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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 35187-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW K. STONE,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by permitting testimony of an unrelated confrontation between Mr. Stone and another bar patron other than the alleged victim.

2. The trial court violated Mr. Stones' right to confront and cross-examine the witnesses against him guaranteed by the Sixth Amendment to the United States Constitution when the trial court precluded cross-examination of the alleged victim regarding his possible motive to testify.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court abuse its discretion by admitting evidence under ER 404(b) of a confrontation between the defendant and another bar patron prior to the alleged assault when the alleged victim neither participated in or was aware of the confrontation?

2. Did the trial court violate Mr. Stones' rights under the Sixth Amendment to the United States Constitution by precluding him from confronting a witness regarding his possible motivation for testimony when the witness was seeking reimbursement for an unrelated assault?

III. STATEMENT OF THE CASE

1. Procedural History

Mr. Stone was charged with assault in the second degree by way of an amended information. CP 65. The information alleged the assault was committed with the use of a deadly weapon. CP 65. Mr. Stone was convicted of assault in the second degree following a trial by jury. CP 94. This appeal timely follows the conviction rendered by the jury. CP 103.

2. Statement of Facts

On February 26, 2005 Mr. Stone went to the Horse and Cow bar to hang out with his friends. RP (06/28/2006) 223. Mr. Stone saw Mr. Bollinger outside of the bar. RP (06/28/2006) 210-211. Mr. Bollinger made an unsolicited comment to Mr. Stone. RP (06/28/2006) 210. Mr. Bollinger punched Mr. Stone several times and came after Mr. Stone. RP (06/28/2006) 212-213. Mr. Stone responded to the attack by punching Mr. Bollinger. RP (06/28/2006) 214.

On the evening of February 26, 2005 Mr. Bollinger also went to the Horse and Cow bar. RP (06/27/2006) 54. He had three to four beers at a friends house prior to going to the bar. RP (06/27/2006) 54. He estimated he consumed one to two beers

during the time he was at the bar. RP (06/27/2006) 54-56.

Mr. Bollinger stayed in the bar area of the establishment. RP (06/27/2006) 54. Mr. Bollinger did not recall anything unusual occurring while he was inside of the bar. RP (06/27/2006) 55.

Mr. Bollinger did not recall seeing Mr. Stone with any other individuals in the bar that night. RP (06/27/2006) 70. Mr. Bollinger was in the bar for three to four hours that night. RP (06/27/2006) 56.

No one tried to pick a fight with Mr. Bollinger, or even argue with him, during the time he was in the bar. RP (06/28/2006) 89.

Mr. Bollinger did not recall any sort of stand-off occurring between himself and Mr. Stone inside the bar. RP (06/28/2006) 90.

Mr. Bollinger testified that Mr. Stone hit him outside of the bar. RP (06/28/2006) 90.

Mr. Bollinger denied any other injuries occurring to his face in the two weeks after February 26, 2005. RP (06/27/2006) 68.

Mr. Bollinger sought medical treatment for the injury he thought he sustained on February 26, 2005 about ten days after the injury. RP (06/27/2006) 68.

The defense sought to cross-examine Mr. Bollinger regarding statements he made in the Victim Impact Statement.

RP (06/27/2006) 38. The Victim Impact Statement was signed by Mr. Bollinger under penalty of perjury. RP (06/27/2006) 38.

Mr. Bollinger included bills for medical care that was incurred for injuries unrelated to the alleged incident with Mr. Stone.

RP (06/27/2006) 38. Mr. Bollinger stated that he had been hit in the head with a bottle by a neighbor about ten days after the event involving Mr. Stone. RP (06/27/2006) 38. The defense sought to present that information to the jury to show Mr. Bollinger's bias and motivation for his testimony. RP (06/27/2006) 41-42. The Court deferred ruling on the issue initially and the issue was resolved when Mr. Bollinger testified at trial. RP (06/27/2006) 43.

Mr. Bollinger did not have medical insurance at that time, nor did he have insurance at the time of the trial. RP (06/27/2006) 74. Mr. Bollinger testified that he did not initially seek medical treatment after February 26, 2005 for financial reasons. RP (06/27/2006) 74. Mr. Bollinger completed and submitted the form to get his medical bills paid for. RP (06/27/2006) 77. Mr. Bollinger did not exactly recall whether the medical appointments were for injuries that occurred on February 26, 2005. RP (06/27/2006) 78-79. The Court disallowed any questioning on the issues raised by the Victim Impact Statement. RP (06/27/2006) 80.

Mr. Peebles testified at trial regarding his observations at the Horse and Cow bar on the evening of February 26, 2005. RP (06/28/2006) 138; RP (06/28/2006) 239-247. Mr. Peebles observed Mr. Stone inside the Horse and Cow bar. RP (06/28/2006) 239. Mr. Peebles testified at a motion hearing conducted prior to trial and again during the jury trial. RP (05/08/2006) 36; RP (06/28/2006) 133-153; 239-241. On all occasions, Mr. Peebles described his observations of Mr. Stone inside of the tavern. RP (05/08/2006) 40; RP (06/28/2006) 138. Mr. Peebles recalled seeing Mr. Stone have words with a male patron, not Mr. Bollinger, inside the tavern. RP (05/08/2006) 13, 39, 40; RP (06/28/2006) 241-242.

Mr. Peebles recalled watching Mr. Stone staring at the gentleman after words were exchanged. RP (05/08/2006) 40; RP (06/28/2006) 214-242. Mr. Peebles recalled watching Mr. Stone, "popping his fist, digging in his pockets, and just standing there in a threatening manner." RP (05/08/2006) 41; RP (06/28/2006) 239-241. These observations were described to the jury in rebuttal testimony. RP (06/28/2006) 239-241.

Mr. Peebles estimated that he watched Mr. Stone for fifteen to twenty minutes. RP (05/08/2006) 44. Mr. Peebles walked over to

Mr. Stone and the bar patron and later followed Mr. Stone into the restroom. RP (05/08/2006) 43; RP (06/28/2006) 143. Mr. Peebles stayed in the restroom to wash his hands after Mr. Stone left to avoid appearances of following Mr. Stone. RP (05/08/2006) 43. Mr. Peebles left the restroom, walked through the entire bar, but did not see Mr. Stone. RP (05/08/2006) 43; RP (06/28/2006) 144. Mr. Peebles did not see Mr. Stone outside of the tavern. RP (05/08/2006) 44.

The admissibility of Mr. Peebles' observations of an interaction between Mr. Stone and another bar patron was debated prior to trial and again before the beginning of the presentation of the defense testimony. RP (06/26/06) 26; RP (06/28/2006) 155.

The defense sought a ruling precluding Mr. Peebles from testifying regarding his observations of Mr. Stone interacting with the bar patron. RP (06/26/2006) at 26; CP 22. The State sought to introduce the evidence pursuant to ER 404(b), calling the incident part of res gestea of the charged offense. RP (06/26/2006) 26-27. The Court engaged in a balancing test weighing the relevance of the information against the potential for prejudice to the defendant. RP (06/27/2006) 33-35. The Court ruled that the evidence of the interaction between Mr. Stone and the male patron was not

admissible unless the defendant raised a claim of self defense. RP (06/27/2006) 35-36. The Court ruled that the ruling would be reconsidered if the issue of self defense was raised.

RP (06/27/2006) 35-36. Ultimately the Court allowed Mr. Peebles to testify regarding his observations of Mr. Stone interacting with the other bar patron as a rebuttal witness because Mr. Stone raised a claim of self defense. RP (06/28/2006) 132-133, 156-159.

IV. ARGUMENT

A. Does a trial court abuse its discretion by admitting evidence under ER 404(b) of a confrontation between the defendant and another bar patron when the alleged victim neither participated in or was aware of the confrontation?

1. The testimony regarding the defendant and bar patron was not admissible under ER 404(b).

The review of a trial court's decision to review evidence under ER 404(b) is under an abuse of discretion standard. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court should begin the analysis with the presumption the evidence is inadmissible. *Id.*

Under ER 404(b) a witness' prior bad acts are admissible if the evidence is relevant to a material issue and the probative value

outweighs any prejudice. ER 404(b); State v. Boot, 89 Wn.App. 780, 788, 950 P.2d 964 (1998). ER 404(b) states as follows:

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..." ER 404(b)

To determine the admissibility of evidence under ER 404(b) the Court is to engage in a balancing test weighing the relevancy of the evidence against the potential for unfair prejudice. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) The Court must first identify the purpose for which the evidence is offered; 2) determine if the evidence is relevant to establish an essential element of the crime; 3) balance the probative value against the prejudicial effect of the evidence; and 4) determine that the acts occurred by a preponderance of the evidence. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)

In this case the State offered the evidence of the prior confrontation under a claim of "res gestae". RP 06/26/2006 26-27. The Court may admit evidence under ER 404(b) to establish the "res gestae" of the offense if the evidence completes the story of the incident by proving the immediate connect of the events near in time and place. State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693

(1980) (quoting E. Cleary, McCormick's Evidence, sec. 190 at 448 (2nd ed. 1972)) aff'd 96 Wn.2d 591, 637 P.2d 961 (1981); State v. Brown, 132 Wn.2d 529, 577, 79 940 P.2d 546 (1997) *cert. denied* 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998).

Bad acts are admissible under ER 404(b) not to show the character of a person, but to show proof of motive. ER 404(b). Once the court determines the relevancy issue, the court is to next engage in a balancing test weighing the probative value against the potential for prejudice. State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. Saltarelli, 98 Wn.2d 358, 361-63, 655 P.2d 697 (1982).

An example of the Court utilizing ER 404(b) in determining the admissibility of a witnesses' prior bad acts is found in State v. Barker, 75 Wn.App. 236, 881 P.2d 1051 (1994). In that case the Defendant sought to admit into evidence the victim's prior DWI conviction to establish the motive for the victim's testimony describing the events in question. The trial court engaged in a balancing test in considering the admissibility of the evidence which resulted in a decision to exclude the evidence. The Court of Appeals upheld that decision concluding that the victim's conviction was not insightful into the issue of motive. Finally, the probative

value of the evidence outweighed the prejudice created by the evidence as described below.

In this matter the trial court initially denied the admissibility of the evidence of the altercation between Mr. Stone and the anonymous bar patron. RP (06/27/2006) 35-36. However, the trial court allowed the ruling to be reconsidered if Mr. Stone raised a self defense claim. RP (06/27/2006) 35-36. Mr. Stone raised a self defense claim, so the Court allowed the testimony at the end of the trial as rebuttal. RP (06/28/2006) 132-133, 156-159.

The trial court's ruling on this issue was incorrect. The evidence was not admissible under a "res gestae" theory. The evidence of the confrontation between Mr. Stone and the anonymous bar patron was totally unrelated to the incident between Mr. Stone and Mr. Bollinger. As Mr. Bollinger testified, he was not aware of anything significant happening in the bar and did not encounter Mr. Stone inside the bar. RP (06/27/2006) 55; RP (06/28/2006) 90. Mr. Bollinger did not recall seeing Mr. Stone with another person that evening. RP (06/27/2006) 70. The confrontation was totally separate from the interaction between Mr. Stone and Mr. Bollinger. Mr. Bollinger was not even aware of the confrontation at issue. Consequently, the evidence was not

related in any way to the incident between Mr. Stone and Mr. Bollinger. The evidence did not “complete the story” of the incident between Mr. Stone and Mr. Bollinger as required for admissibility under the "res gestae" theory. Therefore, the evidence was not admissible under ER 404(b).

Further, in applying the evidence of the incident to this case under the other provision of admissibility under ER 404(b), it is clear that the evidence was not admissible. Evidence offered under ER 404(b) cannot be unduly prejudicial. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). Additionally, the evidence must be relevant for a purpose other than showing propensity of the defendant. *Id.* If the evidence is determined relevant and offered for the purpose other than showing the defendant's propensity for bad acts, the next step in the analysis is to engage in a balancing test to determine if the potential for prejudice outweighs the probative value of the evidence. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

In this matter the evidence was not relevant. Relevant evidence is defined as follows:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. ER 401

Evidence of the confrontation between Mr. Stone and the anonymous bar patron has not bearing on determining whether Mr. Stone assaulted Mr. Bollinger. As previously stated, the confrontation was totally separate from the incident between Mr. Stone and Mr. Bollinger, nor did Mr. Bollinger even know about the confrontation. Therefore, evidence was not relevant and should have been excluded on that basis alone. The only possible purpose for the admission of this evidence was to show that Mr. Stone had a propensity to act in an aggressive hostile manner. This is contrary to the proper purpose of introducing evidence under ER 404(b). Finally, as the evidence had no probative value, and the potential for prejudice was extremely high, the evidence should have been excluded at trial. The evidence had a tendency to show that Mr. Stone was a hostile individual. This is the exact scenario that ER 404(b) attempts to avoid.

2. The testimony regarding the unrelated confrontation between Mr. Stone and bar patron was not admissible even after Mr. Stone raised a self defense claim.

The well established rule in Washington is that "evidence of self defense must be assessed from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendants sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) *quoting* State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984), State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977). Proof of specific acts of violence committed by the victim and known to the defendant are admissible as justifying forceful acts of the defendant in self-defense. State v. Walker, 13 Wn.App. 545, 549, 536 P.2d 657 (1975); State v. Cloud, 7 Wn.App 211, 217-218, 498 P.2d 907 (1972).

In this case the trial court misapplied the rule of admitting prior incidents when a claim of self defense is raised. If the incident inside of the bar had occurred between Mr. Bollinger and another bar patron, that evidence would have been admissible when Mr. Stone raised a self defense claim. The claim of self defense has no bearing on the admissibility of the evidence in this case. The trial court was in error in determining the evidence was admissible because the defendant raised a claim of self defense. The evidence of the incident inside the bar was not admissible under ER 404(b) as described above.

The trial court made the decision to admit the evidence if Mr. Stone raised a claim of self defense on the basis the evidence would then become relevant. RP (06/27/2006) 36. However, the evidence of an incident that Mr. Stone had with another person wholly unrelated to the crime he is charged with, and the alleged victim is unaware of, is not relevant to determine if Mr. Stone committed the crime charged. The court erroneously permitted the testimony of Mr. Peebles.

B. Did the trial court violate Mr. Stones' rights under the Sixth Amendment to the United States Constitution by precluding him from confronting a witness regarding his possible motivation for testimony when the witness was seeking reimbursement for an unrelated assault?

Generally the scope of cross examination is within the discretion of the trial court and reviewed for abuse of discretion. State v. Hoffman, 116 Wash.2d 51, 96, 804 P.2d 577 (1991). However, errors of manifest constitutional error are reviewed de novo. State v. Elmore, 121 Wash.App. 747, 90 P.3d 1110 (2004). Since a defendant's right to cross-examine witnesses against him is a fundamental constitutional right, review should be de novo.

The right to confrontation includes the right to impeach a witness for the prosecution with evidence of bias or inconsistent statements. Davis v. Alaska, 415 U.S. 308, 31618, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Johnson, 90 Wn.App. 54, 69, 950 P.2d 981 (1988). A witness may be impeached by introducing evidence to contradict the witness on a material fact. United States v. DiMatteo, 716 F.2d 1361 (11th Cir. 1983), *cert. granted and judgment vacated* 469 U.S. 1101, 105 S.Ct. 769, 83 L.Ed.2d 767 (1985), *on remand* 759 F.2d 831 (11th Cir. 1985)

The definition of relevant evidence is found in ER 401.

Relevant evidence is defined as follows:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401

A showing of minimal logical relevance is required. State v. Bebb, 44 Wn.App. 803, 723 P.2d 512 (1986), *affirmed* 108 Wn.2d 515, 740 P.2d 829 (1987). Facts that bear on the credibility or probative value of other evidence are facts of consequence under the rule. State v. Rice, 48 Wn.App 7, 737 P.2d 726 (1987)

Relevant evidence is generally admissible. ER 402. The Confrontation Clause of the Sixth Amendment to the Constitution

requires that a defendant be allowed to cross-examine a witness for bias. State v. Dolan, 118 Wn.App. 323, 73 P.3d 1011 (2003) *see also* Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The defendant's right to cross-examine witnesses against him is a fundamental constitutional right. State v. York, 28 Wash.App. 33, 621 P.2d 784 (1981). The issue of bias is relevant to the credibility of a witness and of special significance when the entire State's case depends on the credibility of one witness. State v. Tate, 2 Wash.App. 241, 469 P.2d 999 (1970); State v. Wills, 3 Wash.App. 643, 476 P.2d 711 (1970)

The rules of evidence also provide for cross examination on the issue of bias. United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Pursuant to ER 607 a party may attack the credibility of a witness. Information regarding bias for the purpose of impeachment provides information at the time of trial that a jury can use to test the witness' accuracy. State v. Harmon, 21 Wash.2d 581, 590-91, 152 P.2d 314 (1944); State v. Tigano, 63 Wash.App. 336, 344-45, 818 P.2d 1369 (1991), *review denied*, 118 Wash.2d 1021, 827 P.2d 1392 (1992) Evidence of a witness' prior statements can be offered for either impeachment or for the

purpose of showing bias or prejudice. State v. Harmon, 21 Wash.2d 581, 590, 152 P.2d 314 (1944) Evidence of bias is admissible to weigh-in on a witness' credibility. State v. Whyde, 30 Wash.App. 162, 166, 632 P.2d 913 (1981) Bias may be shown through cross examination or admission of extrinsic evidence. State v. Jones, 25 Wash.App. 746, 751, 610 P.2d 934 (1980)

In the case of State v. Spencer, 111 Wash.App. 401, 45 P.3d 209 (2002), the Court held that the trial court's decision precluding the defendant from calling a witness to impeach the credibility of another witness presented by the prosecution was in error.

A witness may be cross examined as to her ill feelings towards the other party. Stossel v. Van De Vanter, 16 Wash.9, 47 P. 221 (1896) In that case the court held that the plaintiff had the right to have testimony regarding the ill feelings between the parties before the jury. Stossel v. Van De Vanter, 16 Wash. at 15. In the case of State v. York, 28 Wash.App. 33, 621 P.2d 784 (1981), the court determined that the trial court erred in failing to allow defense counsel to cross-examine the negative characteristics of the State's most important witness.

In this case Mr. Stone was denied the ability to cross examine Mr. Bollinger on his motivation for testifying. It was clear from the testimony presented at the time the pre-trial motions were considered, that he had a financial incentive to testify that Mr. Stone assaulted him. Mr. Bollinger submitted a claim for reimbursement for injuries suffered in the victim impact statement. RP (06/26/2006) 39 In that statement he included injuries he claimed were caused by Mr. Stone as well as reimbursement for injuries caused by another individual. Id. The Victim Impact Statement was signed under penalty of perjury. RP (06/27/2006) 38.

Mr. Bollinger did not have medical insurance at the time, and did not have medical insurance at the time of the pre-trial hearing. RP (06/27/2006) 74. He filled out the victim impact statement so that his medical bills would be paid. RP (06/27/2006) 77. Mr. Bollinger received medical treatment on three occasions. RP (06/27/2006) 78-79. He was not certain of the reasons why treatment was necessary. RP (06/27/2006) 78-79. Defense counsel indicated that Mr. Bollinger had been involved in an altercation following the incident with Mr. Stone and was attempting to obtain financial assistance in paying for all of his medical bills, both

related and unrelated to his encounter with Mr. Stone. Mr. Bollinger had an incentive to testify that Mr. Stone was the primary aggressor in the altercation so that Mr. Stone would be prosecuted and his bills would therefore be paid. The trial court committed error in denying Mr. Stone the ability to cross examine Mr. Bollinger on these issues. Under the case law cited above, Mr. Stone was entitled to do so.

V. CONCLUSION

For the reasons cited above, Mr. Stone respectfully requests the court to reverse the convictions entered in this matter.

Respectfully submitted this 16 day of January, 2007.


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COURT OF APPEALS, DIVISION II
APPEAL NO. 35187-1-II

APPELLANT / MATTHEW K. STONE

AMENDED CERTIFICATE OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of the Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Brief of the Appellant Hand-Delivered To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Copy of Brief of the Appellant Hand-Delivered To:

Mr. Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Brief of the Appellant Mailed To:

Matthew K. Stone
1326 NW Fox Run
Bremerton, WA 98311

DATED this __18th__ day of January, 2007, at Port Orchard, Washington.


JEANNE L. HOSKINSON
Legal Assistant

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DIVISION II
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STATE OF WASHINGTON
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