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Division III
State of Washington

NO. 32982-8-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RUSTY JOE ABRAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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- C. Did testimony concerning Abrams' previous contacts with law enforcement establish prior criminal acts, and was such testimony unfairly prejudicial?(Assignment No. 2)
- D. Was any error harmless when substantial evidence supported both Abrams' identity as the perpetrator and his intent to harm Canady? (Assignment No. 2)
- E. Abrams did not admit writing a letter from jail in which he recited facts about the case and arguably admitted assaulting Canady. Did the trial court err under ER 403 and 404(b) when it admitted over a defense limine objection a statement in the letter indicating prior incarceration?(Assignment No. 3)
- F. The State failed to produce testimony upon which the trial court relied when making its limine ruling. Did Abrams waive review when, at the close of the State's case, he failed to move to strike the A-Tank statement and for an instruction to disregard? (Assignment No. 3)
- F. Was any error admitting the A-Tank statement harmless when substantial evidence supported the verdict? (Assignment No. 3)

II. STATEMENT OF THE CASE.¹

The State adopts the procedural facts and supplements the substantive facts recited by appellant Rusty Joe Abrams in his Statement of the Case. RAP 10.3(b).

Abrams moved in limine to exclude in its entirety an eight-page letter written by Abrams while he was awaiting trial. CP 15. Abrams did not admit writing the letter, which he characterized as “inflammatory rhetoric,” and argued the letter was inadmissible under Evidence Rules (ER) 402, 403, and *State v. Lane*,² a case addressing ER 404(b). RP 219.

The State sought to admit only certain portions of the letter including the statement “A-Tank isn’t what it used to be.” RP 224. The State argued the statement was relevant to the identity of the author and explained the State would offer witnesses who would place Abrams in A-Tank at the time jail staff intercepted the letter. RP 241. The extensive limine argument spread over three days of trial. Abrams did not admit having written the letter. RP 241–532. The State went on to identify the

¹ The Verbatim Report of Proceedings consists of five sequentially-paginated transcripts, one for each day of trial, (December 10, 2014, December 11, 2014, December 12, 2014, and December 15, 2014), and a separately-paginated transcript covering pretrial hearing on July 30, 2014 and sentencing on December 16, 2014. The State refers to the trial transcript from December 10 through December 15 as RP and does not cite to the transcript of the pre- and post-trial hearings.

² *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995).

other statements it sought to admit, statements that were arguably confessions or admissions. RP 241–42.

Abrams generally argued all the statements were irrelevant and unfairly prejudicial but focused only on the confession statements, arguing none of them were “by any stretch of the imagination an admission.” RP 245–50. Abrams did not specifically challenge the A-Tank statement. *Id.* The court, however, made a point of addressing the statement when announcing its ruling, noting its concern that this statement would show Abrams had been in jail before. RP 504. Before making its final ruling, the court confirmed the State would tie the A-Tank statement to Abrams’ jail location through witness testimony. RP 505.

Balancing probity against unfair prejudice, the court pointed out the central issue of the case was the identity of the person who sprayed Canady with an allegedly noxious substance. RP 503. “So because this is so central to the case, [the admitted statements are] prejudicial but not unfairly prejudicial.” RP 504. As part of its balancing analysis, the court found a limiting instruction on the admitted statements inappropriate. RP 503.

Specifically addressing prejudice from the A-Tank statement, the court noted it had already admitted the fact of Abrams’ outstanding

warrant and found the A-Tank statement would not add additional prejudice. RP 505.

The court also admitted the following excerpts: “I had an empty can of mace, the police giving chase, dropping like flies out of the race. Pepper spray to the face,” (RP 506), and “I turned old Urwin into a believer, told him that pepper spray takes stupid away” (RP 507).

Abrams noted his objections to admission of the “five lines out of eight pages,” but argued only, “There is no confession in those.” RP 530. He did not specifically object to the A-Tank statement nor specifically refer to it.

The State rested without having produced testimony tying Abrams to A-Tank. Abrams did not move to have the statement stricken from the exhibit or the record, nor did he request an instruction to disregard. RP 548–53.

At trial, Officer Patrick R. Canady testified that on the night he was pepper-sprayed he had been on the Ephrata police force for almost 16 years. RP 257. He recognized Abrams as soon as he spotlighted him wearing a cap and a hooded sweatshirt on a dark street around 1:00 o'clock in the morning. RP 264. Canady was confident enough of his identification to identify Abrams by name when he radioed Officer Jack McLaughlin he had located Abrams, who was wanted on a warrant. *Id.* He

recognized Abrams from previous professional contacts. RP 262. He testified three of these encounters had been documented. He added: “then undocumented times, multiple. You know, you just stop and talk to him and” RP 263. Asked about the three documented encounters, Canady told the jury: “One of them was on 2-1 of 2014 on G Street Southeast.” RP 263. Canady went on, “Another one was on 8-19 of 2013. His friend was at their house burglarizing. That was --” RP 263. Here, the court interjected and reminded the officer to testify only to the time of contact and not to a narrative of what took place. RP 263. Canady apologized then recited a third contact on May 1, 2010. RP 263. He confirmed these three contacts “were face-to-face. They were calls or contacts with other officers with him.” RP 264.

The State also asked Sergeant Jack McLauchlan of the Ephrata Police Department whether he knew Abrams, whether there had been prior contact between them, and whether he could identify Abrams. RP 457. McLauchlan responded to the first two questions with the word “Yes” and to the final question by pointing Abrams out in the courtroom. RP 457–58. Defense counsel did not object.

Canady shined his spotlight on Abrams when he first encountered him and left the light on him for a while. RP 347–48. Abrams was wearing a gray sweatshirt with its hood up, red hat, dark pants, and black

backpack. RP 282. Canady then made a U-turn to catch up with Abrams. RP 348. When Canady caught up with Abrams, the hood was down. *Id.* Canady was positive from the first sighting it was Abrams. RP 282–83.

Canady exited his vehicle and chased Abrams on foot, yelling “Taser Taser Taser Stop!” RP 280. During the foot chase, at a full run, he was about five feet behind Abrams when he ran into a mist. RP 284. He knew it was a defensive chemical agent but he could not identify it. *Id.* He was immediately blinded, left coughing and defenseless. RP 283.

Abrams was arrested 25 hours after the incident. RP 481. He had on his person a can of chemical agent. RP 321. Canady told the jury the chemical agent in that can smelled the same as whatever had been sprayed into his face the night before. RP 322.

III. ARGUMENT.

A. Abrams’ convictions for both Assault in the Second Degree and Assault in the Third Degree, based on the same act, violate double jeopardy prohibitions.

The State concedes error. The third degree assault conviction should be vacated.

B. Defense counsel’s performance was not deficient for withholding objection to the scope of testimony concerning Abrams’ prior contacts with law enforcement.

Abrams concedes evidence that Canady knew him from previous contacts was admissible because a central issue at trial was the identity of who pepper-sprayed Canady while fleeing. The issue is whether the prior-contacts testimony improperly indicated Abrams' prior involvement in criminal activity, and, if so, whether defense counsel was ineffective for not having objected. The testimony did not indicate previous criminal activity so counsel was not ineffective for withholding objection. Any error was too insignificant to be prejudicial in light of the substantial evidence of Abrams' identity and his intent to harm.

1. Testimony concerning Abrams' prior contacts with law enforcement did not establish prior criminal acts.

Canady recognized Abrams as soon as he spotlighted him wearing a cap and a hooded sweatshirt. Canady was so confident it was Abrams he identified Abrams by name when he radioed McLauchlan. He knew Abrams. In his 16 years with the Ephrata Police Department, Canady had multiple professional contacts with Abrams. At the limine hearing, the trial court properly limited prior-contacts testimony, precluding description of the nature of the contacts. At trial, Canady testified to three documented face-to-face encounters, two by date and address alone. Regarding the third, Canady testified: "His friend was at their house burglarizing." The court interrupted, admonishing Canady to limit his

testimony to time and place. Canady also mentioned, without elaboration, multiple undocumented encounters: “You know, you just stop and talk to him and . . .” Nothing in this testimony implicates Abrams in criminal activity. The one statement violating the court’s limine order—that someone was at Abrams’ house burglarizing—reasonably indicates Abrams was a crime victim. It cannot be fairly interpreted to indicate Abrams was the burglar.

McLaughlin’s prior contacts testimony did not prejudice Abrams because it was limited to the single word “Yes” when asked whether he knew Abrams and was again “Yes” concerning whether he had prior contact with Abrams. He identified Abrams in the courtroom.

Abrams argues the extent of the previous contacts testimony exceeded that needed for identification and was highly prejudicial because it strongly suggested criminal propensity. But framed as “previous contacts,” the evidence was not highly prejudicial. Canady’s testimony concerning how quickly he identified Abrams made sense only if the jury knew he had seen Abrams enough in the past to be able to identify him, hooded and hatted, on a dark street. While jurors could have inferred the previous contacts were of a criminal nature, they were not required to make that inference. It is not so unusual for small-town police officers to be familiar with community members that a juror would necessarily

assume Abrams' prior contacts were negative, especially when it appeared he might have been a victim in at least one of the incidents. The jurors could have as easily concluded Abrams' was an old crank who called the police whenever kids ran across his lawn with their bicycles or the neighboring teen-ager played her music too loud.

2. Counsel's legitimate tactical decision not to object was not deficient performance.

Courts presume defense counsel's representation was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption is rebutted only if there is no possible tactical explanation for counsel's action. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Legitimate trial strategy and tactics do not provide a basis on which to claim counsel was ineffective. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Whether to object at trial is a classic example of legitimate trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, 667 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* (citing *Strickland*, 466 U.S. 668; *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)).

Here, evidence of Abrams' prior contact with Canady was clearly admissible to prove the validity of Canady's identification. The extent of these contacts was relevant and necessary to overcome Abrams' argument that nobody could have identified him on a dark street clothed as he was. The court had limited this testimony to dates and locations, as the court itself reminded Canady when he started to stray into detail. It is likely the court would have overruled defense objection to testimony that, for the most part, stayed within the established boundaries. The jurors could have perceived the objections as nit-picky. Certainly, some jurors would be tempted to speculate about exactly why Abrams wanted that information hidden from them.

The decision by Abrams' attorney to withhold objection to the extent of the prior-contact testimony was a legitimate trial tactic and does not constitute ineffective assistance of counsel.

3. Any error was harmless because substantial evidence supported both Abrams' identity as the perpetrator and his intent to harm.

Abrams argues the prior-contact evidence was prejudicial because the remaining evidence was insufficient to prove both his identity as the pepper-sprayer and his intent harm Canady. He asserts the testimony portrayed him as a generally bad person, causing the jurors to overlook

otherwise insufficient evidence on those two issues. His argument is refuted by the evidence.

To convict Abrams of second-degree assault, the State had to prove Abrams assaulted Canady, in an act intended to cause bodily harm, by use of a deadly weapon or through administration of a noxious substance. CP 30. The only uncontested element was that the incident was located in Washington. The jury was instructed that bodily harm meant physical pain or injury, illness or impairment of physical condition. CP 31.

There was ample evidence Abrams was the person who sprayed Canady. First, Canady's own testimony was unequivocal. Canady recognized Abrams as soon as the spotlight hit him. He was so certain he immediately radioed McLauchlan that he had located Abrams. Canady confirmed his identification when he caught up to Abrams in his patrol car before he started foot pursuit. By that time, Abrams' hood was down. Canady pursued Abrams on foot, coming within five feet of him before running into the cloud of pepper spray.

Abrams had a can of pepper spray on his person when he was apprehended 25 hours later. The pepper spray in that can smelled to Canady like the pepper spray that felled him the night before. Abrams wrote from the jail: "I had an empty can of mace, the police giving chase, dropping like flies out of the race. Pepper spray to the face." He also wrote

“I turned old Urwin into a believer, told him that pepper spray takes stupid away.”

The jury did not have to believe Abrams was a generally bad character in order to trust Canady’s identification, especially in light of the other evidence linking Abrams to “mace,” pepper spray to the face, and police dropping like flies while giving chase.

Neither did the jury have to rely on the prior-contacts testimony to conclude beyond a reasonable doubt Abrams intended to harm Canady with the pepper spray. Intent may be inferred from circumstantial evidence. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). Included is the inference or permissive presumption that a defendant intends the natural and probable consequences of his acts. *Id.* Intent may also be inferred from conduct when it plainly follows as a matter of logical probability. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 102 (1997).

The jury did not have to rely on assumptions concerning Abrams’ prior law enforcement contacts to conclude beyond a reasonable doubt he pepper-sprayed Canady intending to cause physical pain or to impair his physical condition. Pepper spray is effective precisely because it causes physical pain and impairment of physical condition. Abrams’ intent to harm Canady followed as a matter of logical probability his act of

spraying a mist of chemical agent over his shoulder with Canady five feet behind him.

Counsel's tactical decision not to object to the scope of testimony concerning prior contacts was neither ineffective nor prejudicial.

C. The trial court did not err under ER 403 and 404(b) when it determined evidence of Abrams' prior incarceration was admissible to prove authorship of a letter.

Unlike the neutral prior-contacts testimony, no juror could fail to realize Abrams had been in jail before once they heard "A-Tank isn't what it used to be." The trial court properly determined the statement was conditionally admissible based on other evidence anticipated to be produced at trial. When the State rested without producing the anticipated evidence, Abrams waived his right of review by failing to move to strike the A-Tank statement and for an instruction to disregard. Any error, however, was harmless.

1. The trial court properly admitted the A-Tank statement when initially ruling on Abrams' limine motion.

Evidence of other crimes, wrongs, or acts is admissible as proof of identity. ER 404(b). A trial court's ER 404(b) ruling should be upheld "absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did." *State v. Yarbrough*. 151 Wn. App.

66, 81, 210 P.3d 1029 (2009) (citing *State v. Mason*, 160 Wn.2d 910, 933–34, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008)).

Although Abrams never specifically challenged the A-Tank statement in his written motion or argument, it was generally clear he objected on the grounds identified by the trial court—the statement was prejudicial because it showed he had been incarcerated in the past. But because Abrams never admitted writing the intercepted letter, the court appropriately admitted the statement to prove identity of the letter’s author after confirming through the State’s offer of proof it would be tied to other testimony placing Abrams in A-Tank when the letter was intercepted.

The trial court correctly determined the probative value of the A-Tank statement outweighed its prejudicial effect. The court found the statement relevant to establishing the identity of the author. The court had already admitted evidence of a warrant for Abrams’ arrest to show the reason for the attempted arrest. The court balanced probity against prejudice and correctly determined there would be no additional prejudice from the A-Tank statement. The court was well within its discretion, based on the facts known and anticipated at the time it made its ruling.

2. Abrams waived review when, at the close of the State’s case, he failed to move to strike the A-Tank statement and request an instruction to disregard.

The State rested without eliciting the anticipated testimony tying Abrams to A-Tank, testimony upon which the court relied in making its initial determination. It is an abuse of discretion to rely on unsupported facts. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

At this point, it was incumbent upon Abrams to move to strike the statement and to request an instruction to disregard. “Appellate courts will not approve a party’s failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction).” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (citing *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988)).). “Failure to object deprives the trial court of this opportunity to prevent or cure the error.” *Kirkman*, 159 Wn.2d at 935 (citing *Madison, supra*, 53 Wn. App. at 762). That the court would have granted such a motion is shown by its comment during limine argument—that the A-Tank statement was of concern because it showed prior incarceration—and by its pointed question to the State, immediately before ruling, confirming the anticipated testimony.

3. Regardless of whether Abrams waived review of the A-Tank statement, any error is harmless.

Any error flowing from admission of the A-Tank statement was harmless, despite the State’s failure to produce its promised testimony.

The proper inquiry here is whether the statement, viewed against the backdrop of all the evidence, so tainted the entire proceeding that Abrams was denied a fair trial. *State v. Weber*, 99 Wn.2d 158, 659 P.2d 1102 (1983) (citing *State v. Nettleton*, 65 Wn.2d 878, 880, 400 P.2d 301 (1965)).

As argued above, substantial evidence proved Abrams was the person who blinded and incapacitated Canady with pepper spray. Canady testified he was immediately certain when he first identified Abrams. His certainty did not change throughout his subsequent contact and pursuit. Abrams was arrested carrying a can of pepper spray that smelled to Canady like the spray that dropped him 25 hours earlier. It is unlikely the A-Tank statement had any influence whatsoever on the verdict and even less likely it stimulated jurors to an emotional response or otherwise unfairly tipped the scales toward conviction.

IV. CONCLUSION.

Abrams conviction for third-degree assault violates double jeopardy prohibitions. Defense counsel's decision to withhold objection to the scope of prior-contacts evidence was a legitimate trial tactic and not ineffective. Admission of the A-Tank statement was not an abuse of discretion. Any error was harmless.

For these reasons, the court should vacate Abrams conviction of Assault in the Third Degree and affirm his conviction for Assault in the Second Degree

DATED this 12th day of January, 2016.

Respectfully submitted,

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