

No. 42339-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

DONOVAN C. BACII, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Amber L. Finlay, Judge

No. 10-1-00386-0

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**BRIEF OF RESPONDENT**

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A. INTRODUCTION

A Mason County jury convicted Donovan Bach of the crimes of burglary in the second degree and attempted residential burglary.

Immediately after the crimes were committed, the owner the property where the crimes occurred called police and reported the driver's license number of the fleeing suspect's car. Investigating officers checked the registration and tracked the car to a residence where they contacted Bach, who they discovered to have an outstanding arrest warrant. Bach was arrested on the warrant, and because Bach was now in their custody, officers had the property-owner take a look at Bach and identify him as the burglar. At trial, the trial court judge ruled that the evidence of the arrest on a warrant was *res gestae* and allowed the jury to know that Bach was under arrest on an unrelated warrant when he was identified by witnesses. Bach asserts that evidence of the warrant was improperly admitted because it was propensity evidence; the State asserts that evidence was *res gestae* evidence, was not prejudicial, and was necessary to explain the circumstances to the jury without deception.

At the close of trial, the trial court judge instructed the jury with standard jury instructions. Among these instructions, the jury was instructed in regard to the definition of the attempt element of attempted residential burglary. Bach asserts that the court's instructions were

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erroneous. The State counters that the trial court's instructions were correct and that this court's court recent decision in *State v. Eplett*, \_\_\_\_\_ P.3d \_\_\_\_\_, 2012 WL 1185957 (No. 41275-6-II, Apr. 10, 2012), is controlling and decisive of this issue.

Finally, at sentencing the trial court ordered Bach to pay certain legal and financial obligations related to his conviction. The trial court's form-orders stated a finding that Bach had the ability to pay these costs, but the record does not contain any evidence from which the reviewing court can sustain the trial court's finding. Bach asserts that the trial court's imposition of costs in this case is erroneous and cites *State v. Bertrand*, 165 Wn. App. 393, 403-406, 267 P.3d 511 (Dec. 8, 2011), to support his contention. The State concedes this error.

**B. STATE'S RESTATEMENT OF BACH'S ASSIGNMENTS OF ERROR TOGETHER WITH STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Bach asserts that the trial court judge abused her discretion by admitting irrelevant evidence in violation of ER 402.
2. Bach asserts that the trial court judge abused her discretion by admitting prejudicial and cumulative evidence in violation of ER 403 and ER 404 (b).
3. Bach asserts that the trial court judge abused her discretion by failing to conduct a complete ER 404(b) analysis on the record.

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4. Bach asserts that his convictions infringed his Fourteenth Amendment right to due process because they were based in part on propensity evidence.

*State's restatement of issues pertaining to Bach's assignments of error numbers 1 through 4:*

Did the trial err by allowing the arresting officer to testify during trial that, while investigating the current offense, the officer arrested Bach on an unrelated warrant and that while Bach was in police custody the victim of the crime under investigation had an opportunity to positively identify Bach -- or was evidence of the unrelated warrant properly admitted as part of the *res gestae* of the current case?

5. Bach asserts that the [trial] court's [jury] instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted burglary.
6. Bach asserts that the [trial] court's instructions on attempted burglary failed to make the relevant legal standard manifestly clear to the average juror.

*State's restatement of issues pertaining to Bach's assignments of error numbers 5 and 6:*

Did the jury instructions when read as a whole correctly instruct the jury in regard to the definition of substantial step as it relates to the element of attempt as regards the crime of attempted residential burglary?

7. Bach asserts that the trial court erred by finding that Bach has the ability or likely future ability to pay legal financial obligations.
8. Bach asserts that the trial court erred by adopting Finding No. 2.5 (Judgment and Sentence).

*State's restatement of issue pertaining to Bach's assignments of error numbers 7 and 8:*

The trial court found that Bach has the ability to pay legal and financial obligations that were ordered by the court at sentencing, but the trial court record does not contain any evidence to support this finding. Was it error for the trial court to make this finding in the absence of a supporting record?

### C. STATEMENT OF CASE

On December 7, 2010, Eddie Lord was asleep in his at his residence in Mason County, Washington, when he was awakened by someone trying to kick in his front door. RP 17-18. Lord looked out the window, saw a car in the driveway, told his wife to call 911, and armed himself with a pistol and a flashlight. RP 18-19. Lord looked out his window and saw Donovan Bach, who Lord identified in court. RP 20-21. 22. Lord told Bach to "freeze," and when Bach refused his command and continued to walk toward his car, Lord fired a shot into the ground, but Bach continued to flee, got in his car, and drove away. RP 21-22. Lord aimed a spotlight at the car while he and his wife read the license number.

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RP 38. They reported the license number to the police. RP 39. Lord later learned that the locks had been pried off of a metal storage container on his property and that water softener had been stolen from it. RP 27-28.

While fleeing the scene of the crime, Bach ran his car into a ditch, and the water softener was later found in the same area. RP 29, 60.

Police officers found the address to which the fleeing car was registered, and they went to that address to investigate. RP 42-43. When officers arrived at the house, they contacted people present at the house, including Bach, and in the process officers discovered that Bach had an outstanding warrant. RP 46.

Bach was arrested on his outstanding warrant. RP 46. After Bach was in custody on the outstanding warrant, but before he was transported to jail, a police officer arrived with Lord to confirm whether the person in custody on the outstanding warrant was the same person who had attempted to kick Bach's door in. RP 54. Lord identified Bach. RP 54, 64-65.

Following a jury trial, the jury found Bach guilty of the crimes of attempted residential burglary and burglary in the second degree. RP 125-126. At sentencing, the court imposed fines and costs in various amounts, the total of which is in excess of \$2,000.00. RP 154. Bach was ordered to

make payments at the rate of \$25.00 per month, beginning sixty days after his release from custody. RP 134.

D. ARGUMENT

- 1) Did the trial err by allowing the arresting officer to testify during trial that, while investigating the current offense, the officer arrested Bach on an unrelated warrant and that while Bach was in police custody the victim of the crime under investigation had an opportunity to positively identify Bach -- or was evidence of the unrelated warrant properly admitted as part of the *res gestae* of the current case?

Trial courts have wide discretion in admitting evidence and in balancing the value of evidence and its prejudicial effect, and appellate courts review trial court evidentiary rulings for an abuse of trial court discretion. *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004).

“A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if 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.” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

In the instant case, officers went to a different residence to investigate the crime that had just occurred at Mr. Lord's house. RP 42-46. Officers went to the different address, where Bach was later discovered, because they ran the registration of the vehicle used in the crime, located the registered address, and went to that address to investigate. RP 42-46. When officers contacted Bach at that address, they learned that he had warrant, and they arrested him. RP 42-46. Because Bach was under arrest on the warrant, Lord had an opportunity to see him and to identify him while he was in the custody of the police. RP 54, 64-65.

Bach asserts on appeal that evidence that he was arrested on a warrant was other bad acts evidence that was offered to show propensity to commit crimes. ER 404(b) provides that evidence of other crimes or acts is not admissible to show that a person acted in conformity with his character. *State v Mutchler*, 53 Wn. App. 898, 771 P.2d 1168 (1989). However, no mention was made to the jury about the reason for the warrant or the nature of any crime or other reason why there was a warrant, and the warrant was offered only for the purpose of establishing the *res gestae* so as to explain how it is that Bach ended up in police custody so that Lord had an opportunity to view and identify him.

Evidence is admissible if it is offered for purposes other than the purposes prohibited by ER 404(b). *Mutchler*, 53 Wn. App. at 901, 771 P.2d 1168.

ER 404(b) enumerates certain exceptions to its prohibitions, but in addition to specific examples of evidence enumerated by ER 404(b) that is admissible because it is not specifically prohibited by ER 404(b).

Washington has recognized a "res gestae or same transaction exception." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *Mutchler*, 53 Wn. App. at 901, 771 P.2d 1168.

In the instant case, Bach's arrest on a warrant was part of the same transaction, which led to his identification by Lord, and prohibiting witnesses from testifying about Bach's outstanding warrant would put the State in a position of either leaving the jury in a state of disbelief because officers showed up a house in the middle of the night, roused Bach from bed, and arrested him for no other reason than that the registration to the car returned to the address where he was found; or, disallowing mention of the warrant would put the State in a position of weaving a deception for the jury while trying to tiptoe around the issue. The *res gestae* exception allows admission of Bach's warrant because the fact of the warrant is factually linked to Lord's later identification of Bach after his arrest, and forcing the arresting officer to avoid that fact would create a deception for

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the jurors, who are during the trial actively and intently engaged in viewing the demeanor of witnesses and assessing their credibility.

At trial, Bach did not object on the basis of ER 404(b) to the admission of evidence of the warrant, or least he did not cite ER 404 as a basis for his objection. RP 7-10. And in any event the fact of the warrant was not evidence of other crimes or bad acts, but was merely offered to show the reason why officers arrested Bach before the investigation was completed. Therefore, there was no analysis of the evidence as an exception under ER 404(b) because the evidence was not objected to on the basis of ER 404(b) and because the evidence was not bad-acts or other crimes evidence but was offered only as *res gestae* evidence.

Bach did not request a limiting instruction regarding the evidence of the warrant. Each of the instructions provided to the jury was accepted by Bach without objection. RP 87-92. When ER 404(b) evidence is offered by the State, a limiting instruction is required. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). But Bach's warrant was not offered as bad acts or other crimes evidence and was not offered as ER 404(b) evidence; Bach did not object on the basis of ER 404(b); and, the evidence was offered only as *res gestae* evidence. And Bach's failure to request a limiting instruction waives the issue on appeal. *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16 (2007).

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Finally, even if the evidence of Bach's outstanding warrant was erroneously admitted, the "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). No details of any potential underlying crime were provided to the jury, and the mere circumstance that Bach had an outstanding warrant is not highly prejudicial. While detained on the warrant, Bach was identified by witnesses who witnessed the crime and saw him flee from the scene. It follows that the warrant played no part in the jury's verdict but that, instead, Bach was convicted based upon eye-witness testimony.

- 2) Did the jury instructions when read as a whole correctly instruct the jury in regard to the definition of substantial step as it relates to the element of attempt as regards the crime of attempted residential burglary?

Bach asserts that Jury Instruction No. 9 erroneously defines the term "substantial step." Instruction No. 9 reads as follows: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." RP 98-99. Bach's assertion is in conflict with the recent decision of this court in *State v. Eplett*, \_\_\_ P.3d \_\_\_, 2012 WL 1185957 (No. 41275-6-II, Apr. 10, 2012).

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As in *Eplett*, the trial court in the instant case included an additional instruction that, when read in combination with Jury Instruction No. 9, clearly and correctly informs the jury of the correct legal standard. In the instant case, the court provided the jury with Jury Instruction No. 8, which read as follows: "A person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act that is a substantial step towards the commission of that crime." RP 99. Jury instructions must be read as a whole. *Eplett* at para. 14. Because Bach's jury was provided Jury Instruction No. 8, which correctly limited the effect of Jury Instruction No. 9, Bach's jury was correctly instructed in this case.

- 3) The trial court found that Bach has the ability to pay legal and financial obligations that were ordered by the court at sentencing, but the trial court record does not contain any evidence to support this finding. Was it error for the trial court to make this finding in the absence of a supporting record?

The trial court record is insufficient for the reviewing court to determine whether Bach has the ability to pay the financial and legal obligations ordered by the court at sentencing. Therefore, the State must concede that, consistent with the court's holding in *State v. Bertrand*, 165 Wn. App. 393, 403-406, 267 P.3d 511 (Dec. 8, 2011), this matter should

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be returned to the trial court for a determination of Bach's "ability to pay these LFOs, taking into account [his] resources and the nature of the financial burden on [him]." *Id.* at 405, n. 16.

#### F. CONCLUSION

It was not error for the court to allow the jury to know that Bach was arrested on an unrelated warrant and that, that is why he was in police custody before the investigation was completed, so that he was identified by the victim in this case at a police show up. Testimony that Bach was arrested on an unrelated warrant was not bad acts or prior offense testimony, but was instead simply a mention that Bach had an unrelated warrant. As such, it was not substantially prejudicial, and was not error, because it was offered only as *res gestae* evidence.

Jury instructions substantially identical those at issue in this case were recently approved by this court in the case of *State v. Eplett*, \_\_\_ P.3d \_\_\_, 2012 WL 1185957 (No. 41275-6-II, Apr. 10, 2012). The State urges the court to follow this decision and to approve the instructions in the instant case and to sustain Bach's conviction.

The imposition of legal financial obligations without an adequate record to support the ruling was recently disapproved by this court in the case of *State v. Bertrand*, 165 Wn. App. 393, 403-406, 267 P.3d 511 (Dec.

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8, 2011). The State, therefore, concedes that the imposition of legal financial obligations in the instant case, without an adequate record to support a finding that Bach has the ability to pay those costs, is erroneous. The State requests that the court return this case to the trial court for a determination of whether Bach has the ability to pay costs and fees as ordered by the court.

DATED: April 16, 2012.

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# MASON COUNTY PROSECUTOR

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