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Court of Appeals
Division II
State of Washington
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No. 52100-8-II

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

STATE OF WASHINGTON, Respondent

v.

BRENNAN PENROSE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY
THE HONORABLE JUDGE MELISSA A. HEMSTREET

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

- A. The Trial Court Erred When It Admitted Evidence Which Was Irrelevant and Unduly Prejudicial.

ISSUE RELATING TO ASSIGNMENT OF ERROR

- A. Documents relating to Mr. Penrose's prior no contact orders and convictions were redacted where the relevance, probative value and prejudicial effect favored redaction of the information. In two of the exhibits the documents referred to a domestic violence allegation. Did failure to redact the allegation unduly prejudice Mr. Penrose?

II. STATEMENT OF FACTS

Blaine and Brennan Penrose¹ are brothers. Vol. 2RP 206. On March 9, 2018, as Officer Schaeffer drove by Blaine's residence, he recognized Brennan, sitting on the front porch. Vol. 2RP 212-13. Schaeffer ran a search of Brennan's name and learned there was a no contact order prohibiting Brennan from being at Blaine's residence². Vol. 2RP 213, 236,237.

¹ The brothers will be referred to by their first names for the sake of clarity. No disrespect is intended.

² During the 3.5 hearing the officer testified he was also aware Brennan had a DOC warrant. (RP) 5/10/18 at 42. This testimony was not given at trial.

When he drove back to the home the porch was empty. Vol. 2RP 242. Schaeffer looked through the window, saw Blaine sleeping on the couch and knocked on the door to awaken him. Vol. 2RP 243-44. Blaine permitted the officers to enter the home to look for Brennan. Vol. 2RP 244. Officers found Brennan in a bedroom putting on his shoes. Vol. 2RP 245-46. They arrested him, and Kitsap County prosecutors charged him with a felony violation of a no contact order, with a special allegation of domestic violence. Vol. 2RP 141; CP 1-7.

In pretrial hearings, Brennan declined to stipulate to previous violations of a no contact order. Vol. 2RP 144. The parties agreed the State had to prove Brennan was the individual named in the no contact order and had two prior convictions for violation of a no contact order. Vol. 2RP 64. They disagreed on the relevance, probative value and unfair prejudice attendant to introduction of criminal charging documents, probable cause statements, and police incident reports to establish he had been convicted of the earlier offenses. Vol. 2RP 139-185.

The parties agreed to redaction of the word “felony” from all documents. Vol. 2RP 146, 153-55,157. The parties agreed the words “domestic violence” should be redacted. Vol. 2RP 115,119,

163. Over defense objection, the court admitted the redacted documents. Exh. 2A, 6A, 7B, 9A. Vol. 2RP 119, 158, 165-66, 181,185, Vol. 3RP 287,288.

Exhibit 2A included a redacted criminal complaint, and partially redacted police incident report from June 20, 2017. The police incident report listed weapons as “hands, fist, feet, etc.” Exh. 2A p. 4.

Exhibit 6A the judgment and sentence for a 2010 conviction for violation of a no contact order had the word “felony” redacted. However, the special allegation of domestic violence was not redacted. Exh. 6A p. 1.

The matter proceeded to a jury trial. Brennan was convicted of felony violation of a no contact order, with a designation of domestic violence. CP 47-48. At sentencing, Blaine told the court he had tried to have the no contact order removed because Brennan had mental health challenges and could only rely on his brothers. Blaine said he had not been staying at the home and had permitted Brennan to stay at the house. RP 6/29/17 at 13-14. Blaine also told the court he would not make Brennan stay at a homeless shelter, when he had an extra bedroom available for him.

RP 6/29/17 at 15. Brennan told the court he struggled with drug addiction and psychological issues. RP 6/29/17 at 17,22.

After conducting an on the record analysis, the court imposed an exceptional downward sentence and entered written finding of fact and conclusion of law. CP 239-241. Brennan makes this timely appeal. CP 236.

III. ARGUMENT

A. The Trial Court Erred When It Admitted Evidence That Was Irrelevant and Unduly Prejudicial.

Evidence is logically relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. If the evidence is logically relevant, then the court must determine whether its probative value outweighs any potential prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362-63,655 P.2d 697 (1982).

ER 403 provides in relevant part that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 404(b) prevents consideration of

prior bad acts as proof of a general propensity for criminal conduct.

State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

ER 404(b) instructs the trial court to consider the purpose and relevance of evidence and assess the probative value and potential prejudice to the defendant. A trial court's decision to admit or refuse to admit evidence is reviewed for abuse of discretion. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992).

A court abuses its discretion when it takes a position no reasonable person would adopt. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). The erroneous admission of evidence requires reversal if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997).

To convict an individual of felony violation of a no contact order, the State must prove he has two prior convictions for violation of a no contact order. RCW 26.50.110(5). To that end, here the State argued for admission of the no contact orders, the judgment and sentences, criminal information, probable cause statements, and police reports from previous convictions.

The trial court admitted the documents, but ordered redaction of prejudicial terms. The court ordered the word “felony” removed from all documents, and specifically the words “domestic violence” removed from Exhibit 2A and Exhibit 7³. Vol. 2RP 163.

Exhibit 6A, a 2010 judgment and sentence for violation of a court order, still contained the prejudicial information of the special allegation of domestic violence. Exh. 6A p.1. Exhibit 2A which had been carefully redacted to delete every mention of the words felony, and domestic violence, still contained the Incident Information portion entitled “Weapons: Hands, Fist, Feet, Etc.” Exh. 2A p. 4, Vol. 2RP 115, 119, 127. The admission of these two exhibits, without redaction of the words the court had already found unfairly prejudicial, resulted in unfair prejudice to Mr. Penrose.

“Unfair prejudice” within the meaning of the rule requiring exclusion of evidence whose probative value is substantially outweighed by danger of unfair prejudice, is a term that means an undue tendency to suggest a decision on an improper basis. *State v. Stackhouse*, 90 Wn.App. 344, 356, 957 P.2d 218 (1998). And “greater prejudice may result from the nature of the conviction; the

³ The court found the probable cause statements in Exhibit 5 wholly inadmissible. Vol. 2RP 15-151.

more similar the prior crime to the one presently charged, the greater the prejudice.” *State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998).

Here, the trial court was very concerned about the unduly prejudicial effect of portions of the exhibit documents and ordered the redactions or found them wholly inadmissible. Vol. 2RP 150-51,163, 175, 176,184-85. The admission of exhibit 6A, without deletion of the special allegation of domestic violence, as it had been for every other exhibit, was presumably an oversight, and resulted in error. Vol. 2RP 115, 119,179.

The court similarly erred when it allowed admission of the incident report in exhibit 2A, which listed weapons as hands, feet and fists. The obvious inference for the jury was that Mr. Penrose was involved with a physical altercation with someone at his residence, despite the court’s ruling that the allegation of domestic violence be removed.

Admission of the exhibits prejudiced Mr. Penrose. The state’s burden was to show he had been convicted of violation of no contact orders on two previous occasions. The state did not have to prove that Mr. Penrose had special allegations of domestic

violence or had been accused of assaulting another with his hands, feet, or fists.

Evidence of prior misconduct should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect. ER 404(b). Error in the admission of prior misconduct evidence is not harmless where the reviewing court finds that ‘within reasonable probabilities...the outcome of the trial would have been different if the error had not occurred.’ *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The trial court here determined to exclude evidence of domestic violence because it was overly prejudicial to Mr. Penrose. The seemingly inadvertent admissions that either overtly or inferentially pointed to domestic violence was prejudicial to Mr. Penrose, as there was no evidence that Mr. Penrose did anything other than go inside of his brother’s home and put on his shoes, violating a no contact order.

The trial court found the words overly prejudicial and it is reasonable to assume the court did so because it did not want the jury to convict Mr. Penrose based on previous behavior. Admission of the exhibits without the redactions requires a new trial.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Penrose respectfully asks this Court to vacate his conviction and remand for a new trial.

Respectfully submitted this 19th day of December 2019.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on December 19, 2018 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Kitsap County Prosecuting Attorney at kcpa@co.kitsap.wa.us and to Brennan Penrose, DOC 342867, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA. 98632.



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Transmittal Information

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