

NO. 40911-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID GLENN HOLCOMB,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
11 JUL 25 AM 9:02
STATE OF WASHINGTON
BY VA
DEPUTY

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

The Honorable Rosanne Buckner

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT AND PREJUDICIAL EVIDENCE BASED ON ITS MISINTERPRETATION OF ER 404(b) AND THE ERROR WAS NOT HARMLESS BECAUSE THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE DIFFERED HAD THE ERROR NOT OCCURRED.

The State argues that the trial court properly admitted details of Holcomb's prior burglary conviction mistakenly relying on State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995). Brief of Respondent at 6-10. Contrary to the State's argument, Medrano is clearly distinguishable because the trial court did not allow evidence beyond the fact that Medrano had prior convictions for second degree burglary and second degree theft. Id. at 111-13. Dr. Wang testified for the State and referred to Medrano's convictions after Medrano himself referred to the convictions. Id. at 112. Division Three of this Court concluded that the trial court did not err in allowing Dr. Wang's testimony:

[W]e do not see the prejudice here when the first mention of these prior crimes was by Medrano. The casual reference by Dr. Wang to Medrano's admission of his prior convictions does not create prejudice beyond that already created when Medrano previously admitted the convictions.

Id. at 113-14.

Unlike Dr. Wang's "casual reference" to Medrano's prior convictions, the trial court here allowed the State to elicit testimony from Holcomb that his prior crime of attempted burglary in the second degree involved "the same intent involved in this case" and "involved an allegation of intent to take metal." 3RP 207-08. The record substantiates that the trial court erred in relying on the State's assertion that the evidence was admissible under Medrano. 3RP 191-98.

Likewise, the State misapprehends this Court's holding in State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999). The State argues that this Court "found to be improper" the trial court's admittance of Wade's prior convictions to prove intent because Wade offered no defense. Brief of Respondent at 9-10. To the contrary, although this Court noted that Wade offered no defense, this Court's decision focused on how the facts of the charged offense differed from the facts of the previous offenses. Id. at 336-37. Accordingly, this Court concluded that the "only reasonable inference to be drawn from Wade's prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion. Such evidence and inference merely establish Wade's propensity to commit drug sale offenses." Id. at 337. Here, the trial court allowed the evidence based solely on the State's assertion that Holcomb's

prior conviction of attempted burglary in the second degree involved the same intent of committing theft of metals. 3RP 190-91, 199-200. Under this Court's reasoning in Wade, without any other facts, the only reasonable inference to be drawn from the evidence is that because Holcomb previously committed the same type of crime with the requisite intent, he was predisposed to have the same intent in the current case. As this Court concluded in Wade, such evidence merely establishes propensity and must be excluded under ER 404(b). Id. at 337.

The State argues further that the trial court properly admitted evidence of a codefendant's guilty plea because Holcomb "opened the door to the evidence," relying on State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969) and State v. Gallagher, 112 Wn. App. 601, 51 P.3d 100 (2002). The State's reliance is misplaced because Gefeller and Gallagher have no application here.

In Gefeller, during cross-examination of a detective, defense counsel asked about the results of the defendant's lie detector test and the detective answered that it was an inconclusive examination. On redirect, the prosecutor asked the detective to explain what he meant by inconclusive results. Gefeller, 76 Wn. App. at 454. This Court concluded that the defendant opened the door to the detective's subsequent testimony because the matter of the lie detector test was first introduced by the

defendant. “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” Id. at 455.

In Gallagher, the trial court granted Gallagher’s motion in limine to exclude evidence of syringes found in his house. During cross-examination of a detective, defense counsel asked him about the lack of any evidence in the house associated with drugs. The State moved to introduce the syringe evidence on redirect to refute the defense implication that there was nothing in the house indicating drug-related activity. Gallagher, 112 Wn. App. at 609. This Court concluded that the trial court properly allowed the evidence because the defense opened the door to the introduction of the evidence. Noting that the defense took advantage of the detective’s inability to talk about the syringes to convey to the jury a false image that the home was devoid of drug-related activity, this Court determined that “the trial court did not allow this unfair advantage to occur.” Id. at 610.

Unlike in Gefeller and Gallagher, Holcomb did not open the door because he did not introduce evidence to gain an unfair advantage. The record reflects that when defense counsel asked Holcomb what he would do, Holcomb inadvertently said “we” instead of “I”:

- Q. There is cool stuff in old buildings. If you found some cool stuff, were you going to take it?
- A. No. We had no use for it. I mean, what were we going to do with machine stuff? We really didn't know anything about except my father was a machinist.

2RP 166.

Holcomb's passing reference to his friends is more like State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996) and State v. Stockton, 91 Wn. App. 35, 955 P.2d 805 (1998). During direct examination in Avendano-Lopez, he said that he had recently been released from jail. This Court concluded that Avendano-Lopez's "passing reference to his release from jail did not open the floodgates to questions about prior heroin sales." Id. at 714-15. During direct examination in Stockton, he said that he thought some men were trying to sell him drugs. Division One of this Court concluded that Stockton made "no more than a passing reference to any knowledge he may have had about drugs" and as such, it did not open the door to questioning about his prior drug use. Id. at 39-40. As in Avendano-Lopez and Stockton, Holcomb's inadvertent use of the word "we" instead of "I" did not open the door to allow the State to question him about a codefendant's guilty plea which was irrelevant.

Importantly, the State argued that evidence of the facts of Holcomb's prior conviction and the codefendant's guilty plea was admissible to prove intent under ER 404(b) and the court agreed with the State in admitting the evidence. 3RP 191-98. Consequently, the standard of review is de novo rather than abuse of discretion because the record substantiates that the trial court misinterpreted ER 404(b). State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Furthermore, in light of the fact that the State's evidence was not overwhelming, the trial court's error was not harmless. There is a reasonable probability that but for the error, which permitted the State to place emphasis on the highly prejudicial evidence during closing argument, the outcome of the trial would have differed. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Reversal is required because the trial court's error denied Holcomb his right to a fair trial. "Only a fair trial is a constitutional trial." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

B. CONCLUSION

ER 404(b) forbids inferences that depend on the defendant's propensity to commit a certain crime. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Holcomb's conviction of burglary in the second degree.

DATED this 22nd day of July, 2011.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

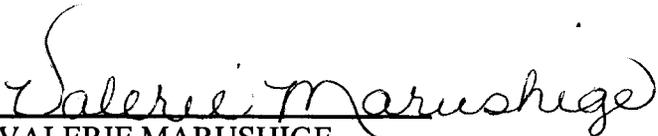
Attorney for Appellant, David Glenn Holcomb

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of July 2011, in Kent, Washington.


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