

NO. 41364-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS MICHAEL QUACKENBUSH,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
IDENTITY

11 SEP 2016
11:00 AM
COURT OF APPEALS
DIVISION TWO

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

The Honorable Stephanie Arend

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE CHARACTER EVIDENCE BASED ON ITS ERRONEOUS VIEW OF THE LAW AND THE ERROR WAS NOT HARMLESS.

The State's argument that the trial court properly admitted evidence that Quackenbush initially denied consuming drugs but later admitted that he had consumed drugs is entirely misplaced and should be rejected.

Initially, the State argues that Quackenbush's statements were admissible under the res gestae or "same transaction" exception to ER 404(b), misapprehending State v. Lilliard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Brief of Respondent at 11-12. In Lilliard, he was charged with possession of stolen property and the trial court admitted evidence of other thefts and incidents. 122 Wn. App. at 425, 430. On appeal, Lilliard argued that the evidence implied that he had a propensity to steal. Division One of this Court held that the trial court did not abuse its discretion, reasoning that "[a] defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of events." Id. at 431-32. The Court explained that under the res

gestae or “same transaction” exception to ER 404(b), “evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” Id. at 432. The State claims that evidence of Quackenbush’s denial and then admission of drug use was “necessary to complete the picture of events.” To the contrary, unlike in Lilliard where the other thefts were connected to the charged crime of possession of stolen property, Quackenbush’s statements about drug use obviously had no connection to the charged crime of attempting to elude a pursuing police vehicle.

Next, the State argues that Quackenbush’s statements were admissible under ER 404(b) to assess his credibility mistakenly relying on State v. Grant, 83 Wn. App. 98, 920 P.2d 60 (1996). Brief of Respondent at 12. In Grant, the State argued that evidence of Grant’s prior assaults on his wife were admissible under ER 404(b) because it was relevant and necessary to assess Ms. Grant’s credibility as a witness and accordingly to prove that the charged assault actually occurred. Division One of this Court agreed, following this Court’s holding in State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991), that evidence of the defendant’s history of physical abuse of the victim was admissible to explain the victim’s delay in reporting the abuse and to rebut evidence presented by the defendant

that the sexual abuse did not occur. Grant, 83 Wn. App. at 106-07. Contrary to the State's farfetched argument that as in Grant, Quackenbush's denial and then admission of drug use was admissible under ER 404(b) to assess his credibility, his statements were irrelevant because they did not tend to make it more probable that he attempted to elude a pursuing police vehicle. Grant, 83 Wn. App. at 106.

The State argues further that Quackenbush's statements of drug use were admissible misconstruing the holdings in State v. Chase, 59 Wn. App. 501, 799 P.2d 272 (1990) and State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). Brief of Respondent at 13-15. As the Court explained in Freeburg, flight, evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime. 105 Wn. App. at 497-98. Quackenbush's statements of drug use allow no reasonable inference of consciousness of guilt of the charged crime of attempting to elude a pursuing vehicle.

As the trial court recognized, "this is not a case about drugs" and "[i]t's irrelevant to this trial whether or not [Quackenbush] had consumed any meth or any other drugs for that matter." RP 39-40 (10/06/10). Accordingly, reversal is required because the court abused its discretion in allowing highly prejudicial propensity evidence and contrary to the

States's assertions, the error was not harmless. See Opening Brief of Appellant.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Quackenbush's conviction of attempting to elude a pursuing vehicle because evidence of "once a liar, always a liar" violates ER 404(a).

DATED this 2nd day of September, 2011.

Respectfully submitted,


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Attorney for Appellant, Thomas Michael Quackenbush

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 Melody Crick, 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 2nd day of September 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

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