FILED
MAY 30, 2012
Court of Appeals
Division III
State of Washington

No. 30519-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH D. BYRD,

Appellant.

RESPONDENT'S BRIEF

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PROSECUTING ATTORNEY

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

Appellant's Statement of the Case describing the facts (Br. of Appellant, at 2–3) is sufficient for the purpose of Respondent's response, and will be accepted as it is, unless otherwise noted below.

D. RESPONSE TO APPELLANT'S ISSUES PRESENTED

1. The evidence about the warrant upon which Appellant was arrested was not introduced pursuant to ER 404(b), so defense counsel was not ineffective by not seeking a limiting instruction with regard to that

evidence, and there was thus no error on the part of the Court by not giving such an instruction.

Appellant is in error characterizing the testimony as being evidence subject to ER 404(b) ("prior bad acts" evidence). The State did not introduce that testimony as anything other than *res gestae* evidence. *State v. Schaffer*, 63 Wn. App. 761, 768-769, 822 P.2d 292, (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993); compare *State v. Mutchler*, 53 Wn. App. 898, 771 P.2d 1168 (1989). The State's response to the *motion in limine* and the Court's ruling both recognize that the basis for the arrest warrant could be prejudicial, but that the fact of the warrant and resulting arrest was necessary to show the circumstances of the encounter. RP 14–16.

It is open to question whether or not the fact of the warrant's existence is even a "prior bad act" that would make this information subject to ER 404(b). Appellant boldly asserts it is, but provides no authority for that position, and the State likewise strenuously disputes that assertion. It is entirely possible that the underlying basis for the warrant would have been subject to such analysis. While the existence of the warrant might in some way cause a juror to consider that some bad fact exists, it is not the same as

knowing that such facts do exist, and what they are. The warrant was for a DOC violation of community custody, which the State's recollection at the time of sentencing was for a prior drug offense. RP 1/4/12, 7–8. That information would almost certainly have created a different analysis at both the trial level and before this Court if introduced, which is why it was avoided.

Even if this Court were to conclude that the warrant testimony is subject to an ER 404(b) analysis, it was not offered to show the character of the defendant or acting in conformity with that character. It was, however, the basis of argument which could be characterized as showing motive or knowledge. RP 153, 155. Argument is of course not evidence. Even if this Court were to consider that the analysis should have been done, it was done, and even if not explicitly styled as an ER 404(b) analysis, the trial court's pronouncement was sufficient. RP 14–16; *State v. Bradford*, 56 Wn. App. 464, 783 P.2d 1133(1989); *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987). Even if the decision of the trial court was in error, it was not sufficient to change the jury's verdict, and reversal is not justified. *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984).

Defendants are, as Appellant states, entitled to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984). There is a "strong presumption counsel's representation was effective", and the burden is on the defendant to show deficient representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance of counsel, Appellant must prove both that the representation provided was deficient, " ... i.e., it fell below an objective standard of reasonableness based on consideration of *all* the circumstances ..." and that prejudice resulted, " ... i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) (emphasis added).

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011) (citation omitted). The facts in this case would not justify giving the limiting instruction sought. Further, if not sought, such an instruction is waived. *State v. Fitzgerald*, 39 Wn. App. 652, 662, 694 P.2d 1117 (1985). See, also, the commentary to WPIC 5.30. There is also a very real risk that a limiting instruction given under such

circumstances as are present here would unwisely draw the attention of the jury to the fact of the warrant, as if it has independent significance.

2. Appellant may be entitled to be resentenced.

The State having reviewed and considered the authorities provided, it has concluded that the law as it stands may require that the matter be remanded for sentencing. *State v. Hunley*, 161 Wn. App. 919, 253 P.3d 448, *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011). The State does not concede that *Hunley* is correctly decided, only that it is the law at this time. The State is allowed, however, to prove such history as it can during the hearing. *Id.*, at 929–930. The State does reserve the right to change its position on this matter should our Supreme Court decide the pending review in the intervening time.

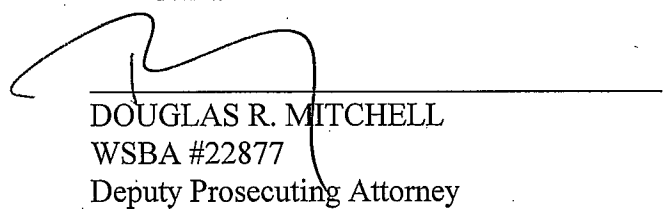
However, the facts of this case may not support Appellant's assertion. It appears that Appellant did in fact at least implicitly acknowledge the State's position as to his criminal history. First, he signed the (Amended) Judgment and Sentence after reviewing it with counsel. CP 59. The criminal history is detailed on page 3 of that document, including the fact that he was

on community custody which added a point. CP 49. Further, counsel appears to have ratified that history without objection, including any from Appellant, who was of course present during the sentencing hearing. "We know that the defendant has that history and that is why the guidelines commission (sic) and the legislature determine that this was an appropriate sentencing range for him." RP 1/4/12, 10. It appears to the State that this is sufficient evidence to satisfy its burden of proof. *State v. Hunley*, 161 Wn. App. 919, 924 253 P.3d 448, *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011).

E. CONCLUSION

This Court should uphold the decisions of the trial court and the conviction of the Appellant. The trial may not have been perfect, as there are no perfect trials. It was, however, fair, and that is what the Appellant was entitled to receive – a fair trial.

Respectfully submitted this 29th day of May, 2012.



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. JOSEPH D. BYRD, Appellant.	))))))))))	No. 30519-8-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

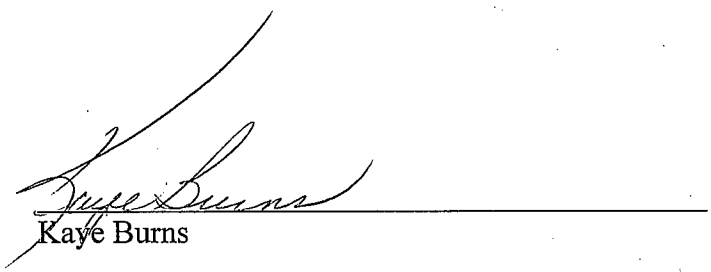
That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols
Wa.Appeals@gmail.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

Joseph D. Byrd
9998 Maple Dr NE - #84
Moses Lake WA 98837

Dated: May 30, 2012.



Kaye Burns