

FILED
September 15, 2015
Court of Appeals
Division I
State of Washington

NO. 73143-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

PETER WHITMORE.

Appellant.

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erroneously admitted evidence that there was an outstanding warrant for appellant's arrest.

2. The court erroneously admitted evidence that another police agency wanted to contact appellant.

3. The court erred in imposing discretionary legal financial obligations without considering appellant's present or future ability to pay them.

Issue Pertaining to Assignments of Error 1 and 2

Over defense counsel's objections, the court admitted police testimony that there was an outstanding Island County warrant for appellant's arrest on an unrelated matter, and that another police agency wanted the Island County Sheriff to help it contact appellant. Did the court commit reversible error in admitting this evidence under where (1) the evidence was not admissible under the res gestae exception to ER 404(b) and (2) the evidence was irrelevant and unduly prejudicial under ER 402, ER 403, and ER 404(b)?

Issue Pertaining to Assignments of Error 3

Did the court erroneously impose discretionary legal financial obligations absent inquiry into appellant's current or future ability to pay them?

B. STATEMENT OF THE CASE

1. Procedural History

Peter Whitmore was charged by information filed in the Island County Superior Court with one count of possession of a controlled substance. CP 37-38. A jury found Whitmore guilty of the offense. CP 13. The court sentenced Whitmore to 60 days in jail, 12 months in community custody, and it imposed certain legal financial obligations (LFO's). CP 3-12.

2. Substantive Facts

a. State's Case

Island County Deputy Sherriff Robert Davison testified that the Anacortes Police Department called the Island County Sheriff's Office and requested it help that agency locate and contact Whitmore. In response to the request Davison ran Whitmore's name in his computer and discovered there was an outstanding Island County warrant for Whitmore's arrest. RP 50-52.¹

Davison and Reserve Deputy Eric Gronbach then went to a home where they believed they would find Whitmore. Whitmore's grandmother answered the door and the officers asked if she would tell Whitmore they

¹ RP refers to the verbatim report of proceedings for January 27, 2015 and January 28, 2015, which are sequentially numbered.

wanted to talk with him. RP 53-54, 79-80. When Whitmore came to the door he said "oh shit." RP 54.

The officers told Whitmore the Anacortes police needed to talk to him, and there was an Island County warrant for his arrest. Whitmore was arrested, handcuffed and taken to the officers' car. RP 55-56, 81-84. At the car Gronbach searched Whitmore. When Gronbach was taking a lighter out of Whitmore's pant pocket a baggie containing .06 grams of methamphetamine came out as well. RP 85, 132-133.

b. Defense Case

Whitmore testified he does some construction work. RP 136. On the day he was arrested he was at his grandmother's house doing a construction project for her. Id. He was eating lunch when he saw the two officers arrive. He thought they were there to speak to his grandmother about a robbery in the neighborhood. RP 137. When his grandmother told him the officers wanted to talk to him, Whitmore went to the door where he was arrested. RP 138-39.

Whitmore explained that the carpentry pants he was wearing when he was arrested and searched were from a tool camper that had been towed to his grandmother's house. RP 140-142. Inside the tool camper was a work bench, tools and a pile of clothes, including rain gear. He and others he works with often use clothes from the tool camper so their own clothes

do not get dirty. Whitmore took the pants he was wearing from the tool camper so he would not get his clothes dirty while working on his grandmother's house. Whitmore was unaware there were drugs in the pants. He had never worn those particular pants before, and the baggie containing the methamphetamine was with a wad of garbage that was in the pants. RP 148-151.

C. ARGUMENTS

1. THE COURT'S WRONGFUL ADMISSION OF UNFAIRLY PREJUDICIAL IRRELEVANT, AND BAD ACT EVIDENCE INFLUENCED THE OUTCOME OF THE CASE.

Whitmore moved to exclude evidence the Anacortes Police Department requested the Island County Sherriff to assist them and contact Whitmore, and that there was an outstanding Island County warrant for Whitmore' arrest. RP 7-8, 11-12. Whitmore argued the evidence was irrelevant, and its admission was prejudicial because the jury would infer Whitmore was a criminal and was also wanted by the Anacortes police because of some prior bad act. RP 11-12. The court ruled the evidence admissible finding it part of the res gestae. RP 12-13. The court erroneously admitted the evidence.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328,

333, 989 P.2d 576 (1999). To that end, ER 402 prohibits admission of irrelevant evidence.² Irrelevant evidence has no probative value. State v. Cameron, 100 Wn.2d 520, 531, 674 P.2d 650 (1983). Evidence is only relevant if (1) it tends to prove or disprove the existence of a fact and (2) that fact is of consequence to the outcome of the case. ER 401. But, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.³

ER 404(b), meanwhile, prohibits admission of character evidence to show the person acted in conformity with that character.⁴ Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). "ER 404(b) forbids such inference

² ER 402 provides: " All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

³ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

⁴ ER 404 provides in relevant part: " (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . (b) Other Crimes, Wrongs, or Acts. 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."

because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336.

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. One of these purposes is proof of res gestae. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989). Res gestae evidence completes the story of the crime by proving the immediate context of happenings near in time and place. Id. To qualify as res gestae, "[t]he other acts should be inseparable parts of the whole deed or criminal scheme." Id.

The testimony the Anacortes police wanted to contact Whitmore, and there was an outstanding Island County warrant for Whitmore's arrest was inadmissible under ER 404(b). The charged offense here is possession of a controlled substance. The evidence does not qualify as res gestae because it is not "a link in the chain of an unbroken sequence of events surrounding the charged offense." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (citation omitted). If it was deemed necessary for the officers to explain their reason for contacting Whitmore, it was sufficient for the officers to report they acted upon "information received." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (rejecting admission of police dispatch evidence to "show the officer's state of mind in explaining why he acted as he did."). It was not necessary to explain

there was an outstanding warrant for Whitmore's arrest or that the Anacortes police wanted to contact him.

Moreover, the testimony was irrelevant and inadmissible under ER 402 and 403. Whitmore maintained that he unwittingly possessed the drugs, and the jury was instructed on the defense of unwitting possession. CP 25. The issue at trial was Whitmore's credibility. If the jury believed his testimony it would have acquitted him. The testimony that the Anacortes police were looking for Whitmore, and there was an outstanding warrant for his arrest, did not tend to prove or disprove any fact at issue in the trial. It had no probative value.

On the other hand, the testimony was unfairly prejudicial. The officers' testimony essentially told the jury that Whitmore was already a criminal and the Anacortes police suspected him of yet other crimes. The evidence led the jury to believe because Whitmore was a criminal it was more likely than not he put the drugs in the pants he was wearing. That belief would have convinced jurors Whitmore knowingly possessed the drugs, despite his testimony, because of his bad character and propensity to commit crimes.

Even if it was necessary to inform the jury Whitmore was arrested on an outstanding Island County warrant so jurors would understand why he was searched, it was not necessary to also inform the jury the Anacortes

police were looking to contact him. The jury would have still heard the complete story surrounding the arrest in the absence of that evidence. That evidence, in conjunction with the warrant evidence, more likely than not led jurors to conclude that Whitmore was a serial criminal, and therefore had a propensity to commit the crime rendering his testimony not credible.

Evidentiary error is grounds for reversal if it results in prejudice. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Smith, 106 Wn.2d at 780.

For the above reasons the outcome of Whitmore’s trial was materially affected by admission of the improper warrant evidence, and evidence the Anacortes police wanted to contact him. Even if the warrant evidence was relevant to explain why Whitmore was searched, the additional evidence that the Anacortes police wanted to contact him materially affected the trial’s outcome.

2. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER WHITMORE'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Whitmore to pay the following discretionary LFO's: (1) \$400 court appointed attorney fee; (2) \$200 criminal filing fee; (3) \$17 Sheriff service fee; and (4) \$100 crime lab fee. CP 7. The court erred in imposing these LFO's because it failed to make an individualized inquiry into Whitmore's current and future ability to pay them.

The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680, 683 (2015). In the judgment and sentence, the following pre-printed, generic language appears:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 5.

But, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Blazina, 182 Wn.2d at 838. Although the court waived the \$1,000 VUCSA fee based on the finding Whitmore was indigent, the record reflects it did not consider Whitmore's indigent status or individual financial resources and the burden of imposing the other financial obligations before it imposed the other fees. RP 2-5 (2/2/2015). The boilerplate finding regarding ability to pay lacks support in the record.

Defense counsel objected only to the imposition of the crime lab fee (RP 3-4 (2/2/2015)), but an appellate court has discretion to review the issue of the imposition of all the discretionary LFO's consistent with RAP 2.5. Blazina, 182 Wn.2d at 835. Whitmore requests that this Court do so, and reserve the LFO's and remand for resentencing. Id. at 838.

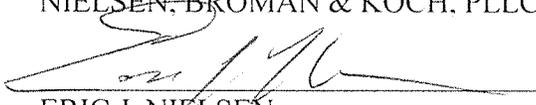
D. CONCLUSION

For the above reasons Whitmore requests (1) reversal of the conviction and remand for a new trial, and (2) reversal of the discretionary LFO's and remand for resentencing.

DATED this 15 day of September, 2015.

Respectfully submitted,

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