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Court of Appeals
Division II
State of Washington
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NO. 52957-2-II

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

STATE OF WASHINGTON, Respondent

v.

CULLEN EARL THOMAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00087-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly excluded irrelevant evidence from trial.**
- II. The State agrees the record is insufficient to allow for review of the Court's comment about a jury question or concern.**

STATEMENT OF THE CASE

Cullen Thomas (hereafter 'Thomas') was charged by information with two counts of Forgery and one count of Bail Jumping on a Class B or C felony. CP 3. Thomas was alleged to have possessed, uttered, offered, disposed of and put off as true two forged checks in the amounts of \$739.00 and \$511.11. CP 3. He was further alleged to have missed a required court appearance on August 2, 2018. CP 3.

Mr. Chet Newton owns a business for which he pays bills usually by check. RP 115. In January of 2017, Mr. Newton paid several bills, and put them in the mailbox for the mailman to pick up. RP 116. He received a call the next day from Rapid Cash explaining that someone was trying to cash one of his checks; they asked him if he wrote it and to a certain person. RP 116, 118. Mr. Newton has never heard of or met anyone by the name of Cullen Thomas. RP 118. Mr. Newton did not make any checks out to Thomas. RP 120-21. At trial, Mr. Newton identified two checks

(Exhibits 6, 7) that were dated for January 6, 2017 and testified that his practice was never to post-date or pre-date checks he wrote. RP 121.

Jessica Williams is a branch manager for iQ Credit Union. RP 141. Ms. Williams identified Exhibit 7 as a check from an iQ Credit Union account. RP 146. This check was cashed at an iQ Credit Union branch on January 6, 2017. RP 147-48.

Kadira Lemes worked for Rapid Cash in January 2017. RP 221. To perform her job duties at Rapid Cash, Ms. Lemes had been trained on identifying checks that appeared to be forged or false. RP 221. One day in January 2017, Ms. Lemes received a check that looked suspicious to her. RP 222-23. The check was half-printed and the writing had been gone over multiple times, as if someone was doodling on it. RP 223. Ms. Lemes identified Exhibit 6 as the check that she received. RP 223. There was also something that had appeared to be erased on the check. RP 224. When Ms. Lemes received the check, after noticing the suspicious nature of the check, she took it to her manager. RP 224. Ms. Lemes called the person who wrote the check, Mr. Newton, and asked him if he wrote the check. RP 224. He indicated that he did not know who the person trying to cash the check was and that they should not cash it. RP 224. Mr. Newton indicated they should call the police. RP 225. Ms. Lemes' manager called the police while Ms. Lemes returned to Thomas at the front of the Rapid

Cash and had him start completing an application to have the check cashed; she had him do this in order to keep him there until police could arrive. RP 225. Police arrived about 5 to 10 minutes later from what Ms. Lemes could remember. RP 226.

Officer Tyson Taylor works as a police officer for the City of Vancouver. RP 150. On January 7, 2017 Officer Taylor was dispatched at about 5:40pm to the Rapid Cash in Vancouver, Washington. RP 151-53. He made contact with Thomas and informed him he was a suspect in a forgery and placed him in handcuffs. RP 154. Officer Taylor then read Thomas the *Miranda* warnings from his department-issued card. RP 155-56. Thomas told Officer Taylor that he received the checks three days prior from work he did on a truck. RP 157. Thomas said that he did work on a man named Chaz's truck. RP 159. The check that Thomas tried to pass at Rapid Cash was for over \$700 and Thomas told Officer Taylor it was for parts and labor. RP 160. Thomas also told Officer Taylor that he had cashed another check on the same account the day before at an iQ Credit Union branch. RP 163. Officer Taylor went to iQ Credit Union a few weeks later and spoke with Ms. Williams. RP 166-67. Officer Taylor was eventually able to collect Exhibit 7, the check Thomas passed at iQ Credit Union on January 6, 2017. RP 168. The check that was admitted as

Exhibit 6, the check Thomas tried to pass at Rapid cash, had erase marks on the pay to order part and on the amount line. RP 161.

The State presented two witnesses to support the bail jump charge. Jeannie Bryant is a Senior Deputy Prosecuting Attorney with the Clark County Prosecuting Attorney's Office. RP 203. In May of 2018, Ms. Bryant worked as the supervisor of the docket team. RP 204. The docket team handles cases that are scheduled on any given docket so that they do not need a number of different deputy prosecuting attorneys to appear. RP 204. A docket is a collection of cases that appear before a judge at a specific time. RP 205.

At a defendant's first appearance, a defendant's name is confirmed, the State provides them with the information of what charges they're facing, and then the Court determines whether bail or release conditions will apply. RP 205. When a defendant is released from custody, a release order is entered and signed by the defendant. RP 206-09. The form indicates whether someone is to be on supervised release or not, and what conditions of release are required of them. RP 206-07. The form also informs a defendant that it is a crime to fail to appear for a required court appearance. RP 208. The release form was Exhibit 1. Exhibit 2 was the information in Thomas's case; the information showed Thomas was charged with forgery, a class C felony. RP 210.

On May 3, 2018, Ms. Bryant appeared before the Court on a readiness docket and handled Thomas's case. RP 212. The trial date was continued. RP 212-14. A scheduling order was filled out and entered with the Court that indicated a readiness date of August 2, 2018 and a trial date of August 6, 2018. RP 215-16. The scheduling order also alerts a defendant that he is personally required to appear and that failure to appear may result in the issuance of a warrant and may constitute the crime of bail jumping. RP 216. Thomas was given a copy of the scheduling order when he appeared in court. RP 217. The form is filled out on carbon copy/NCR paper; Thomas was given the yellow, or second, copy of the scheduling order. RP 217.

Katie Sinclair is a Deputy Prosecuting Attorney at the Clark County Prosecuting Attorney's Office. RP 235. Ms. Sinclair worked in the docket unit, handling superior court files for the office. RP 235. On August 2, 2018, Ms. Sinclair was so working, and was assigned to the Readiness docket on Thursday afternoon. RP 236. The readiness hearing is a mandatory court date. RP 236-37. Thomas was scheduled for that hearing and did not appear in court. RP 239. At 2:49pm, the Court called him as a failure to appear and authorized a warrant. RP 239. Ms. Sinclair was at the readiness hearing the entire length of the docket and Thomas did not ever appear. RP 239.

Thomas wanted to present evidence regarding why he failed to appear at the August 2, 2018 court date and as to when he returned to court again after August 2, 2018. RP 40-69; CP 15-17. Thomas sought to call both of his parents as witnesses to explain they believed the hearing date was for August 3, 2018. RP 40-69. Thomas also sought to call his prior defense attorney to testify that she received a call from him on August 3, 2018 regarding his court appearance. RP 312-13. Thomas argued he should be allowed to present this evidence to show background and the context surrounding his confusion as to the date of his court hearing and also to show the jury that he was not a “bad guy” or a “scofflaw.” RP 44. Thomas was clear that he was not raising an affirmative defense to the charge of bail jumping. RP 64. The trial court ruled this evidence was irrelevant as it was not relevant to proving any element of the crime of bail jumping or to proving any defense raised to the crime of bail jumping; the court also found that any possible relevance was outweighed by the potential that it would confuse the jury. RP 48-50, 65-70, 312-15.

The jury convicted Thomas on all counts, as charged. CP 37-39. Thomas was sentenced to a standard range sentence; he timely filed the instant appeal. CP 43-55.

ARGUMENT

I. The trial court properly excluded irrelevant evidence from trial.

Thomas argues the trial court erred in excluding evidence related to the reasons why he committed the crime of bail jumping. The trial court did not abuse its discretion in its decision to exclude the irrelevant evidence and this decision did not deny Thomas the right to present a defense. The trial court did not err and Thomas's convictions should be affirmed.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). This Court will defer to a trial court's rulings unless "no reasonable person would take the view adopted by the trial court." *Id.* (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or made for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). If a trial court excludes relevant defense evidence, this Court will determine as a matter of law whether the exclusion violated the defendant's right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Even when a

defendant raises a Sixth Amendment challenge to the exclusion of evidence, this Court reviews the exclusion of evidence for an abuse of discretion. *State v. Witthauer*, ___ Wn.App.2d ___, 2019 WL 3202959 (Div. 2, 2019) (citing *State v. Lee*, 188 Wn.2d 473, 486-88, 396 P.3d 316 (2017) and *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017)).¹ Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). Thus, while a defendant has a right to present evidence and to present a defense, a defendant has no right to present irrelevant evidence, or evidence that is unduly prejudicial, confusing or misleading.

Here, the State charged Thomas with Bail Jumping. This required the State prove that Thomas had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before the court and that he failed to appear. RCW 9A.76.170(1). The State was not required to prove that Thomas knew on the day he failed to appear that he was failing to appear at a court date; the statute only requires that the State prove Thomas was given notice of his court date. *State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004).

¹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals that were issued on or after March 1, 2013. These opinions are not binding on this Court and may be afforded as much persuasive value as this Court chooses.

Therefore, it is not a defense to the crime that someone “forgot” about the court date or was mistaken about the court date. *See id.* The defenses to bail jumping would therefore include the statutory affirmative defense that uncontrollable circumstances prevented the person from appearing or surrendering, *see* RCW 9A.76.170(2), that the person was never given notice of the court date, that the person actually did appear at the court date, or some other procedural defect such as the person was not admitted to bail.

Thomas wanted to argue at trial, and to present evidence to support, the idea that he misread the court document setting his next court date and that he was mistaken about when he was required to appear in court. This evidence and theory was in no way relevant to the crime of bail jumping or to any possible defenses to the crime of bail jumping.

Accordingly, the trial court appropriately excluded evidence of Thomas’s “mistake” to prevent jury nullification and to prevent jury confusion.

ER 402 provides that “[e]vidence which is not relevant is not admissible.” ER 402. “Relevant evidence” is “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.” ER 401. Additionally, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair

prejudice or confusion of the issues, or if it is misleading to the jury. ER 403.

Additionally, the evidence that Thomas wanted to have admitted was for the purpose of proving his character and was improper character evidence. This court may affirm a trial court's decision to exclude evidence on any proper basis and not necessarily for the basis the trial court declared. *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). ERs 404 and 405 generally govern admission of evidence of a person's character. Character evidence "is normally thought to encompass evidence offered for the purpose of showing a party's general tendencies with respect to honesty, peacefulness, carelessness, temperance, or truthfulness." Tegland, Karl, Wash. Practice, Courtroom Handbook on Washington Evidence, sec. 404:1 (2019 ed.). Thomas now claims that the evidence regarding the mistake he made about the court date was relevant to show that he wasn't the kind of person to disregard a court date and essentially, that he was a good, honest person who simply made a mistake. This is clear character evidence. Character evidence is only permissible if it is a "pertinent" trait of character. ER 404(a)(1). Thus the character evidence must be pertinent to rebut the nature of the charge. The question then becomes whether the character trait of being a good person is "pertinent" to rebut the charges. As already established, this evidence was

not relevant to any defense of bail jumping and was certainly not relevant to rebut the charges of forgery. Generally, someone's general good moral character is not pertinent to rebut the charge. For example, in *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011), our Supreme Court held that evidence of a defendant's good moral character was irrelevant in a rape of a child trial. Thomas's good moral character is likewise irrelevant in his forgery and bail jump trial.

Furthermore, the method that Thomas sought to introduce the character evidence was improper. Even if Thomas's good moral character was a pertinent character trait and therefore was relevant to the charges of forgery and bail jump, such evidence may only be proved by reputation evidence. ER 405. ER 405(a) provides "in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Thus, on Thomas's case, he could only have been allowed to present evidence of his reputation of having good moral character (again, only if it was relevant, which the State maintains it was not); he could not have presented evidence of specific acts which showed his character, which is exactly what testimony regarding his mistake about the court date would have

been- a specific instance to show the type of person he is. This is expressly disallowed by the evidence rules.

Thomas claims that his evidence was the “res gestae” of the crime, but the crime was over and finished on the day Thomas missed his court date. The crime of bail jumping is not a continuing course of conduct crime and the event of the bail jump did not continue over the next several days. Thus it cannot be included as the “res gestae” of the event. “Res gestae” evidence must be evidence that is “relevant to a material issue and its probative value must outweigh its prejudicial effect.” *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Once again, relevancy of the evidence that a defendant proffers matters. A defendant has no right to admit irrelevant evidence. The evidence that the defendant wanted to present, that he came to court the following day and mistakenly thought his court document said a different date, was not relevant to the crime of bail jumping and it was not relevant to a defense. It was more likely than not only going to confuse the jury or lead to jury nullification. The trial court was correct to exclude it on relevancy grounds and because it was confusing or misleading to the jury. This Court should also affirm because Thomas’s only reason for wanting to introduce the evidence was to convey to the jury his good character, which was improper as it was not a pertinent trait of character to these crimes or defenses, and was attempted

to be introduced in an improper manner. Specific act evidence is not admissible except on cross-examination or for other limited purposes which are not at play here. The trial court properly excluded this evidence and its decision should be affirmed.

Even if the trial court erred in excluding the evidence Thomas sought to admit regarding his bail jump charge, that would only affect his bail jump conviction and not the two forgery convictions. Thomas argues that the evidence would have affected all convictions, including the forgery convictions, because the evidence would help him “gain credibility with the jury.” Br. of Appellant, p. 18. This is simple character evidence which, as discussed above, is not admissible. The only reason Thomas argues that it affects the forgery convictions is because the jury was unable to hear improper character evidence regarding Thomas’s credibility. Had the forgery charges been tried separately, Thomas would likewise not have been allowed to introduce evidence regarding his good intent and good character surrounding attending court responsibly as it would have been wholly irrelevant to the forgery charges standing alone. There is no possibility that the evidence that Thomas sought to introduce would have had an effect on the jury’s verdicts on the forgery convictions except that it would have been a way to backdoor improper evidence of his reportedly good character, which is not a proper consideration for the

jury for any of the charges Thomas faced. Accordingly, if this Court finds the evidence was relevant and should have been admitted regarding the bail jump, only the bail jump charge could have possibly been affected; the forgery convictions should remain. The bail jump conviction should also remain as the evidence does not establish a defense or negate any of the elements of the crime and this Court can be satisfied that the result would have been the same as the evidence overwhelmingly proved Thomas's guilt of the bail jump charge.

II. The State agrees the record is insufficient to allow for review of the Court's comment about a jury question or concern.

Thomas argues that his case should be remanded for an evidentiary hearing to determine the nature and extent of ex parte contact between the court and the jurors. The State agrees that the record does not show the whole story of what happened with a jury "concern" and whether the Court had any contact whatsoever with the jury. Accordingly, this matter should be remanded for an evidentiary hearing to determine whether any contact between the court and the jury occurred while the jury was deliberating.

Just before the jury was brought in to declare their verdict, the trial court told the parties,

...One question the jury apparently had was they were concerned about Exhibit No. 8. I note No. 8 was not admitted, so I'll probably mention that to them after I get their verdict and poll the jury. So, what I'll do is have them come out. I'll get the verdict from the foreman, take a look at it and then read it, pull [*sic*] the jury and usually I'll go ahead and excuse them and then I'll talk to the parties a bit....

RP 382. This remark from the court shows there was a juror question or concern, but does not detail any contact the court had with the jury or how the trial judge knew there was a question or concern. Thus because Thomas has raised this issue as a concern, this Court should remand for an evidentiary hearing to determine whether any communication occurred, and if it did, the nature and extent of the communication.

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CONCLUSION

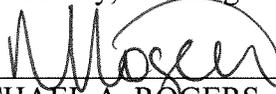
The trial court properly excluded irrelevant evidence at trial and the trial court's decision should be affirmed. However, the case should be remanded for an evidentiary hearing on whether there was any contact between the trial court and the jury while the jury was deliberating.

DATED this 25th day of September, 2019.

Respectfully submitted:

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