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Court of Appeals
Division III
State of Washington

33422-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY JOSEPH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF KITTITAS COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in admitting evidence the defendant previously threatened a corrections officer
2. Admitting the evidence of prior threats was not harmless error.
3. The State's closing argument improperly shifted the burden of proof

B. ISSUES

1. The defendant was charged with grabbing and threatening a corrections officer after she refused his request for pencils. Was evidence the defendant had threatened a corrections officer the day before when his request for pencils was denied improperly admitted at trial?
2. Was admitting evidence of prior threats harmless error?
3. The prosecutor told the jury that the only testimony showed everyone agreed that three essential elements of the charged offense had been proved. Did this argument violate defendant's right to the presumption of innocence by shifting the burden of proof to the defense?

C. FACTS

Anthony Joseph was charged with assaulting a corrections officer, Laura Mittleider, while he was incarcerated in the Kittitas County Jail on October 12, 2014. According to Officer Mittleider, she was operating the request cart following breakfast. (RP 26-27) She asked Mr. Joseph if he needed anything. (RP 29) He said yes and as he approached the door to his cell she opened the cuff port. (RP 30-31) He asked for paper and pencils; she told him he couldn't have any pencils. (RP 32) He became angry, began screaming, reached through the cuff port and grabbed her left arm. (RP 32) She pulled away, immediately left the area and radioed for backup. (RP 32, 35)

Before trial, the deputy prosecutor told the court she wanted to introduce evidence that the reason Mr. Joseph was not permitted to have pencils was that he had threatened Officer Contreras the day before and as a result he was not permitted to have any sharp objects in his cell. (RP 13-14) The court ruled such evidence would be inadmissible because it would be evidence of prior misconduct. (RP 17)

At trial, Officer Mittleider explained that the request cart gave every inmate an opportunity to request "toilet paper, paper, pencils, certain forms for courts, agency forms, inmate worker program applications. There's a -- combs and soap and toothpaste and toothbrushes." (RP 26-

27) She testified that Mr. Joseph asked for paper and pencils, she told him he couldn't have any pencils and he began screaming, "I'm going to kill you bitch" and then reached through the cuff port and grabbed her arm. (RP 32)

Prior to examining Officer Contreras, the deputy prosecutor told the court that when Mr. Joseph was told the day before that he couldn't have any pencils he got very angry and she wished to ask Officer Contreras what was Mr. Joseph's response when that officer told him he could not have any pencils. (RP 46) The court overruled defense counsel's relevance objection but instructed the deputy prosecutor that the officer could not testify to "the reason why." (RP 46-47)

Officer Contreras testified the request cart is usually left out in the hallway. (RP 54) Asked why, he explained: "Because inmates more or less can reach through and grab items off the request cart. It's going to be a safety concern because the request cart has pencils, combs, picks, things that tend to be used as weapons." (RP 54) The witness went on to testify that Mr. Joseph already knew he was not going to get a pencil. (RP 54) "On the day prior I told him myself that he wasn't going to be getting pencils off the request cart." The deputy prosecutor then asked, "And without saying any specifics, what was his demeanor when told that?" Officer Contreras answered, "He was very angry, upset. He cursed, yelled,

made threats.” (RP 54) The court overruled defense counsel’s objection to this testimony.

Mr. Joseph told the jury that he did not become angry when Officer Mittleider refused to give him any pencils and that he did not attempt to grab her. (RP 64-65, 67)

In closing argument, the deputy prosecutor told the jury that, when Deputy Mittleider told him she wouldn’t give him a pencil, this made Mr. Joseph mad:

In fact, the day before he was told he couldn’t have a pencil and it made him really mad that day. This is something he already knows. He’s not getting to have a pencil and it makes him mad. And Deputy Contreras had the same sort of anger reaction when -- you know, when he - when he told him he’s not getting a pencil. He gets mad about that. And that’s something that you can -- his emotional state is what leads him to lunge through the cuff port and grab her.

(RP 96)

The deputy prosecutor also pointed out to the jury that Mr. Joseph failed to present any evidence refuting the other elements of the charged offense:

Well, obviously, 2, 3 and 4 won’t be any question. I mean, the testimony -- the only testimony is, in fact, that everybody agrees to is it happened over at the Kittitas County Jail, which is in the State of Washington; that Laura Mittleider was there and that she was a staff member at that correctional institution/local detention facility; the only one in Kittitas County. So that -- those two are met.

That at the time of the assault she was performing her official duties. And again, you heard that, that one of the duties of the persons who work there is, you know, to do various things when inspections is over then they bring the request cart around so people can have their toiletries and their toothpaste and [inaudible on tape -- muffled]. And so 2, 3 and 4 are not at issue at all.

(RP 90-91)

The jury found Mr. Joseph guilty of custodial assault. (RP 107)

D. ARGUMENT

1. EVIDENCE DESCRIBING THE DEFENDANT'S ANGER AND THREATS ON A PRIOR OCCASION WAS IMPROPERLY ADMITTED.

The trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Discretion is abused "when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons," such as the misconstruction of a rule. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

The rules of evidence prohibit the "admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405,

420-21, 269 P.3d 207 (2012). The court has explained that there are no exceptions to this rule. *Id.* at 429.

Evidence Rule 401 provides: “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.

“Evidence which is not relevant is not admissible.” ER 402. Even 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.

Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In order for a court to admit evidence of other wrongs, the court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d at 642.

The trial court initially recognized that evidence of a prior occasion where Mr. Joseph had become angry and threatened a corrections officer who refused to give him a pencil would merely constitute evidence of his propensity to become angry and threatening when deprived of a pencil, and would only be relevant to suggest he would likely have acted in conformity with that propensity by becoming angry when Officer Mittleider refused to give him a pencil. (RP 17) The court properly ruled such evidence inadmissible.

Thereafter the State introduced evidence that inmates ordinarily are permitted to have pencils, and that the corrections officers consider pencils to be potential weapons. Nevertheless, the court then permitted the State to present evidence that on a prior occasion Mr. Joseph was refused pencils and had then become angry and threatening. (RP 46-47) In so ruling, the court merely suggested the evidence should be limited to those facts, and not expressly include the obvious inference that Mr. Joseph's anger was actually caused by the officer's refusal to give him pencils.¹

¹ In the event, the actual testimony was as follows:

- Q. Alright. Now, are you familiar with whether or not 16 Mr. Joseph knew he was not going to get a pencil?
- A. I am.
- Q. Okay. And how are you familiar with that?
- A. In the day prior I told him myself that he wasn't going to be getting pencils off the request cart.
- Q. Alright. And without saying any specifics, what was his demeanor when told that?

Far from rendering the previously excluded evidence more properly relevant, evidence that pencils were considered weapons and that, although they were generally provided to inmates they were explicitly denied to Mr. Joseph, enhanced the prejudicial effect of the testimony. The only relevance of Mr. Joseph's prior conduct was to support the inference that he was a dangerous person deemed likely to use pencils as weapons and thus likely not only to become angry and threatening when deprived of pencils but also likely to assault the officer who denied his request.

The court initially identified the purpose for which Mr. Joseph's prior anger and threatening conduct, recognized the prejudicial effect of such evidence and determined that this outweighed any probative value it might have. The court nevertheless ultimately changed its ruling once the prejudicial effect of the evidence had become even greater. The decision to admit this portion of Deputy Contreras's testimony was unreasonable and represents a misconstruction of the rules of evidence.

A. He was very angry, upset. He cursed, yelled, made threats.

(RP 54)

2. EVIDENCE OF PRIOR THREATS WAS NOT HARMLESS.

Admission of evidence in violation of ER 404(b) is reviewed under the nonconstitutional harmless error standard. *Gunderson*, 181 Wn.2d at 926 (citing *Gresham*, 173 Wn.2d at 433). The test is whether, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* (internal quotation marks omitted).

The deputy prosecutor relied on this evidence during closing argument:

And you also heard that that made him mad and now he's telling you oh no, that didn't make him mad. But it did make him mad. In fact, the day before he was told he couldn't have a pencil and it made him really mad that day. This is something he already knows. He's not getting to have a pencil and it 8 makes him mad. And Deputy Contreras had the same sort of anger reaction when -- you know, when he -- when he told him he's not getting a pencil. He gets mad about that. And that's something that you can -- his emotional state is what leads him to lunge through the cuff port and grab her.

(RP 96)

The jury's verdict turned almost entirely upon the credibility of the alleged victim and the defendant. There were no witnesses to the alleged assault; Mr. Joseph denied its occurrence. It is reasonably probable that evidence Mr. Joseph had responded with anger and threats when he was

denied access to pencils on a prior occasion, coupled with evidence inmates tend to use pencils as possible weapons, materially affected the outcome of the trial.

3. PROSECUTORIAL ARGUMENT IMPROPERLY
SHIFTED THE BURDEN OF PROOF.

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial.” *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). “ ‘it is impossible to expect that a criminal trial shall be conducted without some show of feeling,’ but our courts have long and repeatedly emphasized that prosecutors must abstain from appeals to passion, prejudice, or sympathy, making rational and reasoned arguments from the evidence instead.” *United States v. Wexler*, 79 F.2d 526, 529–530 (2nd Cir.1935); see *State v. Reed*, 102 Wn.2d 140, 146–47, 684 P.2d 699 (1984).

Generally, when evaluating purportedly improper remarks, a reviewing court considers them in the context of the entire case, including the entire argument, the issues presented, the evidence at issue, and the court’s instructions. *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994). There is reversible prejudice only when there is a substantial likelihood that the conduct in question affected the jury’s decision. *State*

v. Stenson, 132 Wn.2d 668, 718–19, 940 P.2d 1239 (1997). But prosecutorial argument that shifts the burden of production to the defendant has been held to be such flagrant misconduct as to justify reversal even when the defendant completely fails to object. *Boehning*, 127 Wn. App. at 518, 521-23; see *State v. Dixon*, 150 Wn. App. 46, 58-59, 207 P.3d 459 (2009).

The State’s argument was improper because it shifted the burden of production to Mr. Joseph. See *State v. Fedoruk*, 184 Wn. App. 866, 891, 339 P.3d 233 (2014); *Boehning*, 127 Wn. App. at 522–23. The deputy prosecutor told the jury there were no issues as to three of the elements of custodial assault because “the only testimony is, in fact, that everybody agrees” the alleged victim was a staff member of a correctional institution who was performing her official duties at the time. (RP 90-91); see RCW 9A.36.100(1)(b).

The closing argument suggested that the jury need not consider three of the essential elements of the charged offense because Mr. Joseph failed to present evidence on those issues. The statement could, moreover, have been understood to mean that Mr. Joseph had actually conceded these issues although there is no evidence of any agreement to that effect.

E. CONCLUSION

This matter should be remanded for a new trial in which irrelevant evidence of prior misconduct is excluded.

Dated this 29th day of January, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33422-8-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ANTHONY JOSEPH,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on January 29, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on January 29, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on January 29, 2016.


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