

FILED
COURT OF APPEALS
DIVISION II

10 MAR -9 AM 11:54

STATE OF WASHINGTON

COA NO. 39361-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DRAPER,

Appellant.

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

The Honorable Richard Bosey, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

PM 3-8-10

TABLE OF CONTENTS

Page

A.	<u>ARGUMENT IN REPLY</u>	1
1.	THE COURT'S WRONGFUL ADMISSION OF BAD ACT EVIDENCE UNDER ER 404(b) UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.....	1
2.	THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE.....	4
D.	<u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Aaron,
57 Wn. App. 277, 787 P.2d 949 (1990)..... 5

State v. Copeland,
130 Wn.2d 244, 922 P.2d 1304 (1996)..... 3

State v. Edwards,
131 Wn. App. 611, 128 P.3d 631 (2006)..... 3, 4

State v. Foxhoven,
161 Wash.2d 168, 163 P.3d 786 (2007) 1

State v. Freeburg,
105 Wn. App. 492, 502, 20 P.3d 984 (2001)..... 5

State v. Lane,
125 Wn.2d 825, 889 P.2d 929 (1995)..... 1, 2, 5

State v. Mutchler,
53 Wn. App. 898, 771 P.2d 1168 (1989)..... 2-4

State v. Russell,
__ Wn. App. __, __ P.3d __, 2010 WL 436463 (Filed February 09, 2010).
.....5

State v. Saltarelli,
98 Wn.2d 358, 655 P.2d 697 (1982)..... 1, 2

State v. Thrift,
4 Wn. App. 192, 480 P.2d 222 (1971)..... 3, 4

State v. Trickler,
106 Wn. App. 727, 25 P.3d 445 (2001)..... 3

TABLE OF AUTHORITIES (CONT'D)

Page

STATE CASES (CONT'D)

State v. Willis,
67 Wn.2d 681, 409 P.2d 669 (1966)..... 4

OTHER STATE CASES

State v. Joos,
966 S.W.2d 349 (Mo. App. 1998) 3

RULES, STATUTES AND OTHERS

ER 401 1
ER 402 1
ER 404(b)..... 1-5

A. ARGUMENT IN REPLY

1. THE COURT'S WRONGFUL ADMISSION OF BAD ACT EVIDENCE UNDER ER 404(b) UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

The State contends ER 404(b) res gestae evidence can be irrelevant under ER 402 and still be admissible. Brief of Respondent (BOR) at 14-15.¹ The State does not understand the rules of evidence.

ER 404(b) incorporates the relevancy requirement under ER 401 and 402. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). ER 404(b) is designed to allow the State to use relevant evidence necessary to establish an essential element of its case. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The State is unable to articulate why the evidence at issue in this case was necessary to establish an essential element of its case.

The State relies on State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). BOR at 12, 14-15. Its reliance is misplaced. If ER 404(b) evidence is admissible as res gestae, there is no additional requirement that res gestae evidence be relevant for an additional purpose identified under ER 404(b), such as plan, motive or identity. Lane, 125 Wn.2d at 834.

¹ The State's response brief initially refers to appellant as "JJ." BOR at 1-2. The State presumably meant Draper.

The State cites Lane for the proposition that testimony may constitute res gestae evidence although its purpose is not relevant to proving an element of the crime. BOR at 12 (citing Lane, 125 Wn.2d at 834). Lane holds no such thing. The court in Lane held the res gestae evidence at issue in that case was admissible because the trial court found it to be relevant to the charged crime. Lane, 125 Wn.2d at 834.

Draper does not argue evidence of the arrest warrant needed to be relevant for some additional purpose under ER 404(b) beyond res gestae. His argument is that it needs to be relevant to an issue in the case. Why the officer contacted Draper and whether Draper was traveling incognito at the time were irrelevant to whether Draper committed the charged crimes and therefore cannot be admitted as res gestae evidence.

"In deciding whether evidence of other crimes or acts is admissible for a proper purpose, the trial court must first consider the relevance of the evidence." State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989) (citing Saltarelli, 98 Wn.2d at 361). Res gestae evidence is relevant if (1) the identified fact for which the evidence is to be admitted is of consequence to the action and (2) the evidence tends to make the existence of the identified fact more or less probable. Mutchler, 53 Wn. App. at 901. Evidence of crime unrelated to the crime charged is inadmissible as res gestae unless it is relevant to some issue of

consequence at trial. State v. Trickler, 106 Wn. App. 727, 733-34, 25 P.3d 445 (2001); Mutchler, 53 Wn. App. at 901.

Draper's bail jump on an unrelated charge does not make it any more probable that he unlawfully possessed a firearm on the day in question. The reason why police contacted Draper that day is of no consequence to the action. The story of gun possession is therefore complete without officer testimony that Draper had a warrant out for his arrest on an unrelated charge and was traveling incognito as a result of that warrant.

The State cannot cite a single Washington case holding evidence of an outstanding warrant was admissible *res gestae* evidence to show why police contacted a person in a prosecution for an unrelated crime.² Washington courts are not bound by case law from other jurisdictions interpreting their evidentiary rules. See State v. Copeland, 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996) (federal court interpretation of federal rules of evidence not binding).

State v. Thrift and State v. Edwards did not involve ER 404(b) evidence, but those cases recognize why an officer began investigation or

² The State quotes State v. Joos, 966 S.W.2d 349, 354 (Mo. App. 1998) as stating "the mention of outstanding warrants may be admissible to provide a clear and coherent narrative of the circumstances preceding the arrest." Joos does not contain this statement.

apprehended the suspect on an unrelated charge is irrelevant when not an issue in controversy. State v. Edwards, 131 Wn. App. 611, 613-15, 128 P.3d 631 (2006); State v. Thrift, 4 Wn. App. 192, 194-95, 480 P.2d 222 (1971). The State does not even address State v. Willis, where an officer inadvertently testified he took the defendant into custody based on an arrest warrant for a crime unrelated to the one charged. State v. Willis, 67 Wn.2d 681, 688, 409 P.2d 669 (1966). The Supreme Court found this evidence did not require a new trial only because defense counsel refused the trial court's offer to instruct the jury to disregard the officer's testimony and the defendant, in taking the stand, admitted he had previously been convicted of two felonies. Willis, 67 Wn.2d at 688-89.

2. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE.

The State asserts the trial court had no obligation to give a limiting instruction for the res gestae evidence admitted under ER 404(b) because evidence related to the arrest warrant was offered to prove the context of the crime. BOR at 21. The State is wrong.

When evidence of res gestae involves other crimes or acts, the evidence must meet the requirements of ER 404(b). Mutchler, 53 Wn. App. at 901. "When evidence is admitted for a limited purpose and the party against whom it is admitted requests such an instruction, the court is

obliged to give it." State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). "[I]t is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). A limiting instruction must be given to the jury for ER 404(b) evidence, even if the defense does not ask for one. State v. Russell, __ Wn. App. __, __ P.3d __, 2010 WL 436463 at *1, 5 (Filed February 09, 2010).

The State cites Lane for the proposition that res gestae evidence is offered for the truth of the matter asserted and need not be relevant for an additional purpose under ER 404(b). BOR at 21. Lane has nothing to do with whether a limiting instruction is required for res gestae evidence. There is no authority for the proposition that ER 404(b) res gestae evidence is immune from limiting instruction. Such instruction was necessary to limit the jury's consideration of the evidence to its proper res gestae purpose, rather than as evidence of propensity to commit crime.

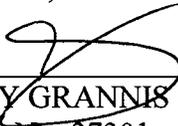
D. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the conviction for possessing a stolen firearm and remand for a new trial on that count.

DATED this 4th day of March 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39361-1-II
)	
MICHAEL DRAPER,)	
)	
Appellant.)	

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 8TH DAY OF MARCH 2010, 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] LORI SMITH
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

- [X] MICHAEL DRAPER
DOC NO. 831922
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF MARCH 2010.

x *Patrick Mayovsky*