

No. 39361-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

Vs.

MICHAEL DRAPER,

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

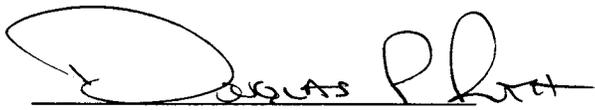
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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

JJ assigns five errors to the trial court. These errors, however, all revolve around the admission of the following two statements by the arresting deputy sheriff:

"I observed a gold Windstar van, which was one of the vehicles that was supposedly affiliated with Mr. Draper that he was traveling in incognito." RP at 33.

And,

"I told [Mr. Draper] I knew who he was, that he was Michael Draper, that he had a felony warrant and needed to step forward..." RP 35.

The admission of these statements was not an abuse of the trial court's discretion.

### **I. The Contested Statements were Admissible as Res Gestae Evidence.**

At trial, JJ unsuccessfully objected to the admission of the above two statements based on Rule 404(b). He now assigns error to that admission of the evidence. He finds error in the trial court's denial of both his objection and subsequent motion for a mistrial. The trial court based these rulings upon its pretrial decision that the

latter statements were admissible as res gestae statements. On appeal, JJ disputes whether the evidence constituted admissible res gestae evidence. He argues that the statements were unrelated to the charges filed against him -- unlawful possession of a firearm and possession of a stolen weapon -- and were prejudicial. This assignment of error and his argument are unpersuasive. The trial court properly exercised its discretion in admitting the evidence.

This court reviews a trial court's evidentiary rulings for abuse of discretion. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). Trial courts have broad discretion in determining whether evidence is relevant. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). To determine whether the trial court abused its discretion by denying the motion for mistrial this court examines three factors: the seriousness of the irregularity; whether the comment was cumulative to other evidence properly admitted; whether the irregularity could be cured by an instruction to the jury to disregard the remark; and whether the prejudice was so grievous

that nothing short of a new trial could remedy the error. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Evidence Rule (ER) 404(b) prohibits admission of evidence showing the character of a person to prove the person acted in conformity with it on a particular occasion. State v.

Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

This evidence, on the other hand, may be admitted for other purposes, including proof of motive, intent, opportunity, and identity.

ER 404(b). In addition to these expressly enumerate exceptions, the state Supreme Court has recognized an exception for res gestae" evidence, or evidence that explain the circumstances of a crime. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981).

Regardless of which basis a trial court uses to admit evidence of other crimes or misconduct under ER 404(b), it must identify on the record why the evidence it is being admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The court must find that even if the evidence is admissible for a valid purpose, the probative value of the ER 404(b) evidence outweighs its prejudicial effect. Brown, 132 Wn.2d at 571, 940 P.2d 546.

Under the res gestae exception to ER 404(b), evidence of other crimes is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)). Res gestae evidence is admissible if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or proof of the history of the crime charged. State v. Schaffer, 63 Wn.App. 761, 769, 822 P.2d 292 (1997), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993).

Res gestae evidence is admissible because "a jury is entitled to know the circumstances and background of a criminal charge. It cannot be expected to make its decision in a void-without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." U.S. v. Daly, 974 F.2d 1215, 1217 (9<sup>th</sup> Cir. 1992) *quoting* United States v. Moore, 735 F.2d 289, 292 (8th Cir. 1984). If this evidence wasn't admissible, a defendant could benefit from committing multiple offenses:

The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot,

by multiplying his crimes, diminish the volume of competent testimony against him. *State v. King*, 111 Kan. 140, 145, 206 P. 883, 885 (1922).

*State v. Tharp*, 27 Wn.App. 198, 205, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981).

The res gestae exception applies in the case before the court. The trial court correctly admitted the deputy's testimony as res gestae statements. The evidence that Mr. Draper was subject to an outstanding warrant provided context insofar as it informed the jury of the reason why the deputy confronted Mr. Draper. The evidence is intertwined and closely linked in time and circumstances with the firearm offenses and was needed to complete the story of the deputies chase and ultimate recovery of the illegal weapon. The fact that the outstanding warrant is what lead the deputy to speak with and eventually chase Mr. Draper constitutes the first link in the chain of the "sequence of events surround the charged offense." *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Res gestae evidence does not need to necessarily be part of the same transaction as the charged offenses. Res gestae evidence can be that which is "necessary to be placed before the jury in order that it have the entire story of what transpired..."; that it may have each piece in the mosaic

necessarily admitted in order that a complete picture be depicted..."

Tharp 96 Wn.2d at 594.

If the testimony of the warrant had not been introduced, Mr. Draper would have benefitted from his commission of other offenses. The jury would have received a fragmentary version of events. Without the explanation that the deputy was enforcing a warrant, there would be no context for why he seemed so interested in Mr. Draper. The jury would have been allowed to guess that the officer was targeting or harassing Mr. Draper when he confronted him at the store. Given the nature of this case, the prosecutor's explanation for offering the evidence was reasonable.

Other holdings of this court support the trial court's rationale that the deputy's testimony was *res gestae* evidence and admissible. In *State v. McBride*, 74 Wn.App. 460, 873 P.2d 589 (1994), the trial court admitted an officer's testimony that he observed the defendant make what appeared to be three drug sales before making the sale for which the defendant was charged with committing. The defendant contended on appeal that the testimony regarding pre-crime sales was barred by ER 404(b) and should have been excluded. Division three rejected this argument. It found the trial court did not abuse its discretion since the

evidence "tended to show Mr. McBride and his brother were working together" and was admissible as res gestae since "it was important for the jury to see the whole sequence of events; it explained what attracted Officer Vanos' attention to Mr. McBride." McBride, 74 Wn.App. 464.

Other state courts have applied the res gestae doctrine in similar contexts to admit similar testimony. See State v. Joos, 966 S.W.2d 349, 354 (Mo.App. 1998) ("the mention of outstanding warrants may be admissible to provide a clear and coherent narrative of the circumstances preceding the arrest."); State v. Sanders, 761 S.W.2d 191,192 (Mo.App. 1988) (holding that the mention that the defendant was "wanted" or the subject of an "arrest warrant" for an unrelated offense is admissible to provide a clear and coherent narrative of the events leading to his arrest); State v. Yakovac, 145 Idaho 437, 180 P.3d 476 (2008) (holding that testimony regarding outstanding warrants in a drug possession case were relevant not to show possession, but rather to explain the officers' actions of searching the defendant when she approached them with a complaint); McGlocklin v. State, 516 P.2d 1357, 1363 (Okl.Cr. 1973) (officer's testimony that he was searching defendant's car because they were investigating a

kidnapping did not warrant a mistrial because the statement was a part of the res gestae).

As well have federal courts. See U.S. v. Gonzalez, 328 F.3d 755, 759 (5<sup>th</sup> Cir. 2003) (testimony by officer regarding history of arrests for transporting narcotics is admissible as intrinsic to the story of the crime in this case, as it explained the officer's continued questioning, which ultimately revealed that the defendant was lying); US v. Daly, 974 F.2d 1215 (9<sup>th</sup> Cir.1992) (admission of evidence of pre-arrest shoot-out was necessary to put Daly's illegal conduct into context because it was sufficiently intertwined with the evidence regarding the possession charge.); U.S. v. Collins, 90 F.3d 1420, 1428 -1429 (9<sup>th</sup> Cir.1996) (testimony that defendant was at building to commit a burglary was properly admitted to prevent the jury from questioning why he had a gun, noting that this exception is most often applied in felon-in-possession cases); U.S. v. Molina 172 F.3d 1048, 1055 (8<sup>th</sup> Cir.1999) (evidence of first controlled buy was not subject to a ER 404(b) analysis because it helped to explain the basis for the undercover operation); U.S. v. Moore, 735 F.2d 289, 292 (8<sup>th</sup> Cir.1984) (The trial court did not err by letting the government establish that the defendant had been arrested in the course of a drug raid; this evidence was res gestae

and a jury is entitled to know the circumstances and background of a criminal charge and the context in which the defendant was arrested).

One federal case is particularly illustrative of the application of *res gestae* to admit evidence similar to that contested here. In *U.S. v. Andaverde*, 64 F.3d 1305 (9<sup>th</sup> Cir. (Wash), 1995), the Ninth Circuit Court reviewed the admission of evidence in a trial for the same crimes that Mr. Draper convicted of committing. During the trial, one of the officers described the basis for a search warrant he obtained for the defendant's home:

Myself and Detective Schenck responded to that burglary scene. While there, we were informed of some information by a couple of patrol officers that were there. Based on their information and things that we observed, Detective Schenck ultimately requested and obtained a search warrant for a residence to recover items believed to have been taken."

*Andaverde*, 64 F.3d at 1314. A second police officer also referred to the burglary at trial as being the reason for obtaining the search warrant. The reviewing court found that this evidence was not admitted as evidence of other crimes, but was evidence "inextricably intertwined" with the case. The testimony provided to the jury the necessary context of the state's charge. The evidence specifically completed "the agents' accounts of their dealings with

Bloom." Andaverde, 64 F.3d at 1315. As such, the court held that the trial court did not abuse its discretion to admit the evidence.

The court also held that the evidence was not particularly prejudicial. The references "were not extensive" and were supplied as "background for the police's behavior." Id.

In contrast, Mr. Draper's reliance on *State v. Thrift*, 4 Wn.App. 192, 193-95, 480 P.2d 222 (1971), to argue that testimony about an unrelated arrest is inadmissible is unpersuasive. In *Thrift*, Division I reviewed Thrift's objection to a police officer testifying that Thrift was arrested on an outstanding warrant on an unrelated crime. Thrift, 4 Wn.App. at 193-94. On appeal, the court found the trial court did not abuse its discretion by refusing Thrift's motion for a mistrial since the officer's testimony was not so prejudicial as to require a mistrial. Thrift, 4 Wn.App. at 195-96. In arriving at this holding, the court found that the testimony was improper since it was not relevant or necessary to prove an essential element of the crime Thrift was charged with committing. Id.

This holding is distinguishable since here, unlike in *Thrift*, the context of Mr. Draper's apprehension was necessary to explain why the deputy confronted the appellant and gave chase. Failure to do so would have allowed the jury to speculate why the officer might

have taken such action. This risk did not exist in *Thrift* since the officer placed Thrift in custody for both the outstanding warrant and "for investigation for uttering a forged prescription." *Thrift*, 4 Wn.App. at 194. The state did not need to inform the jury of the former reason in order to complete the story of the arrest.

Moreover, the *Thrift* opinion did not hold that the officer's testimony was not admissible under ER 404(b)'s as a res gestae statement. In fact, the court did not address whether the statement qualified as res gestae. It only examined whether the evidence met any of the listed exceptions in ER 404(b): motive, intent, the absence of accident or mistake, a common scheme or plan or identity. *Thrift*, 4 Wn.App. at 195. The absence of any discussion of res gestae in the opinion is likely attributable to the date of the opinion. *Thrift* was decided prior to when the Supreme Court issued its holding in *State v. Tharp, supra*, in which it introduced res gestae as an exception to ER 404(b). Since that holding, numerous opinions have applied the res gestae exception to ER 404(b) objections. Consequently, the *Thrift* opinion is not precedent for finding that the trial court abused its discretion by classifying the deputy's testimony as res gestae evidence and admitting it despite ER 404(b)'s proscription.

Similarly, the holding in *State v. Edward*, 131 Wn.App. 611, 128 P.3d 631 (2006) does not present a basis for reversing Mr. Draper's conviction. The *Edward* opinion does not address ER 404(b) evidence. The opinion concerns whether certain testimony constituted hearsay. The state in *Edward* argued that the statements in question were offered not for "the truth of the matter asserted," but to explain why the detective started his investigation." *Edward*, 131 Wn.App. at 614. The court rejected this explanation since it found that there was no relevancy to the reason why the officer initiated an investigation. *Id.* This was a proper reason to find that the testimony was hearsay, but it is not a reason necessarily applicable to evidence offered under ER 404(b). Res gestae evidence is relevant to establish the story of the crime. To be admissible, res gestae evidence does not need to be separately relevant for another purpose, as is true of hearsay evidence. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). Thus, the *Edward* holding does not pertain to the issue Mr. Draper has presented this court. Testimony may constitute res gestae evidence although its purpose is not relevant to proving an element of a crime. *Id.*

Finally, *State v. Sanford*, 128 Wn.App. 280, 115 P.3d 368 (2005) and *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995), cited by the appellant, do not support his argument. The *State v. Sanford* decision did not concern res gestae evidence. In that case, the state admitted a booking photo to establish the identity of the defendant. The man objected to the evidence as it was evidence of his prior criminal record. This court agreed. However, res gestae was not raised as a reason for admission. Nor could it have been. A booking photo neither establishes the context of a crime nor the time, place, and circumstances of any criminal acts. Consequently, the res gestae exception is not relevant to admission of such evidence and the *Sanford* opinion does not determine the issue before this court today.

In contrast, the Supreme Court did rely upon res gestae to admit testimony in *State v. Powell*. The defendant in *Powell* contested the trial court's admission in a murder trial of four prior assaults by the defendant on his wife. *Powell*, 126 Wn.2d at 249. The state argued that although the evidence was subject to ER 404(b), admission of the evidence was permissible as establishing intent. *Powell*, 126 Wn.2d at 261. The Supreme Court rejected this reason, but, sua sponte, held that the evidence constituted res

gestae of the crime. *Powell*, 126 Wn.2d at 263-64. Since, the trial court here did not base its decision to admit the evidence on Mr. Draper's intent, the *Powell* holding is of limited applicability. Its reasoning is also not applicable. Again, res gestae evidence is relevant for the reason it is offered – to complete the mosaic of the events surrounding the crime. It is unnecessary that the state also show that this mosaic is "at issue" or relevant. *Lane*, 125 Wn.2d at 834.

In sum, the deputy's testimony, as in *McBride* and *Andaverde*, served the purpose of providing to the jury the context of the crime and, thereby, removing the risk of jurors forming their own, negative, explanation for the police pursuit. The evidence was not introduced to establish Mr. Draper's propensity to commit the crimes charged. Thus, it is not the kind of evidence to which the general prohibition in ER 404(b) applies. The evidence was proper under the res gestae exception to ER 404(b) and admissible.

Mr. Draper contends that whether the testimony was res gestae evidence, ER 401 required the state to establish that it was relevant evidence. He misreads the law. Res gestae evidence does not need to be independently relevant to be admissible under

ER 404(b). Lane, 125 Wn.2d at 834. As the Supreme Court observed,

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 exception 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. Tharp, 96 Wash.2d at 593-94, 616 P.2d 693. There is no additional requirement, as imposed by the Court of Appeals here, that res gestae evidence be relevant for an additional purpose, such as plan, motive, or identity.

Id. Since there was no question here regarding whether the warrant was valid and existed, the deputy's testimony was admissible as res gestae evidence regardless of whether it also established a material issue.

## **II. Admission Of The Contested Evidence Was Not Unduly Prejudicial to the Appellant.**

Of course, as the *Lane* opinion notes, res gestae evidence is not admissible if unduly prejudicial. Here, it was not. First, the fact that the officer knew there was an outstanding warrant regarding Mr. Draper is not at all relevant to his knowledge of the gun's ownership, the aspect of the state's case that he identifies as its weak link. The deputy's testimony did not affect the Mr. Draper's strategy of attempting to show that he had no knowledge that the

gun was stolen. Thus, any possible prejudicial effect must be due to the evidence's tendency to generally portray Mr. Draper as someone who commits crimes, including the crimes charged. But the mere fact that Mr. Draper had an outstanding warrant does not indicate a propensity to illegally possess a stolen firearm. A reasonable juror knows that a warrant does not establish that the subject of the warrant has been convicted of a crime. Equally, a reasonable juror knows that a felony warrant could relate to any felony crime. Because the court did not allow the state to identify the facts, circumstances or underlying crimes charged in the outstanding warrants, the relative prejudice to Mr. Draper was minimal. This lack of specificity greatly diminished any chance the testimony would impress upon the jurors' minds and foster the "once a thief, always a thief" mindset.

Second, the statements were brief. Reference to the outstanding warrant and Mr. Draper being incognito was mentioned at the very beginning of testimony and not mentioned again throughout the rest of the trial. Thus, although the two remarks may have had the potential for prejudice, they were not so serious as to be capable of misleading and prejudicing the jury.

Moreover, the references in this particular case did not prejudice the defendant in light of the other evidence of past misconduct. Because one of the charges Mr. Draper was being tried for was illegal possession of a firearm, the court instructed the jury that he had been convicted of a prior felony. More incriminating was the testimony, admitted by the trial court and not challenged on appeal, of Mr. Draper's possession of a stolen truck shortly before he was apprehended with the stolen firearm. Since it is likely that the jury assumed that the warrant was related to this theft, the deputy's reference to the warrant did not even present to the jury of a third instance of misconduct. It is probable that it merely foreshadowed the evidence the jurors would hear later from the owner of the truck.<sup>1</sup> This evidence also overshadowed the deputy's incognito comment. After learning that the truck's owner had seen Mr. Draper driving his truck and confronted him, it would be of little surprise to the jury that he was incognito on the day the deputy observed him. The challenged testimony added nothing to

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<sup>1</sup> The state fails to understand Mr. Draper's argument that the warrant testimony "encouraged jurors to infer Draper knew the gun was stolen because a court had already determined Draper was the one who had stolen the truck from Anderson's residence." Appl. Br. at 24. The juror's assumption that the warrant was issued in response to the stolen truck should not make it more or less likely that Draper knew the gun was stolen. As Mr. Draper states, "the fact that Draper knew the truck was stolen does not necessarily show he knew the gun was stolen. Anderson did not see his gun in his truck... the fact that Draper drove away upon being confronted by Anderson... does not make it more likely that he knew the gun was stolen." Appl. Br. at 23-24.

any prejudice that might have existed due to the unchallenged introduction of this other evidence. Thus, the state fails to see how either statement by the deputy could have affected the verdict. See State v. McMurray, 40 Wn.App. 872, 876, 700 P.2d 1203, 1207 (1985) (brief allusions of the witnesses to McMurray's prior record for drinking and driving could not be deemed prejudicial so as to have changed the outcome of the trial in light of other evidence of his drinking and driving). Certainly, the references were not used as an improper vehicle for informing the jury that Mr. Draper had committed other crimes.

### **III. The Trial Court Adequately Balanced the Prejudicial and Probative Effects of the Contested Evidence.**

Mr. Draper asserts that the trial court failed to balance on the record the probative value of the testimony against its prejudicial potential. His assertion lacks any foundation. The record shows that the trial court did conduct a proper balancing inquiry. The court considered the state's and Mr. Draper's arguments both pre-trial and during the trial and provided a reasoned ruling at each point. The content of these rulings contain an adequate examination of the evidence's potential for prejudice and proof if admitted. For example, the court stated before the trial began:

"I can also see the other side of it, and that is the jury becomes aware that the reason that Officer Adkisson was initially contacting the defendant was because there was a warrant... and they're not told what it was for, which they're not going to be. They can go back there, and well, I wonder what the warrant was for. On the other hand, I think Mr. Meagher's point is well taken. They're liable to go off on a tangent and say, why was this officer after this guy for no reason, if we don't explain it to them... I don't see how it's any more prejudicial to just mention it in passing that the reason that the officer was looking for Mr. Draper was because he was aware that there was a warrant for him. We're not going to go into why. We're not going into what the charge may or may not have been." RP at 27-28.

After Mr. Draper's attorney objected to the actual testimony, the court again weighed the impact of admitting the evidence. When each party presents argument addressing the prejudicial and probative nature of the evidence, a court does not need to conduct an extensive balancing on its own. If the record reflects that the trial court adopted the express argument of one of the parties as to the relative weight of probative value and prejudice, there is no error. State v. Hughes, 118 Wn.App. 713, 725, 77 P.3d 681, 686 (2003).

Nor must a court "recite the Rule 403 test when balancing the probative value of evidence against its potential for unfair prejudice. We must affirm if the record, as a whole, indicates that the court properly balanced the evidence." United States v. Morris,

827 F.2d 1348, 1350 (9th Cir.1987), *cert. denied*, 484 U.S. 1017, 108 S.Ct. 726, 98 L.Ed.2d 675 (1988). When both the pre-trial and trial ruling are considered, the record here is sufficient to establish that the trial court conducted ER 404(b) balancing.

Regardless, certainly the record contains sufficient articulation of the prejudicial and probative concerns of the court and the parties to allow this court to determine that the trial court would have admitted the evidence if it had weighed those concerns. Where a reviewing court has enough evidence to make that determination, the failure to weigh prejudice on the record is harmless error. *State v. Gogolin*, 45 Wn.App. 640, 645, 727, 727 P.2d 683 P.2d 683 (1986).

**IV. It Was Unnecessary for the Trial Court to issue a Limiting Instruction when Admitting the Contested Testimony and the Failure of the Trial Court to Do So was Not Prejudicial.**

Mr. Draper next claims that this court should reverse his conviction because the trial court failed to instruct the jury to consider the deputy's testimony for a limited purpose. He bases his argument on ER 105, which states:

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

An appellate court reviews a trial court's decision regarding issuing a limiting instruction for abuse of discretion. State v. Gallagher, 112 Wn.App. 601, 51 P.3d 100 (2002).

Mr. Draper's argument fails, first, because the deputy's testimony was not offered for more than one purpose. It was simply offered for what the truth of the matter asserted. It wasn't offered to show motive, intent, opportunity, etc., but simply to establish that the deputy informed Mr. Draper that there was an outstanding warrant for his arrest. It was offered to show the full context of the crime. So, an ER 105 instruction was unneeded.

The use of res gestae evidence is unlike the admission of hearsay evidence for a different purpose than the matter asserted. This hearsay evidence is admissible only because it is offered for a purpose separate from the truth of the matter asserted. In contrast, res gestae evidence is offered only for the matter asserted. It is not necessary that res gestae evidence "be relevant for an additional purpose" to be admissible. Lane, 125 Wn.2d at 834.

More importantly, the failure of the trial court to provide an instruction was harmless error. Admission of evidence is harmless if it did not, within reasonable probabilities, materially affect the outcome of the trial. Tharp, 96 Wash.2d at 599.

As described above, the introduction of the "warrant" and "incognito" evidence was only slightly prejudicial to Mr. Draper in light of the other evidence presented at trial. The *res gestae* evidence lacked specificity and potency, and was overshadowed by the evidence of Mr. Draper's other criminal conduct. At most the evidence showed he was suspected of committing another crime. Since Mr. Draper did not testify, his credibility was not at issue and the admitted evidence did not pertain to any of the elements of either crime. The prejudicial impact was also minimized by the trial court. Although the trial court did not provide a limiting instruction when admitting the evidence, it did instruct the state that it could not describe the underlying facts of the particular offense. This limitation allowed the state to avoid the jury's collective mind from wandering, but did not allow the jury to give undue consideration to the evidence.

Moreover, delivering a limiting instruction may not have diminished the risk of prejudice any further. As part of the deputy's narrative, the reference to the warrant and Mr. Draper being incognito was fleeting and unmemorable. However, if the court had punctuated this testimony with a limiting instruction delivered mid-narrative, it is likely the jury would have given the evidence greater

attention. A limiting instruction would have changed the nature of the testimony from a story detail to a matter deserving addressing by the court. When combined with the lack of information given to the jury about the warrant, the judges warning would only serve to increase the chance that the jury would fill the void with their own conclusions. This would have served neither the state nor Mr. Draper. In these circumstances, when the objectionable evidence is buried within a story, an instruction can do more harm than good. State v. Yarbrough, 151 Wn.App. 66, 90, 210 P.3d 1029, 1041, (2009); State v. Barber, 38 Wn.App. 758, 771 n. 4, 689 P.2d 1099 (1984) (failure to ask for a limiting instruction is a rational choice by a defense attorney since it would have highlighted evidence damaging to his client). The U.S. Supreme Court observed in Krulewitch v. United States, "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." Krulewitch, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949),

Although the trial court may have been required to give a limiting instruction under ER 105, nonetheless, reversal is not warranted because the error was harmless. It did not, within reasonable probabilities, materially affect the outcome of the trial.

See *Tharp*, 96 Wash.2d at 599. Given the innocuous nature of the testimony and the cumulative references to his past criminal conduct, it is unlikely that the jury's verdict was impacted by admission of the evidence in the absence of a limiting instruction. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 261, 944 P.2d 1005 (1997) (the admission of evidence is harmless error if the evidence is cumulative with other properly admitted evidence). Because the record already contained similar evidence, the prejudicial effect of the deputy's testimony was minimal. The trial court did not abuse its discretion by admitting the evidence or by denying Mr. Draper's request for a limiting instruction. And if it did, the abuse was harmless.

**V. Mr. Draper Did Not Receive Ineffective Representation.**

Mr. Draper's fourth assignment of error is that he received ineffective assistance of counsel. His assignment is contingent upon this court finding that defense counsel waived all arguments based on the trial court's failure to issue a limiting instruction because counsel did not request one initially. The state is not encouraging the court to find such a waiver. Rather, the state argues that a limiting instruction was not needed. An instruction was not needed for the same reason defense counsel's choice not

to request one pre-trial was a correct decision: an instruction would have unnecessarily brought attention to the testimony and created prejudice where none otherwise would exist.

Of course, defense counsel's later request for an instruction is also not a basis for finding his representation ineffective and prejudicial since the trial court did not deliver an instruction. Furthermore, defense counsel is permitted to make tactical decisions and the choice whether to request a limiting instruction is such a decision. *Yarbrough*, 151 Wn.App. at 90. Thus, counsel's performance was not ineffective.

**VI. The Trial Court's Admission of the Contested Statements Without a Limiting Instruction Did Not Cumulatively Produce an Unfair Trial.**

Mr. Draper concludes his assignment of errors to this court by arguing that his trial contained such an accumulation of errors that the outcome of his trial was prejudiced. Yet, he lists four errors, all of which are anchored in a deputy's brief references to Mr. Draper having an outstanding warrant and being incognito. As argued above, the admission of these statements was not error. At the very least, these statements were not sufficiently influential on the jury to shift its focus from the merits of the charges to the defendant's general propensity for criminality. Thus, they do not

create cumulative error sufficient to have affected the outcome of the trial.

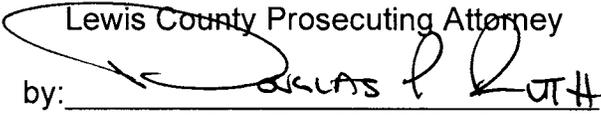
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Draper's conviction.

RESPECTFULLY submitted this 27 day of January, 2010.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

by:

  
DOUGLAS P. RUTH, WSBA 25498  
Attorney for Plaintiff

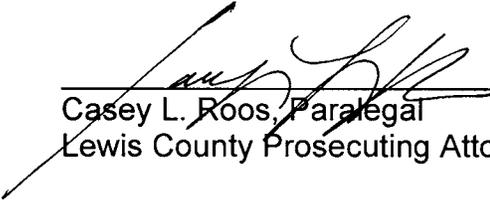
COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,            )           NO. 39361-1  
  )           Respondent,  
vs.                                    )           )  
  )           )  
MICHAEL DRAPER,                )           DECLARATION OF  
  )           MAILING  
  )           )  
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Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 27, 2010 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Eric J. Nielsen  
Casey Grannis  
Nielson Broman & Koch, PLLC  
1908 E Madison St  
Seattle WA 98122-2842

DATED this 27<sup>th</sup> day of January 2010, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing