

NO. 70911-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GARTH OLSEN,

Appellant.

COLLECTED
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
JAN 11 2011
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PRESENTED

1. Evidence of a defendant's prior misconduct is not prohibited by ER 404(b) if admissible for a proper purpose. The trial court conducted the correct four-part analysis and determined that Olsen's prior conduct was an inseparable part of the crime charged that was highly probative of his intent and was not unduly prejudicial. Olsen's conduct was admitted at trial for a proper purpose under ER 404(b) and as res gestae. Did the trial court properly exercise its discretion in admitting evidence of Olsen's prior conduct?

2. Physical evidence lawfully seized from a defendant in a search incident to arrest that links the defendant to a crime scene is not subject to an ER 404(b) analysis where the evidence is not offered to prove the defendant's character. Evidence must be relevant and not unduly prejudicial in order to be admissible. The trial court determined that papers seized from Olsen's person that linked him to the scene of the crime were relevant to establish his identity and connection to the scene and were not unduly prejudicial. Did the trial court properly exercise its discretion in admitting physical evidence found in Olsen's pocket?

B. STATEMENT OF THE CASE

On February 27, 2013, the State charged Garth B. Olsen with one count of voyeurism. CP 1. Following a jury trial, Olsen was convicted as charged. CP 58.

On February 26, 2013, Olsen had walked to the Cowgirls Espresso Stand on Lake Washington Boulevard, in Renton, Washington. RP 196, 288-30. He arrived prior to 4:00 a.m. RP 200-03, 209-10. It was dark outside. RP 207. He was waiting at the coffee stand when the barista arrived to open the stand for her morning shift. RP 200-03. When the barista entered the coffee stand, Olsen wandered off. RP 203, 211. She began her opening routine, turned off the alarm, and went into the bathroom to change her clothes. RP 212.

While in the bathroom, she heard a noise from outside of the window that sounded like a big boom. RP 213. Her first instinct was to look to the window in the bathroom. Id. Olsen had climbed up on an ice box that was positioned on the outside of the coffee stand in order to peer into the bathroom where the barista was changing her clothes. RP 269. The barista saw Olsen's face illuminated in the window peering down at her. RP 213. She was unclothed and starting to get dressed. Id. As he peered down on

her, Olsen said, "You're a f'in' whore, let me see your ass, let me see you." RP 227. The barista called 911. RP 215.

Olsen was contacted by law enforcement a couple of hundred yards north of the coffee stand. RP 290. He was apprehended after a short pursuit. RP 291. During a search incident to arrest, officers located some papers in his jacket pocket. Id. The papers contained different writings including pornographic websites, the name of the coffee stand, Cowgirls Espresso, the license plate number of the victim's vehicle, and a description of the vehicle. RP 293-96. The barista positively identified Olsen at the scene. RP 229.

That same morning, Olsen had previously been contacted by two of the same law enforcement officers. RP 181-87, 285-86. He was contacted at the Big Foot Java coffee stand approximately three hours prior to the charged crime and less than two miles from the crime scene. Id. Officers had responded to a 911 call made by the barista at the Big Foot Java coffee stand. RP 181. The barista provided a description of Olsen who was contacted by law enforcement at the scene. RP 184. During that interaction, Olsen stated the following to officers regarding the baristas in the area:

“They’re all whores.” RP 186. He said, “Do you see what they’re wearing? They don’t wear anything, the baristas around here.” Id.

During pre-trial motions, the State moved to admit Olsen’s prior conduct at the Big Foot Java coffee stand as *res gestae*. RP 7-21. The State also argued that the evidence was offered for a proper purpose under ER 404(b). Id. The court conducted an ER 404(b) analysis on the record. RP 155-57. The trial court held that the evidence of prior misconduct was admissible. Id.

Olsen moved to exclude as evidence the papers that were seized from him in a search incident to arrest. RP 70-76. The trial court concluded that the evidence was relevant and was not unduly prejudicial. RP 76.

The evidence of Olsen’s prior misconduct at the Big Foot Java coffee stand and the papers that were seized following his arrest were admitted at trial. RP 147-49, 155-57, 160, 180-87, 284-87, 291-96.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO ER 404(b).

Olsen claims that the trial court abused its discretion in admitting evidence of prior bad acts. This claim should be rejected.

Prior to trial, the court heard argument on the admissibility of Olsen's conduct and found by a preponderance of evidence that the acts occurred, the conduct was part of the same continuum and admissible to complete the story of the crime charged, which was relevant to prove a necessary element, and the admission of the evidence was not unfairly prejudicial.

The trial court's decision regarding the admission of evidence pursuant to ER 404(b) is reviewed for an abuse of discretion. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The reviewing court should uphold a trial court's ruling under ER 404(b) unless there is a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. State v. Sublett, 156 Wn. App. 160, 195, 231 P.3d 231 (2010). The trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. Id. (citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

To admit evidence pursuant to ER 404(b), a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to

prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). The trial court is not required to hold an evidentiary hearing to determine the admissibility of ER 404(b) evidence, and may rely on an offer of proof. State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

- a. Evidence Of The Defendant's Conduct At The Big Foot Java Coffee Stand The Same Morning Was Admitted For A Proper Purpose Pursuant To ER 404(b) And An Inseparable Part Of The Crime Charged.

The admission of evidence surrounding Olsen's conduct at the Big Foot Java coffee stand was addressed during pre-trial motions. RP 7-21. The State moved for admission of the conduct, in limine, and argued that the acts were an inseparable part of the crime charged. Id. The State also argued, in briefing, that the acts were relevant to prove the essential element that Olsen committed the act of voyeurism for the purpose of arousing or gratifying his sexual desire. Supp CP __ (sub 40).

The trial court properly analyzed the admission of the conduct under ER 404(b). RP 155-57. The court determined that the evidence would be admissible to establish the defendant's

state of mind, which was relevant to prove sexual gratification, a necessary element of the crime charged. RP 156; *see also* RCW 9A.44.115. This was a valid exception¹ to ER 404(b). In addition, the court determined that Olsen's conduct was part of a continuum and was admissible as *res gestae*. RP 156. The trial court found, "that the prejudice does not outweigh the probative value," of the evidence. RP 156. Following the court's ruling, the evidence was admitted at trial. RP 180-87, 284-87.

- i. The conduct was relevant to show intent.

"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." ER 404(b). Evidence of prior misconduct "may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* ER 404(b) is a categorical bar to admission of certain types of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The same evidence may, however, be

¹ The term "exception" in the context of ER 404(b) is simply legal shorthand for a "proper purpose" upon which evidence may be admitted. See Gresham, 173 Wn.2d at 421.

admissible for any other purpose, subject to its relevance and balancing its probative value against the danger of unfair prejudice. Id. There are an undefined number of purposes for which evidence may be properly admitted under ER 404(b). Id. at 421.

Olsen asserted a defense of general denial putting every element of the crime charged at issue. The State was required to establish that Olsen committed the act of voyeurism for the purpose of arousing or gratifying the sexual desire of any person. RCW 9A.44.115. This put at issue Olsen's state of mind leading up to the commission of the crime. Thus, Olsen's conduct surrounding the commission of the crime was highly probative of his intent.

During the incident at Big Foot Java, Olsen told law enforcement officers, "Do you see what they're wearing? They don't wear anything, the baristas around here. They're all whores." RP 186. This evidence was necessary to establish Olsen's state of mind during the act of voyeurism and went directly to an element of the crime charged. This evidence corroborated the State's theory that Olsen committed the act of voyeurism for the purpose of arousing or gratifying his own sexual desire. Olsen's sexual desire is explicit in the language he used and the comments he made to law enforcement at the Big Foot Java coffee stand the same

morning. This evidence is highly probative of Olsen's intent and relevant to establish the sexual gratification element of the crime charged.

This evidence was also relevant because the incident took place in the immediate time frame of the voyeurism. See Lane, 125 Wn.2d at 833. The trial court referred to the conduct as a continuum. RP 156. The trial court indicated that the conduct could be used to establish Olsen's state of mind. Id. Great deference should be afforded to the trial court's determination of relevancy. Lane, 152 Wn.2d at 835.

Olsen asserts that the only logical relevance of the officers' testimony about the Big Foot Java incident is based on a propensity argument. He is incorrect. For this assertion he cites State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001). Pogue involved a drug prosecution in which the State admitted evidence of prior convictions for drug offenses to rebut the defense of unwitting possession. Id. at 982. The State conceded on appeal that the trial court erred in allowing the State to inquire into the defendant's past possession of cocaine. Id.

The case before this court is substantially different from that which Olsen has relied on. In this case, the State did not inquire of

Olsen's prior conviction for voyeurism. Instead, the State admitted evidence of Olsen's words and conduct that occurred in the same early morning hours in which he committed the voyeurism. Olsen's words and conduct, while committed three hours prior to the crime charged, were highly probative of his state of mind at the time he committed the crime and relevant to prove his sexual desire. They were properly admitted under ER 404(b).

ii. The res gestae exception also applied.

Evidence of conduct that is offered to provide the jury with a complete description of the crime charged can be admissible as res gestae. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). Res gestae evidence is not evidence of unrelated prior criminal conduct but is part of the crime charged. Sublett, 156 Wn. App. at 196. It is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Res gestae evidence is probative because it necessarily completes the mosaic of events, thus there is no additional requirement that res gestae evidence be relevant for an additional purpose under ER 404(b) such as plan or motive. Lane, 125 Wn.2d at 834. "Once the trial court has found res gestae

evidence relevant for a purpose other than showing propensity and not unduly prejudicial, that evidence is admissible under the res gestae exception² to ER 404(b), so long as the State has shown by a preponderance of the evidence that the uncharged crimes occurred and were committed by the accused.” Id.

Evidence was presented that Olsen approached a similar coffee stand three hours prior to the commission of the crime and engaged in harassing behavior of a young female barista that occurred less than two miles from where the charged crime occurred. RP 181-87, 284-88. Olsen used similar language in calling all baristas whores when confronted at the Big Foot Java. RP 186. Olsen’s conduct continued when he walked less than two miles down the road and peered in on a young barista whom was changing in the restroom of her coffee stand. RP 226. Olsen then focused his comments to that barista and called her a whore. RP 227. Olsen’s conduct was part of a continuum from the Big Foot Java incident that continued during the crime charged and culminated in his arrest. The evidence of the Big Foot Java incident provided the context for Olsen’s actions and completed the

² Division II of the Court of Appeals has declined to characterize res gestae evidence as an exception to ER 404(b). State v. Briejer, 172 Wn. App. 209, 224, 289 P.3d 698 (2012).

story of the crime. The conduct was close in both time and place to that of the charged crime. It was properly admitted by the trial court as res gestae.

The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present an incomplete version of events by arguing that evidence of other misconduct is inadmissible because it only tends to show the defendant's bad character. State v. Tharp, 27 Wn. App. 198, 205, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591 (1981).

In State v. Powell, the Court found that evidence of statements made by the defendant two days prior to the commission of the crime were properly admitted as res gestae evidence in order to establish the hostilities between the defendant and his wife, whom he killed. Powell, 126 Wn.2d at 263. The court found that the statements were necessary for the jury to understand the nature of the defendant's conduct and completed the story of the crime on trial by proving its immediate context. Id. Similarly, Olsen's conduct and statements at the Big Foot Java less than four hours prior to the crime completed the story of how and why he came to be on top of a coffee stand peering down at the victim as

she changed in the bathroom and calling her a whore. The prior conduct was near in time and place and was properly admitted.

Olsen likens this case to that of State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001). Trickler involved the prosecution of a defendant for possession of a stolen credit card in which the State sought to admit evidence that the defendant possessed 16 other stolen items at the same time he possessed the stolen credit card. Id. at 733-34. The court was concerned that the jury would be left to draw no other conclusion but that the defendant was a thief and therefore he must have known the credit card in his possession was stolen. Id.

Here, the State did not elicit evidence of multiple other incidents leading up to the crime. Rather, the State introduced one event that occurred just hours prior to the criminal conduct in which Olsen articulated his state of mind to officers. Olsen's conduct was connected in time, place, and circumstances and was an inseparable part of the crime charged.

iii. Evidence was not unduly prejudicial.

The evidence from the Big Foot Java coffee stand is prejudicial, but only in the sense that it is highly probative. The trial court conducted an ER 403 analysis on the record and found that

the evidence was admissible. Olsen's prior misconduct was neither unduly inflammatory nor prevented the jury from making a rational decision. The evidence was not unfairly prejudicial within the meaning of ER 403 and was admissible pursuant to ER 404(b).

State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990).

- b. Evidence Obtained From The Defendant's Pockets Which Included A Piece Of Paper With The Victim's License Plate Number And Description Of Her Vehicle Along With The Coffee Stand's Name And Pornographic Websites Connected The Defendant To The Scene Of The Crime, Established His State Of Mind, And Was Properly Admitted At Trial.

The basic operation of ER 404(b) is derived from its plain text. Gresham, 173 Wn.2d at 420. "Certain types of evidence (i.e., 'evidence of other crimes, wrongs, or acts') are not admissible for a particular purpose..." Id. ER 404(b) pertains to crimes, wrongs, or acts which a party intends to introduce at trial. Id. It does not pertain to physical evidence found at a crime scene, nor a defendant's fingerprints, or any other type of evidence that is not considered a prior bad act. While ER 404(b) is a categorical bar to the admission of evidence that is used to prove the defendant's character and action in conformity therewith, evidence obtained

from the defendant's person at the time he is leaving a crime scene does not automatically invoke an ER 404(b) analysis.

All evidence must be relevant in order to be admissible. ER 402. Although relevant, evidence may be excluded if the court finds the evidence is unduly prejudicial. ER 403. Each piece of evidence in a criminal trial is subject to a relevance analysis and its probative value must be weighed against the danger of unfair prejudice. State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). The threshold to admit relevant evidence is low such that minimally relevant evidence is admissible. Id. (citing State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). Only when the court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice is the evidence to be considered unduly prejudicial. ER 403.

Olsen's assertion that the admission of a piece of paper lawfully seized from his pocket in a search incident to arrest should have been subject to an ER 404(b) analysis prior to admission at trial is incorrect. This issue was addressed by the trial court during pre-trial motions. RP 70-76. Olsen sought to suppress the paper which included writings of pornographic websites, the victim's license plate number from the vehicle she drove to the scene, a

description of the vehicle, and the name of the coffee stand at which she worked where the incident occurred. RP 71. The trial court conducted the proper ER 402 and 403 analyses and found that the evidence was relevant and not unduly prejudicial. During the course of trial, Olsen raised an additional argument that the note found in his pocket was an uncharged act of misconduct and subject to ER 404(b). RP 161. The trial court properly denied Olsen's motion.

On appeal, Olsen mischaracterizes the piece of paper as "misconduct," in arguing that close scrutiny must be engaged in to determine whether the evidence was admitted for a proper purpose. The paper is in fact physical evidence, which links Olsen to the scene of the crime. The circumstantial evidence was used to prove identity, in order to establish that Olsen was the individual peering in on the victim at the coffee stand, which was located several blocks from where Olsen was arrested. RP 115. The evidence was not unduly prejudicial, and thus was properly admitted at trial.

Even if the paper found in Olsen's possession, which linked him to the scene of the crime were to be considered an uncharged act of misconduct, the evidence would have been admissible as

res gestae, thus Olsen cannot establish that any error was prejudicial. Sublett, 156 Wn. App. at 196. The trial court's failure to conduct a balancing analysis on the record would be harmless, because the evidence was admissible under a valid exception to ER 404(b). Id.

c. Even Assuming The Admission Of Evidence Was Improper, The Error Was Harmless.

The erroneous admission of evidence pursuant to ER 404(b) is not of constitutional magnitude because any error would be in violation of an evidentiary rule not a constitutional mandate. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). In order to establish that the admission of evidence resulted in prejudicial error, Olsen must show that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980). He must establish that within reasonable probabilities, the outcome would have been different. Id. Without a showing that the outcome was materially affected, Olsen cannot establish prejudice. An error in admitting evidence that does not result in prejudice to Olsen is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The improper admission of evidence constitutes harmless error so long as the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id. In assessing whether the error was harmless, the court measures the admissible evidence of Olsen's guilt against the prejudice, if any, caused by the erroneously admitted evidence. Id. In this case, Olsen requests reversal without establishing prejudice.

Here, the admissible evidence of Olsen's guilt is overwhelming. At trial, the State offered the testimony of six different witnesses. Officers Magnotti and Stevens responded to the 911 call of the victim at Cowgirls Espresso. RP 189, 288. They took Olsen into custody near the scene of the crime and facilitated the identification of Olsen. Id. The victim testified about the events of the crime as they occurred. RP 194-256. Her testimony established Olsen's identity and presence at the scene. RP 210. She testified that she saw Olsen's face peering in the bathroom window at her. RP 214. Olsen's viewing of the victim occurred while she was in the bathroom, a place where she had a reasonable expectation of privacy. RP 226-28. She was unclothed when Olsen viewed her intimate areas. RP 253-54. Olsen made sexually charged comments to the victim about showing parts of

her unclothed body, which established his sexual desire in viewing the victim. RP 227. Tommy M. testified that he drove by Cowgirls Espresso and saw Olsen perched on top of the ice box peering into a window of the coffee stand. RP 269-70. The window was seven feet off of the ground. RP 310. This, along with Olsen's comments to the victim, established that Olsen knowingly viewed the victim. Finally, Olsen's statement to Detective Barfield was played for the jury. RP 309. In his own words, Olsen knew that the victim was going to change her clothing inside the bathroom of the coffee stand, so he climbed up on the ice box so he could take a look at her. Ex. 17; RP 379-80.

The State established beyond a reasonable doubt through overwhelming evidence that Olsen knowingly viewed the victim for the purpose of arousing or gratifying his sexual desire, and that the viewing occurred without the victim's knowledge and consent while in a place where she had a reasonable expectation of privacy. The evidence also established the alternate means of the crime that Olsen viewed the intimate areas of the victim without her knowledge and consent where she had a reasonable expectation of privacy.

The evidence in dispute was of minor significance. The overwhelming evidence of Olsen's guilt, including his own statements, established the elements of the crime of voyeurism. The admission of that evidence did not result in prejudice to Olsen. Any error was harmless.

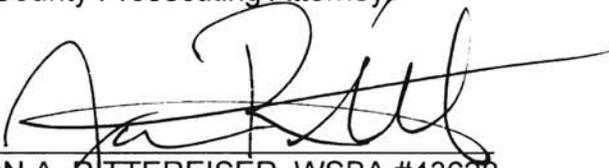
D. CONCLUSION

This court should affirm Olsen's conviction and sentence.

DATED this 8th day of July, 2014.

Respectfully submitted,

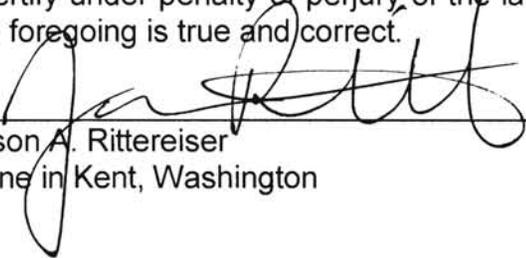
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. OLSEN, Cause No. 70911-9-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.



Jason A. Rittereiser
Done in Kent, Washington

7/8/14
Date

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