

**FILED**

AUG 19, 2016

Court of Appeals  
Division III  
State of Washington

No. 33183-1-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JD MILLER,

Defendant/Appellant.

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Appellant's Reply Brief

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A. ARGUMENT

1. Regarding Respondent's Preface.

In the Preface to his brief, Respondent maintains his Statement of the Case provides “a more complete and accurate version of the ‘Facts’ ” than those presented in Appellant’s opening brief. Respondent’s Brief p. vii. This assertion by Respondent provides a good overview of his erroneous legal interpretation of ER 401, ER 402 and ER 404(b) that permeates his entire argument. Respondent seems to believe *any* evidence pertaining to Mr. Miller or Mr. Pearson should be admitted into evidence if it comports with the State’s theory of the case, regardless of its relevance to the charged crime. This view is contrary to ER 401 and ER 402, as well as ER 404(b). Those rules mandate that only relevant evidence is admissible and not evidence of other crimes to show that the defendant had a propensity to commit this crime.. “ ‘Relevant evidence’ means 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. Under this definition, many of the facts Respondent believes provide “a more complete and accurate version of the [f]acts” are irrelevant and/or violate 404(b).

2. Evidence of the weapons found in Pearson's BMW should not have been admitted pursuant to ER 401, 402, 403 and 404(b).

Respondent argues evidence of the weapons found in Pearson's BMW is relevant to show Pearson and Miller went to the Welch residence to "get something," thus refuting Pearson's testimony that the purpose of the visit was to see Miller's cousin. Respondent's Brief pp 15-16. Similarly, at trial the State argued its theory of the case was Miller and Pearson went to Welch's residence to settle a drug debt or to take something and the presence of the weapons bolstered that theory. RP 257-58, 424-32. But how is this theory or the reason for Miller's presence relevant to the assault charge? There was no evidence of any drug dealing involving Miller, other than speculation by the Bennett's having seen him at the Welch residence on a previous occasion, and Miller was not charged with burglary or theft.

Respondent argues the weapon evidence is relevant to show motive pursuant to 404(b) because it shows Miller went to the residence for a criminal purpose and Miller assaulted Bennett because Bennett told Miller he was going to call the police. Respondent's Brief p 20. This argument is factually incorrect. Bennett told Pearson, not Miller, he was going to call the police. RP 173. Miller was still inside the house when Bennett

had that exchange with Pearson. Bennett never threatened to call the police when he confronted Miller RP 173-74. Therefore, this evidence does not show motive for the assault under ER 404(b) as Respondent claims it does.

Respondent also argues evidence of the weapons found in Pearson's BMW was relevant to show Pearson had no reason to be scared of Bennett and to refute any claim of self-defense by Pearson.

Respondent's Brief pp 16-20; RP 216. How is any of that relevant to the alleged assault by Miller? The prosecutor and the Court seemed to forget throughout the trial that Pearson was not a co-defendant in this case. The relevant mental state is that of Miller not Pearson. Miller was inside the house when Bennett confronted Pearson and Pearson had left before the ensuing confrontation between Miller and Bennett occurred. RP 173-74.

Similarly, evidence of the BMW weapons was irrelevant to any alleged claim of self-defense by Miller. Even assuming Miller was aware of the weapons in the BMW, both Pearson and the weapons were gone before the assault occurred.

3. Evidence of the TV and Welch's note should not have been admitted pursuant to ER 404(b).

Respondent argues this evidence was also relevant to show motive, since Miller was stealing the TV and assaulted Bennett because Bennett told Miller he was going to call the police. Respondent's Brief p 22. As stated previously, Bennett told Pearson, not Miller, he was going to call the police and Miller was still inside the house when that exchange occurred. RP 173-74. Since, Miller was not charged with burglary or theft and this evidence does not establish any motive for the assault, it is irrelevant and erroneously admitted in violation of ER 404(b).

4. Miller was improperly sentenced as a persistent offender under the Persistent Offender Accountability Act (POAA) because his prior Idaho conviction for aggravated assault is not legally or factually comparable to a Washington most serious offense.

Respondent first argues Miller should not be allowed to make this argument because he admitted to committing the prior Idaho offense in a previous guilty plea. Respondent's Brief pp 27-28. This is a fallacious argument and Respondent's reliance on *State v. Hennings* is misplaced. First, Miller is not challenging the fact he committed the Idaho offense. Instead, he is arguing his Idaho conviction is not comparable to a

Washington most serious offense, which is a completely different argument.

Regarding Respondent's reliance on *Hennings*, Respondent neglects to mention his quoted citation is to the dissenting opinion of that case. *Hennings*, 100 Wash. 2d 379, 390-96, 670 P.2d 256, 262 (1983) (Rosellini, dissenting). Moreover, the issue in *Hennings* was whether the double jeopardy clause bars a second habitual criminal proceeding where the dismissal of the charge is based on insufficient evidence of the validity of a prior conviction. 100 Wash. 2d at 380. The issue in *Hennings* has no relevance to Miller's argument regarding the comparability of an Idaho offense.

The remainder of Respondent's argument that the Idaho conviction is comparable to Washington's crime of second degree assault is addressed at length in Appellant's opening brief and will not be repeated here.

B. CONCLUSION

For the reasons stated herein and in Appellant's opening brief, the conviction should be reversed or, in the alternative, the matter should be remanded for resentencing within the standard range and to make an individualized inquiry into Mr. Miller's current and future ability to pay before imposing LFOs.

Respectfully submitted August 19, 2016,

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s/David N. Gasch, WSBA #18270  
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on August 19, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the reply brief of appellant:

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