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Court of Appeals
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NO. 53717-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY BELL,
Appellant.

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

The Honorable Donald J. Richter, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted evidence in violation of ER 404(b) that Mr. Bell had been flagged as an officer safety risk in law enforcement databases because the evidence is highly prejudicial while offering little probative value.
2. The state failed to prove that Mr. Bell willfully obstructed law enforcement officers as charged in count five because the state's evidence fails to prove that Mr. Bell delayed his arrest or that he willfully disobeyed orders to lay on the ground.

Issues Presented on Appeal

1. Did the trial court abuse its discretion when it admitted evidence in violation of ER 404(b) that Mr. Bell had been flagged as an officer safety risk in law enforcement databases because the evidence is highly prejudicial while offering little probative value?
2. Did the state fail to prove that Mr. Bell willfully obstructed law enforcement officers as charged in count five when the state's evidence fails to prove that

Mr. Bell delayed his arrest or that he willfully disobeyed orders to lay on the ground?

B. STATEMENT OF THE CASE

Procedural Facts

The state charged Mr. Bell with three counts of felony harassment of a law enforcement officer: one from March 23rd related to U.S. Forest Service Officer Andrew Larson and two from March 28th related to Officer Larson and Lewis County Sheriff's Deputy Adam Kasinger. CP 19-22. The state also charged Mr. Bell with two counts of obstructing a law enforcement officer for the incident with Officer Larson on March 23rd and for delaying his arrest on March 28th. CP 19-22. Mr. Bell elected to proceed to a jury trial. CP 16-17.

The jury found Mr. Bell guilty as charged. CP 94-98. The trial court granted Mr. Bell a first-time offender waiver pursuant to RCW 9.94A.650(2) and sentenced him to credit for time served. RP 300-01. Mr. Bell filed a timely notice of appeal. CP 127.

Substantive Facts

On March 23, 2019, Officer Larson contacted Mr. Bell in the woods near U.S. Forest Service Road 5290 after observing Mr. Bell

riding an ATV behind a winter wildlife closure. RP 71. Officer Larson intended to cite Mr. Bell for operating a motor vehicle within the closure. RP 75.

Officer Larson told Bell he had he had seen Mr. Bell riding an ATV on the gravel bar with his three dogs. RP 72. When asked, Mr. Bell denied that he had been riding an ATV. RP 71-72. Mr. Bell replied by telling Officer Larson that he had been the victim of a violent crime in the past and said “[i]f you put your hand on your gun, I will put you down.” RP 72-73. Officer Larson decided to terminate the contact and told Mr. Bell he was going to keep looking for the ATV rider before walking back to his patrol truck. RP 74-75.

Officer Larson radioed for backup as soon as he reached his patrol truck. RP 76. Within 30 minutes a deputy from the Lewis County Sheriff’s Department arrived as backup. RP 77. Officer Larson and the Lewis County deputy attempted to locate Mr. Bell but could not find him. RP 77.

Two days later, Officer Larson reported his interaction with Mr. Bell to his supervisors. RP 78. Lewis County deputies showed Officer Larson a photo of Mr. Bell which Officer Larson identified as

the man he had contacted on March 23rd. RP 78-79. Lewis County Sheriff's Deputy Daniel Riordan located Mr. Bell's address and organized an operation to arrest Mr. Bell. RP 78-80, 154-56. Deputy Riordan noted that Mr. Bell had been flagged in their system as an officer safety risk based on past incidents and as a result law enforcement were directed to contact him only with two or more officers present. RP 159-60.

On March 28, 2019, Officer Larson, Deputy Riordan, Deputy Jared Kasinger, and Washington State Patrol Trooper Kaleb Ecklund drove to Mr. Bell's home and attempted to contact him. RP 80, 84, 158-59, 179-180. Dispatch called Mr. Bell's home and to ask him to come outside, but no one answered the phone. RP 162. An officer knocked on the front door but received no response. RP 161-62. The other three officers asked neighbors for information about Mr. Bell's whereabouts while Officer Larson remained outside Mr. Bell's house. RP 85, 162-64.

As the other officers were searching the neighborhood, Mr. Bell exited his house and began to approach Officer Larson. RP 85. Officer Larson radioed for the other officers to return to the house and ordered Mr. Bell to put his hands up and get on the ground. RP

85-86. The arrest took approximately 30 seconds. RP 86, 165. Deputy Kasinger arrived and drew his firearm. RP 182-83.

Mr. Bell told Officer Larson and Deputy Kasinger that he would “put [them] down” if they touched their weapons. RP 87, 183-84. When other officers arrived with weapons drawn Mr. Bell complied with orders to put his hands up while commenting about the police presence in his neighborhood. Mr. Bell explained he could not get all the way on the ground due to a knee injury. RP 172-73, 183. After the arrest, Mr. Bell continued to ask why he was being arrested. RP 218. Trooper Ecklund responded that Mr. Bell had threatened Officer Larson, whose face Ecklund illuminated with a flashlight. RP 218.

Mr. Bell recognized Officer Larson and became angry. RP 218. Before Deputy Riordan placed Mr. Bell in a patrol car to be transported to jail, Mr. Bell accused Officer Larson of sneaking up on him in the woods. RP 88-89, 167. During the booking process, jail staff told Mr. Bell that they could provide him with resources to get home if he was released because the jail is a long distance from Packwood. RP 185. Mr. Bell responded that he would walk home and use the time walking to plot revenge against Officer

Larson. RP 185.

Mr. Bell moved to exclude any reference to the officer safety flag as unduly prejudicial and irrelevant to the current charges during motions in limine. RP 16-21. The state asserted that evidence of the officer safety alert was relevant because it tended to show reasonable fear, which is an element of felony harassment. RP 16-17. The trial court denied Mr. Bell's motion to exclude the evidence:

[TRIAL COURT]: Well, I'm inclined to allow the admission of the alert, although I will have to reserve somewhat depending on what the alert says. But I think it's fair given the elements of the crime, or the alleged crime, that the officers had a reasonable fear as to the threat here . . . It's prejudicial, but I will allow, given the elements of the alleged crime, for you to present to the jury that there was an officer safety alert and whether or not that alert included the fact that he owned firearms, I will allow that as well.

RP 21-23. During direct examination of Officer Larson, the state asked him about the officer safety alert:

[PROSECUTOR]: Were you aware of an officer safety flag regarding Mr. Bell on March 28th of 2019?

[OFC. LARSON]: On March 28th I met up with two deputies and a state trooper in Packwood prior to try to make contact with Randy Bell. And at that point I was informed that there was an officer safety flag on Randy Bell, and that officer safety flag mandated at least a two-officer contact.

RP 80. Officer Larson also testified that the presence of an officer

safety flag indicates that the suspect has “some history” and an arrest would be a “high-risk contact situation.” RP 83. Deputy Riordan testified that the flag indicated “weapons caution” and mandated multiple officers be present to contact the suspect. RP 160. At Mr. Bell’s request, the trial court gave a limiting instruction to the jury specifying that the it may only consider evidence of the officer safety flag to determine the mindset of witnesses. RP 244-45. The instruction allowed the jury to consider the evidence for all three counts of harassment. RP 244-45.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE THAT LAW ENFORCEMENT HAD FLAGGED MR. BELL AS AN OFFICER SAFETY RISK BASED ON PRIOR UNCHARGED INCIDENTS IN VIOLATION OF ER 404(b) AND ER 403

ER 404(b) prohibits the admission of evidence showing prior misconduct to prove the commission of a new offense. ER 404(b). A trial court may admit such evidence under an exception to ER 404(b), but only if: (1) the State proves that the misconduct occurred by a preponderance of the evidence; (2) the trial court identifies the purpose for which the evidence is being introduced;

(3) the trial court determines that the evidence is relevant to proving an element of a charged crime; and (4) the trial court balances the evidence's probative value against its prejudicial effect. *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (citing *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995)).

ER 404(b) should be read in conjunction with ER 403. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). ER 403 provides that “[a]lthough 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.” ER 403. A trial court should resolve doubts as to admissibility of prior bad acts character evidence in favor of exclusion. *State v. McCreven*, 170 Wn. App. 444, 459, 284 P.3d 793, *review denied* 176 Wn.2d 1015, 297 P.3d 708 (2012). Appellate courts review a trial court's decision to admit evidence for an abuse of discretion. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (citing *Pirtle*, 127 Wn.2d at 648).

Here, Officer Larson was not aware of an officer safety issue on March 23, 2019. Nonetheless, the trial court allowed law

enforcement witnesses to testify that Mr. Bell had been flagged as an officer safety risk based on prior interactions with law enforcement and explain the significance of this flag to their interactions with him. RP 80-83, 160.

This testimony contained allusions to Mr. Bell possessing weapons and having criminal history. RP 83, 160. The trial court's decision to admit this testimony constitutes an abuse of discretion because it allowed specific propensity evidence into Mr. Bell's trial that was not relevant to count one and this evidence's prejudicial effect severely outweighed any probative value it might have had with regard to both counts.

The circumstances of this case are analogous to those discussed in *Perrett*. In that case, the defendant was convicted of assault in the second degree after he pointed a gun at his roommate. *Perrett*, 86 Wn. App. at 315-16. When he was arrested, the defendant told the police that they could not take his guns because "the last time the sheriff took his guns, he didn't get them back." *Perrett*, 86 Wn. App. at 315. The defendant moved to exclude this statement on the basis that it constituted improper evidence of a propensity to commit crimes involving firearms, but

the trial court admitted it over his objection. *Perrett*, 86 Wn. App. at 316. The Court of Appeals held that the trial court abused its discretion by admitting the statement because it constituted inadmissible propensity evidence:

The issues in the case were whether Perrett pointed the gun at Johnston, and if so, whether he was justified by the law of self-defense in doing so. . . .the statement was unfairly prejudicial; it raised the inference that Perrett had committed a prior crime involving a gun, thereby making it more likely he had done so again.

Perrett, 86 Wn. App. at 319-20. The court cited this error as one of several that entitled the defendant to a new trial. *Perrett*, 86 Wn. App. at 323.

As was the case in *Perrett*, the inherent prejudicial effect of suggesting that Mr. Bell has a specific propensity to be violent severely outweighs the probative value of the evidence related to the officer safety flag. As an initial matter, the evidence must be relevant to be admissible. ER 402. Evidence is relevant if it has the tendency to make the existence of any fact of consequence to the case more or less probable. ER 401. Here, because Officer Larson was unaware of the officer safety flag until March 28th, it was not relevant to count one which is related to Mr. Bell's interaction with Officer Larson on March 23rd. CP 19.

Even if the evidence is relevant to the other counts of harassment, the trial court must still balance its prejudicial effect against its probative value. ER 403. Evidence showing prior negative interactions with law enforcement is disfavored under ER 404(b) and ER 403:

The state may not show defendant's prior trouble with the law . . . even though such facts might logically be persuasive that he is *by propensity* a probable perpetrator of the crime. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948)). Under *Perrett*, evidence of the officer safety flag is overly prejudicial to Mr. Bell because it signaled the jury that he was a known, dangerous criminal, i.e. has a propensity to commit crimes. *Perrett*, 86 Wn. App. at 319-20.

The trial court's error in admitting evidence of the officer safety flag is subject to a harmless error analysis. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002)). The erroneous admission of evidence under ER 404(b)

constitutes reversible error if there is a reasonable probability that admitting the evidence affected the outcome of the trial. *Fuller*, 169 Wn. App. at 831 (citing *Everybodytalksabout*, 145 Wn.2d at 469). Here, the trial court gave a limiting instruction, but this instruction allowed the jury to consider evidence of the officer safety flag as substantive evidence of reasonable fear in all three counts of harassment, including the count related to an incident that took place before Officer Larson knew about the flag. RP 244-45.

There is a reasonable probability that allowing the jury to consider evidence of the officer safety flag affected the jury's verdict on the felony harassment charges. This court should reverse his harassment convictions and order a new trial. *Everybodytalksabout*, 145 Wn.2d at 468-69.

2. THE STATE FAILED TO PROVE THAT MR. BELL WILFULLY OBSTRUCTED LAW ENFORCEMENT OFFICERS BY DELAYING HIS ARREST WHEN THE EVIDENCE SHOWS MR. BELL'S FAILURE TO COMPLY WAS DUE TO A PHYSICAL DISABILITY

To convict a defendant of obstructing a law enforcement officer, the state must prove beyond a reasonable doubt that the defendant (1) willfully hindered, delayed, or obstructed a law

enforcement officer in the discharge of the law enforcement officer's official powers or duties, (2) the defendant knew that the law enforcement officer was discharging official duties at the time, and (3) the act occurred in Washington. RCW 9A.76.020(1). Mr. Bell challenges element (1).

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime and any sentencing enhancements beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

Even viewed in a light most favorable to the state, the evidence presented at Mr. Bell's trial is insufficient to prove that he willfully obstructed law enforcement as alleged in count five. The evidence shows that Mr. Bell exited his house and began to

approach Officer Larson as the other officers searched around the neighborhood. RP 85-86. Officer Larson ordered Mr. Bell to stop, put his hands in the air, and lay on the ground. RP 85.

Mr. Bell followed orders to put his hands in the air and turn around to be handcuffed. RP 86, 165. The fact that he continued to walk towards Officer Larson does not establish willful hindrance because the entire arrest took somewhere between 30 seconds and a minute and did not involve any struggle. RP 86, 165. Furthermore, Mr. Bell told the officers while they were arresting him that the only reason he did not lay on the ground as instructed was due to a knee injury that prevented him from doing so. RP 172-73, 183. This evidence does not establish beyond a reasonable doubt that Mr. Bell willfully hindered or delayed the officers trying to arrest him on March 28th.

Even if this court finds that Mr. Bell's actions did momentarily delay his arrest, the evidence fails to establish that that he willfully obstructed the officers. As used in the obstruction statute, the term "willfully" requires that the defendant acted knowingly with respect to the elements of obstructing a law enforcement officer. *State v. Buttolph*, 199 Wn. App. 813, 816-17, 399 P.3d 554 (2017) (citing

RCW 9A.08.010(4)). No reasonable trier of fact could find that Mr. Bell willfully ignored the officers' commands to get on the ground when the evidence shows that his failure to do so was due to his knee injury-a physical disability and not the intent to obstruct RP 172-73, 183.

The state failed to prove that Mr. Bell hindered, delayed, or obstructed his arrest. Even if this court finds that the state did prove that Mr. Bell delayed his arrest, any obstruction was not willful and cannot form the basis for a criminal charge. The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Bell's conviction for obstructing a law enforcement officer in count five and order dismissal of that charge.

D. CONCLUSION

The trial court abused its discretion when it admitted evidence that Mr. Bell had been flagged as an officer safety risk in law enforcement databases because this evidence has little probative value while being highly prejudicial to Mr. Bell. There is a

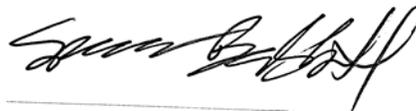
reasonable probability admitting this evidence affected the outcome of Mr. Bell's trial. For this reason, Mr. Bell respectfully requests that this court reverse his convictions and order a new trial. Furthermore, the state failed to prove the essential elements of obstructing a law enforcement officer beyond a reasonable doubt as charged in count five. Based on this, Mr. Bell respectfully requests that this court vacate that conviction and order dismissal of the charge.

DATED this 21st day of January 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and Randy Bell, 108 Tunnel Lane, Packwood, WA 98361 a true copy of the document to which this certificate is affixed on January 21, 2020. Service was made by electronically to the prosecutor and Randy Bell by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

LAW OFFICES OF LISE ELLNER

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