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NO. 51833-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CALVIN LUARCA,

Appellant.

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

The Honorable John Fairgrieve, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper admission of irrelevant and unfairly prejudicial evidence that appellant gave a false name when being transported by paramedics denied him a fair trial.

2. A scrivener's error in the judgment and sentence must be corrected.

Issues pertaining to assignments of error

1. The trial court granted the defense motion to exclude evidence that appellant had an outstanding felony probation warrant for which he was arrested before he was booked on the charges in this case. There was evidence that, hours before he was booked on these charges, appellant gave paramedics a false name as he was being transported to the hospital. Where use of a false name would support an inference that appellant was trying to avoid arrest on the warrant, but was not connected to the charged offenses, did the court's error in admitting testimony about the false name deny appellant a fair trial?

2. Where the judgment and sentence contains a scrivener's error, is remand for correction of the error the appropriate remedy?

B. STATEMENT OF THE CASE

Calvin Luarca and Zonnisha Meyer were in a dating relationship in the fall of 2017. RP 277-78. On the morning of November 18, 2017, Meyer called 911 and reported that her ex-boyfriend was in her house, he punched her several times in the face, she thought her life was in danger, and she stabbed him. RP 135, 301. She repeated her story when police responded. RP 119. Meyer identified her ex-boyfriend as Calvin Luarca and explained that he had left the house before she called 911. RP 125, 135.

Police found Luarca at a local urgent care center. RP 138. He was being prepared for transport to a hospital when they arrived, because he needed emergency surgery for the abdominal wound Meyer inflicted. RP 138-39, 410.

Meyer also went to the hospital. The only injury she sustained was a cut to her hand from the knife she was holding. RP 131, 302, 358-60, 571.

Luarca had a federal probation violation warrant, and when he came out of surgery he was placed under arrest on the warrant. RP 86. He invoked his rights and asked for an attorney. RP 87, 93, 97. Once the medical staff cleared him to move, he was transported to the jail medical unit. RP 140, 378. Not until he was there was he informed that he was

being charged in connection with the incident at Meyer's home that morning. RP 87, 396. Ultimately the charges included first degree burglary (domestic violence), fourth degree assault (domestic violence), interfering with reporting domestic violence, second degree theft (domestic violence), tampering with a witness, and domestic violence court order violation. CP 5-7.

Prior to trial the defense moved to exclude evidence about Luarca's federal probation status and methamphetamine use. RP 74-75. The State made an offer of proof that Meyer would testify that two to three days before the incident Luarca became erratic and paranoid. He told her that he had cut off his probation ankle monitor and was using methamphetamine, and that's why she chose to end their relationship. RP 75-78, 208-09. Defense counsel argued that Meyer could describe Luarca as erratic without going into his federal probation status or drug use. That information was not relevant and highly prejudicial. RP 79, 211. The court ruled that the offered evidence was more prejudicial than probative, and the State could not offer it in its case in chief. RP 214.

Meyer testified that Luarca was becoming jealous and aggressive, so she ended their relationship the night before the incident. RP 280. Luarca responded that he thought she was seeing someone else, who he thought was at her place, so he came to her house to check. RP 283. He

called her when he arrived, and she went to the door carrying the knife she had been using in the kitchen. RP 285. When she opened the door, Luarca entered the house and started looking around. RP 286. Meyer said they had a confrontation downstairs, and Luarca hit her in the head. She slipped and cut herself with the knife she was carrying. RP 289. She then ran outside and tried to call 911 using an old phone, but Luarca followed her and knocked the phone out of her hands. RP 291-92, 294. According to Meyer, she went back inside to look for her iPhone, and Luarca entered through the back door. They had another confrontation in which he hit her and she stabbed him. RP 296-97. After that Luarca left, and Meyer used a neighbor's phone to call 911. RP 298, 301.

At trial the police officer who found Luarca at urgent care testified that as paramedics were preparing Luarca for transport to the hospital, he heard them ask Luarca his name. RP 390-91. Defense counsel objected, and outside the jury's presence he argued that the State should not be permitted to elicit the fact that Luarca gave the paramedics a false name. Luarca had a federal warrant at the time, and use of an alias would indicate he was trying to avoid arrest on that warrant. At the time in question Luarca did not know of any charges from the incident in which he was stabbed, so use of a false name had little to no probative value as to the charged offenses. RP 392-93, 396-98. The court overruled the

objection, finding the jury could draw a reasonable inference that Luarca's statement reflected a consciousness of guilt, based on Meyer's allegations as to what happened. RP 399.

The police officer then testified that when paramedics asked Luarca his name, he said it was Tim Carter. RP 406. The State relied on this testimony in closing when arguing that events transpired as Meyer described. RP 636.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED LUARCA'S DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE THAT HE GAVE A FALSE NAME TO PARAMEDICS.

Both the state and federal constitutions guarantee criminal defendants a fair trial. U.S. Const. Amend V; U.S. Const. Amend XIV; Wash. Const. art. 1 § 3; *see State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to

commit a crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The rule does allow for the introduction of other acts evidence if it is relevant for some legitimate purpose, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). But such evidence is admissible only if the trial court finds the substantial probative value of the evidence outweighs its prejudicial effect. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This cautious approach recognizes the inherent prejudice of evidence of other bad acts. *State v. Sexsmith*, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible,” and the State must meet a substantial burden when attempting to bring in evidence under one of the exceptions to ER 404(b). *DeVincentis*, 150 Wn.2d at 17. A trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). “The abuse of discretion standard is not, of course, unbridled discretion.” *In re Parentage of Jannot*, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), *affirmed*, 149 Wn.2d 123 (2003). A court abuses its discretion if its decision is contrary to relevant law, based on untenable grounds, or

supported by untenable reasons. *Thang*, 145 Wn.2d at 642; *Jannot*, 110 Wn. App. at 22.

Evidence of flight, resisting arrest, use of a false name, and other related conduct may be admissible under ER 404(b) to prove the defendant's consciousness of guilt. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); *see also State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965) (rationale underlying admissibility of evidence of flight following the commission of a crime is that flight is an instinctive reaction to consciousness of guilt or is an attempt to avoid arrest and prosecution). This evidence tends to be only marginally probative of guilt, however. Thus, to be admissible, "the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." *Freeburg*, 105 Wn. App. at 498. Evidence should only be admitted under this exception if it allows "a reasonable inference of consciousness of guilt of the charged crime." *Freeburg*, 105 Wn. App. at 498.

In *Freeburg*, the trial court admitted evidence that the defendant was in possession of a weapon at the time of his arrest as evidence of flight. *Freeburg*, 105 Wn. App. at 496. But the arrest occurred more than two years after the charged crime, the defendant made no attempt to resist arrest, and the gun in his possession was not the gun used in the shooting

with which he was charged. The Court of Appeals held that the State failed to prove the defendant's possession of the gun at the time of his arrest was evidence of his consciousness of guilt in the charged offense. *Freeburg*, 105 Wn. App. at 500-01.

When determining whether evidence of giving a false name is admissible to show consciousness of guilt, the question is whether the defendant gave a false name to avoid detection for the crime charged. *Freeburg*, 105 Wn. App. at 497-98. Specifically, there must be a connection between the false name and the crime charged at the time the false name was given. *Id.*

Here, Luarca was charged with burglary, assault, theft, and interfering with reporting domestic violence. Thus, the State had to show that when he gave a false name to paramedics, he did so because of his guilt concerning those charges.¹ The evidence shows Luarca was not even informed of those charges until several hours later, however. RP 87, 396. But at the time he gave the false name, he was aware he had a federal probation violation warrant for which he would want to avoid detection. RP 86, 392-93, 396-98. In fact, he was first arrested on this warrant and not on the offenses charged in this case. RP 86. While a reasonable inference can be drawn that Luarca wanted to avoid arrest on the existing

¹ The other two charges involve events which occurred later. CP 5-7.

warrant, nothing in the record suggests he used a false name to avoid detection on charges he was not yet even aware of. *See State v. Hagler*, 74 Wn. App. 232, 234, 236, 872 P.2d 85 (1994) (defendant's flight from officer during traffic stop was not consciousness of guilt where State failed to show which of two possible crimes defendant felt guilty about). The necessary link between Luarca's use of a false name and the charged offenses does not exist here, and that evidence should have been excluded. *See Freeburg*, 105 Wn. App. at 500-01.

Moreover, any marginal relevance the evidence may have had to the charges in this case was outweighed by the danger of unfair prejudice. The trial court had already ruled that evidence of Luarca's federal probation status was unfairly prejudicial and inadmissible. RP 214. As the court acknowledged, Luarca could not fairly rebut the inference of guilt urged by the State without also informing the jury of this highly prejudicial explanation for the false name. RP 399.

The trial court's improper admission of evidence requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected if the error had not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). There were enough inconsistencies between Meyer's testimony and the physical evidence that the State's case against Luarca was not overwhelming. Meyer testified

that Luarca followed her outside when she tried to call 911, and Luarca knocked the phone out of her hand before re-entering the house without her permission. RP 294, 296, 362-63. But the broken cell phone was found inside the house, and there was no indication it had been moved. RP 364. Meyer also testified that Luarca assaulted her repeatedly, hitting her in the head and face and choking her, but the only injury she sustained was a cut on her hand from the knife she was holding. RP 289, 332, 358-59. She said she felt her knife make contact with Luarca, when in fact he required abdominal surgery as a result of the stab wound she inflicted. RP 139, 410.

Because of the court's error, the jury heard that Luarca lied about his identity, and the State pointed this out to the jury in closing argument. RP 406, 636. From this evidence the jury could either infer that Luarca was trying to evade detection on the charged offenses, an inference which is contrary to facts of which the jury was unaware, or it could speculate that he is a dishonest person who had something to hide. The latter unfairly shifts the jury's attention to his criminal propensity, just as if Luarca had explained that he gave a false name to avoid the federal warrant. ER 404(a); *Freeburg*, 105 Wn. App. at 502. Given the powerful nature of this evidence, its lack of relevance, and the weakness of the State's case, the court's error cannot be considered harmless. Admission

of the statement denied Luarca a fair trial, and his convictions must be reversed.

2. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

At sentencing, the court found Luarca indigent and waived all non-mandatory legal financial obligations. RP 722. The felony judgment and sentence reflects the court's decision, imposing only the \$500 victim assessment, the \$100 domestic violence assessment, the \$100 DNA fee, and restitution. CP 352-53. The \$200 criminal filing fee is stricken and initialed by the court. CP 352. The misdemeanor judgment and sentence indicates that legal financial obligations are imposed as stated in the felony order, but it also lists the \$200 criminal filing fee. CP 364.

It appears that the court inadvertently failed to strike the criminal filing fee from the misdemeanor order like it did in the felony order. This error must be corrected. Moreover, recent amendments to RCW 36.18.020(2)(h) prohibit imposition of the criminal filing fee on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). The proper remedy is remand for correction of the scrivener's error. *In re the Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005); *see also Ramirez*, 191 Wn.2d at 749-50 (proper remedy for

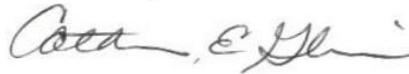
improperly imposed LFO is to remand for amendment of judgment and sentence).

D. CONCLUSION

The trial court's improper admission of irrelevant and unfairly prejudicial evidence that Luarca gave paramedics a false name denied him a fair trial, and his convictions must be reversed. In addition, remand is necessary to correct an error in the judgment and sentence.

DATED December 18, 2018.

Respectfully submitted,



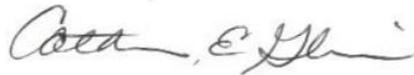
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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
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Catherine E. Glinski
Done in Manchester, WA
December 18, 2018

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