at 13-15. This is a stretch.

The clear purpose of counsel’s discussion in the email was to express *dissatisfaction* with the oral instruction the court had employed in an attempt to prevent the same mistake in the written instruction. It is nothing more than an acknowledgment that the court will be giving the same instruction again and a motion to reconsider one aspect of that instruction. In context, it is not an affirmative request for the language constituting a judicial comment. Counsel did not “materially contribute” to the error in question. See In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (requiring material contribution).

Next, the State argues there were no judicial comments because jurors would have understood that references to “these threats” were simply intended to distinguish the threats made to Robinson from other threats discussed at trial. See Brief of

Respondent, at 17. As proof, the State notes that jurors were repeatedly told they could use the evidence of other bad acts to determine if Chuol had a motive to make the threats. According to the State, since motive was only relevant to help jurors determine *whether* the threats were made, jurors could not have interpreted “these threats” as an indication the court believed the threats had been made. See Brief of Respondent, at 18-19. One does not follow from the other, however.

Motive “can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Although it is not an element of a criminal offense, it is always relevant and admissible because “[t]he human mind searches for a rational explanation for an irrational act[.]” State v. Matthews, 75 Wn. App. 278, 284-285, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022, 890 P.2d 463 (1995); see also State v. Haga, 13 Wn. App. 630, 637, 536 P.2d 648 (motive a permissible and relevant inquiry), review denied, 86 Wn.2d 1007 (1975).

Since motive is *always* a relevant consideration (whether the elements of the charge have otherwise been proved or not), the fact jurors could use evidence of Chuol's uncharged bad acts to assess

his motive to make the threats did nothing to undermine the clear implication from the court's use of "these threats" that the court believed the threats had, in fact, been made. And an implication is enough for a violation. See Levy, 156 Wn.2d at 721.

Finally, the State argues that the judicial comments were harmless despite the presumption of prejudice. First, the State notes that jurors were told to disregard any judicial comments. Brief of Respondent, at 19-20. This is insufficient. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892.

Second, the State notes that jurors acquitted on count 2, Threats to Bomb or Injure Property. According to the State, jurors would not have acquitted on this count if they considered the court's references to "these threats" as indications the charged threats had been made. See Brief of Respondent, at 21-22. But jurors most likely acquitted on this charge because Robinson did not initially claim Chuol had threatened to use a bomb. See RP 124. Not even a judicial comment on the evidence suggesting the threats had been made could overcome *that* prosecutorial hurdle. The evidence on count 1, however, would have been much closer and the court's comments more likely to sway jurors in favor of conviction.

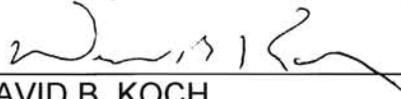
B. CONCLUSION

For all of the reasons discussed in Chuol's opening brief and above, this Court should reverse. Alone and in combination, the errors require a new trial.

DATED this 6th day of May, 2014.

Respectfully Submitted,

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v.)	COA NO. 70132-1-1
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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 6TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TOM CHUOL
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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MAY 2014.

x Patrick Mayovsky

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