

No. 42339-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donovan Bach,

Appellant.

Mason County Superior Court Cause No. 10-1-00386-0

The Honorable Judge Amber Finlay

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial judge abused her discretion by admitting irrelevant evidence in violation of ER 402.
2. The trial judge abused her discretion by admitting prejudicial and cumulative evidence in violation of ER 403 and ER 404(b).
3. The trial judge abused her discretion by failing to conduct a complete ER 404(b) analysis on the record.
4. Mr. Bach's convictions infringed his Fourteenth Amendment right to due process because they were based in part on propensity evidence.
5. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted burglary.
6. The court's instructions on attempted burglary failed to make the relevant legal standard manifestly clear to the average juror.
7. The sentencing court erred by finding that Mr. Bach has the ability or likely future ability to pay his legal financial obligations.
8. The sentencing court erred by adopting Finding No. 2.5 (Judgment and Sentence).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence that is irrelevant, unduly prejudicial, or directed at proving propensity should not be introduced at a criminal trial. Here, the trial judge admitted evidence that Mr. Bach had an outstanding arrest warrant at the time he was contacted by police. Did the trial court err by admitting irrelevant and unduly prejudicial evidence of criminal propensity without balancing relevant factors on the record?

2. A criminal conviction may not be based on propensity evidence. In this case, the prosecution introduced evidence that Mr. Bach had an outstanding arrest warrant at the time he was contacted by police. Were Mr. Bach's convictions based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process?

3. A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of attempted residential burglary beyond a reasonable doubt?

4. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations, absent some support in the record for the finding. Here, the sentencing court made such a finding in the absence of any supporting evidence in the record. Was the sentencing court's finding clearly erroneous?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The Lords were victims of an attempted break-in on December 7, 2010. RP 18-20. The person attempted to kick open their home's door, and moved a water softener that had been in a detached shed. Eddie Lord woke up, yelled out the window, and fired his gun. RP 18-21. The culprit left, apparently dropping the water softener. RP 22, 28, 34.

Lord was taken by police to view Donovan Bach who sat in the back of a police car. Lord agreed that Mr. Bach was the culprit. RP 22, 64.

The state charged Mr. Bach with Attempted Residential Burglary and Burglary in the Second Degree. CP 17-18.

The defense moved to prevent the state from bringing out the fact that Mr. Bach already had an arrest warrant when the police contacted him that night. RP 7. The court declined to limit the state, and the jury was told that Mr. Bach was subject to an arrest warrant. RP 10, 46. The court did not tell the jury that their consideration of this fact should be limited in any way. Court's Instructions to Jury, Supp CP; RP 46.

The court defined substantial step in instructing the jury as "conduct that strongly indicates a criminal purpose and that is more than

mere preparation.” Court’s Instruction No. 9, Supp. CP. This was done without objection. RP 85-93.

Mr. Bach was convicted of Attempted Residential Burglary and Burglary in the Second Degree. CP 9.

At the sentencing hearing, none of the parties addressed Mr. Bach’s employment or financial status, but the court entered a written finding that the defendant has the ability or likely future ability to pay the legal financial obligations imposed. CP 9, RP 129-137.

Mr. Bach timely appealed. CP 5, 6.

ARGUMENT

I. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE THAT PAINTED MR. BACH IN A NEGATIVE LIGHT.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009).

This includes when the court relies on unsupported facts, takes a view that

no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

- B. The trial judge abused his discretion by admitting evidence that Mr. Bach had an outstanding arrest warrant at the time he was contacted by police.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “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.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Under ER 404(b), “[e]vidence of other... 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, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of other acts may be admitted, the trial court is required to analyze the evidence and must “(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.” *Asaeli*, at 576 (quoting *State v. Pirtle*, 127 Wash.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.¹ *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wash.App. 727, 733, 25 P.3d 445 (2001).

Here, the trial court erroneously overruled Mr. Bach’s objection to testimony that he had an outstanding arrest warrant at the time he was contacted by police. RP 7-10. This evidence was irrelevant and highly prejudicial. It did not relate to any element of the charged crime and it painted Mr. Bach in a negative light. For these reasons, the evidence should have been excluded under ER 402, ER 403, and ER 404(b).

Furthermore, the court failed to conduct an adequate analysis on the record by identifying the purpose for its admission, considering its

¹ However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

relevance, and weighing its probative value against its prejudicial effect. *Asaeli, supra*. Finally, the court failed to give the jury an instruction limiting the jury's consideration of the evidence. Court's Instructions to the Jury, Supp. CP.

The error requires reversal because it is prejudicial. *Asaeli, supra*. There is a reasonable probability that the admission of the evidence materially affected the outcome of the trial, because it influenced the way jurors would evaluate the remainder of the evidence. *Id., at 579*. The jury may have believed the warrant proved that Mr. Bach was a career criminal (or a "criminal type") who had already flaunted the authority of the court by failing to appear.

Upon learning about the arrest warrant, the jury likely paid insufficient attention to the evidence supporting Mr. Bach's defense. Accordingly, Mr. Bach's convictions must be reversed and the case remanded for a new trial, with instructions to exclude evidence that he had an outstanding arrest warrant at the time he was contacted by police. *Id.*

II. MR. BACH’S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THEY WERE BASED IN PART ON PROPENSITY EVIDENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime can violate due process under the Fourteenth Amendment.² U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish

² The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In the absence of a limiting instruction, the jury is likely to use the prior "bad acts" as propensity evidence; this is especially true when jurors are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved..." Instruction No. 1, Court's Instructions to the Jury, Supp. CP.

C. Mr. Bach's convictions were based in part on evidence that he had an outstanding arrest warrant at the time he was contacted by police.

In this case, the state introduced testimony that Mr. Bach had an outstanding arrest warrant at the time he was contacted by police. RP 46. The prosecution's theory was not that the evidence was relevant to prove an element of the offense, but rather "that being arrested on a warrant is

part of the *res gestae* and explains the actions of the police officers.” RP 7-9.

This argument is spurious. Under the *res gestae* exception, evidence of other bad acts is admissible to complete the story of the *crime*; it is not admissible to complete the story of the *investigation*. See, e.g., *State v. Powell*, 126 Wash.2d 244, 263, 893 P.2d 615 (1995). Furthermore, the basis for the officers’ actions was wholly irrelevant. *State v. Edwards*, 131 Wash.App. 611, 615, 128 P.3d 631 (2006).

There was no basis to admit the evidence. It was irrelevant under ER 401 and ER 402, unduly prejudicial under ER 403, and inadmissible under ER 404(b). In addition, the trial court did not limit the jury’s consideration of this evidence. Court’s Instructions to the Jury, Supp. CP. The problem was compounded by Instruction No. 1, which included the following language: “In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition.” Instruction No. 1, Court’s Instructions to the Jury, Supp. CP.

Evidence that Mr. Bach had an outstanding arrest warrant at the time he was contacted by police suggested that he had a propensity toward criminal activity, and that he had already flaunted the authority of the court by failing to appear. When combined with the language of

Instruction No. 1, this evidence resulted in a conviction based in part on propensity evidence. *Garceau, supra*. This violated Mr. Bach's Fourteenth Amendment right to due process. *Id.* Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

III. MR. BACH'S ATTEMPTED BURGLARY CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.

A. Standard of Review

Constitutional violations are reviewed *de novo*, as are jury instructions. *E.S., at 702; State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must make the correct legal standard manifestly apparent to the average juror. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court's failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). An omission or misstatement of the law in a jury instruction that

relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Bach engaged in conduct corroborating the intent to commit the specific crime of residential burglary.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick*, at 427.

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." Instruction No. 9, Supp. CP (emphasis added). This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with *other* evidence; [to] make *more* certain." *The*

American Heritage Dictionary (Fourth Ed., 2000, Houghton Mifflin Company) (emphasis added). The *Workman* Court's choice of the word "corroborative" requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused's conduct. Instruction No. 9 removed this requirement by employing the word "indicate" instead of "corroborate;" under Instruction No. 9, there is no requirement that intent be established by independent proof and corroborated by the accused's conduct. Instruction No. 9, Supp. CP.

Second, Instruction No. 9 requires only that the conduct indicate *a criminal purpose*, rather than *the* criminal purpose. This is similar to the problem addressed by the Supreme Court in cases involving accomplice liability. See *State v. Roberts*, 142 Wash.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in "a crime," even if he was unaware that the principal intended "the crime" charged); see also *State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 9 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted

burglary.³ Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Bach's alleged criminal intent; nor was it required to show that his conduct strongly corroborated his intent to commit the particular crime of first-degree burglary. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

IV. THE SENTENCING COURT'S FINDING REGARDING MR. BACH'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, ___ Wash.App. ___, ___, ___ P.3d ___ (2011). In this case, the sentencing court entered such a finding without any support in the record. CP 9. Indeed, the record suggests that Mr. Bach lacks any ability to pay the amount ordered, given that this conviction diminishes his chances of ever finding gainful employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

³ This creates a manifest error affecting Mr. Bach's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

CONCLUSION

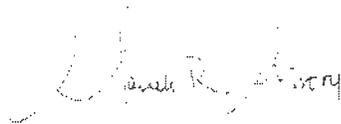
For the foregoing reasons, Mr. Bach's convictions must be reversed and the case remanded for a new trial. In the alternative, Finding No. 2.5 of the Judgment and Sentence must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 25, 2012.



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