

FILED

FEB 11, 2016
Court of Appeals
Division III
State of Washington

NO. 32982-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

RUSTY ABRAMS,

Appellant.

7
ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. ABRAMS' TWO ASSAULT CONVICTIONS VIOLATE DOUBLE JEOPARDY PROHIBITIONS.....	1
2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO SPECIFIC EVIDENCE SURROUNDING OFFICERS' PRIOR CONTACTS WITH ABRAMS UNDER ER 403 AND ER 404(B).	1
3. THE TRIAL COURT ERRED UNDER ER 403 AND 404(B) WHEN IT ADMITTED EVIDENCE THAT ABRAMS HAD BEEN IN JAIL BEFORE.	4
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Patterson v. Horton
84 Wn. App. 531, 929 P.2d 1125 (1997)5

State v. Gresham
173 Wn.2d 405, 269 P.3d 207 (2012)7

State v. Soper
135 Wn. App. 89, 143 P.3d 335 (2006)
review denied, 161 Wn.2d 1004, 166 P.3d 719 (2007)5

RULES, STATUES AND OTHER AUTHORITIES

ER 1045

ER 4015

ER 4025

ER 403 1, 2, 4, 7

ER 404 1, 4, 7

A. ARGUMENT IN REPLY

1. ABRAMS' TWO ASSAULT CONVICTIONS VIOLATE DOUBLE JEOPARDY PROHIBITIONS.

The State properly concedes a double jeopardy violation and agrees that Abrams' conviction for Assault in the Third Degree must be dismissed. See Brief of Respondent, at 6.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO SPECIFIC EVIDENCE SURROUNDING OFFICERS' PRIOR CONTACTS WITH ABRAMS UNDER ER 403 AND ER 404(B).

The State argues that defense counsel's failure to object to the circumstances surrounding Officer Canady's prior contacts with Abrams was not deficient because those circumstances did not necessarily indicate prior criminal activity. Brief of Respondent, at 7-9. The State concedes, however, that jurors "could have inferred the previous contacts were of a criminal nature." Brief of Respondent, at 8. They could have indeed.

Evidence surrounding these contacts must be examined in light of the other evidence admitted at trial and not in a vacuum. Jurors also learned that there was a warrant for Abrams' arrest and that he had served jail time before ("A-Tank isn't what it used to be."). 3RP 265, 458; exhibit 27. In this context, the evidence provided by Officer Canady beyond the fact of the contacts

themselves – i.e., contacts in “professional capacity,” three contacts documented in police records, one contact involved Abrams’ friend who was a burglar, some were in response to calls and involved other officers, and multiple additional “undocumented” contacts – paints a picture of longstanding and pervasive criminal conduct. There could be no legitimate tactic behind counsel’s failure to keep this evidence out.

The State speculates that counsel may have withheld any objection because he did not want jurors to perceive him as “nit-picky” or wanted to avoid jurors speculating why he wanted this evidence kept from them. See Brief of Respondent, at 10. But this evidence should have been the focus of a pretrial motion in limine. See Brief of Appellant, at 22 (“A *pretrial objection* to all of this evidence under ER 403 and 404(b) would have been sustained.” (emphasis added)). At the very least, the motion could have been made outside the jury’s presence immediately before Canady took the stand. Or, counsel could have asked for jurors to be excused once it became apparent Canady was inclined to discuss more than he should. There was no reason to argue the merits of the issue in front of jurors. Nor was there a reason to do nothing.

The State does not similarly defend the admission of Officer's McLauchlan's prior contacts with Abrams. Nor could it. Since he did not claim to see the individual who ran from Officer Canady, his prior contacts with Abrams were irrelevant and inadmissible. Yet, counsel did not object. But the State argues that McLauchlan's testimony, like Canady's, was not prejudicial in light of substantial evidence supporting Canady's identification of Abrams as the man who sprayed him. See Brief of Respondent, at 8, 10-13.

As discussed in Abrams' opening brief, however, conviction was far from assured without the offending evidence. The person who sprayed Canady alluded capture, leaving reason to doubt that Abrams was that person, particularly because of the poor lighting and stress of the situation. There also was reason to doubt the State's proof of intent for Assault in the Second Degree. See 4RP 630-637. Jurors were more likely to find Abrams guilty, however, in light of his lengthy and significant history of contacts with police. Prejudice has been established.

3. THE TRIAL COURT ERRED UNDER ER 403 AND 404(B) WHEN IT ADMITTED EVIDENCE THAT ABRAMS HAD BEEN IN JAIL BEFORE.

Even with the foundation promised by the prosecution (evidence that Abrams was in A-tank when he wrote the letter), that Abrams had previously spent time in jail should have been excluded under ER 403 and ER 404(b). The evidence was of minimal relevance and injected highly improper prejudice because it demonstrated that Abrams had engaged in sufficiently serious past criminal conduct to warrant his incarceration. But the evidence most certainly was inadmissible in light of the State's failure to provide the foundation on which Judge Antosz premised his decision to admit the evidence.

In response, the State argues that – although defense counsel properly and sufficiently objected to this evidence prior to its admission – the issue has been waived because defense counsel did not object a second time and then move to strike the evidence when the prosecution failed to provide its promised foundation. Thus, rather than recognize that it improperly gained an unfair advantage with the admission of this very harmful evidence through an unfulfilled promise to the trial judge, the State

seeks further gain from its impropriety by preventing Abrams from doing anything about it on appeal.

The State cites no persuasive authority supporting waiver.

Under ER 104:

When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

ER 104(b). When, however, the proponent of the evidence fails to fulfill the condition precedent to admission of the evidence, the trial court should strike the evidence. Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997); see also State v. Soper, 135 Wn. App. 89, 96-100, 143 P.3d 335 (2006) (trial judge strikes testimony once condition for admissibility not proved), review denied, 161 Wn.2d 1004, 166 P.3d 719 (2007). It was the trial judge's responsibility to strike the evidence once the prosecutor failed to do what he had promised at Abrams' trial.

In any event, defense counsel's initial objections were sufficient to cover the State's later failure of proof because they included arguments that the A-tank evidence was irrelevant under ER 401 and ER 402. CP 15; 2RP 219-220; 3RP 245-247, 500. Judge Antosz agreed the evidence concerning A-tank was

irrelevant without proof of the necessary conditional fact that Abrams was housed there when he allegedly wrote the letter. See 3RP 504-505 (confirming the State would prove the conditional fact that Abrams was in A-tank when the letter was written). When the State subsequently failed to produce its promised foundation, Abrams' prior incarceration was indeed rendered irrelevant. And since the defense had already objected on relevancy grounds, nothing more was required.

Finally, the State argues that, even if not waived, the error should be deemed harmless. See Brief of Respondent, at 15-16. But the impact of this improper evidence was significant. As the State concedes, this evidence made clear to every juror deciding Abrams' fate that he had been in jail before. See Brief of Respondent, at 13. Not only did it tell jurors that Abrams was a repeat offender, it necessarily colored and shaped jurors' perceptions of Abrams' numerous prior contacts with law enforcement, making it extremely doubtful (contrary to the State's suggestion) that jurors may have simply concluded that Abrams had so many law enforcement contacts because he was just a grump who often called police to complain about others. See Brief of Respondent, at 8-9.

This evidence supported the notion that Abrams was a “criminal type” and therefore more likely to be the individual who sprayed Officer Canady with mace in an attempt to avoid another arrest. In a case where the suspect got away, and identity was at issue, this evidence – within reasonable probabilities – could have materially affected the outcome. See State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (harmless error standard for improper admission of evidence under ER 403 and ER 404(b)). Therefore, reversal is appropriate.

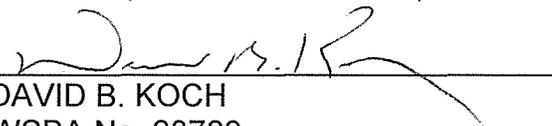
B. CONCLUSION

For the reasons discussed in Abrams’ opening brief and above, this Court should reverse and remand for a new trial. Alternatively, this Court should vacate Abrams’ conviction for Assault in the Third Degree.

DATED this 11th day of February, 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Rusty Abrams

No. 32982-8-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 11th day of February, 2016, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Grant County Prosecutor's Office
kburns@co.grant.wa.us
gdano@grantcountywa.gov

Rusty Abrams
DOC No. 798502
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed in Seattle, Washington this 11th day of February, 2016.

X  _____