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Court of Appeals
Division III
State of Washington

No. 33595-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Luis Anguiano,

Appellant.

Yakima County Superior Court Cause No. 14-1-00150-4

The Honorable Judge Michael McCarthy

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 4

I. The trial judge should not have overruled Mr. Anguiano’s objection to evidence of the prior burglary.4

A. Mr. Anguiano was prejudiced by the improper admission of propensity evidence. 4

B. The trial court improperly allowed the state to bolster its propensity evidence with hearsay records admitted without proper foundation..... 6

II. The evidence was insufficient to convict Mr. Anguiano of Murder by Extreme Indifference. 7

III. The unit of prosecution for firearm enhancements is one enhancement per crime, regardless of the number of firearms present. 8

IV. Mr. Anguiano’s attorney did not admit or acknowledge any prior felony convictions. 10

CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>City of Bellevue v. Lorang</i> , 140 Wash.2d 19, 992 P.2d 496 (2000)	6
<i>Protect the Peninsula's Future v. City of Port Angeles</i> , 175 Wn. App. 201, 304 P.3d 914 (2013).....	9
<i>State v. Anderson</i> , 94 Wn.2d 176, 616 P.2d 612 (1980).....	7, 8
<i>State v. DeSantiago</i> , 149 Wn.2d 402, 68 P.3d 1065 (2003)	9
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014)	5
<i>State v. Hardy</i> , 133 Wn.2d 701, 946 P.2d 1175 (1997).....	6
<i>State v. Henderson</i> , 182 Wn.2d 734, 344 P.3d 1207 (2015).....	8
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	10
<i>State v. Kirwin</i> , 166 Wn. App. 659, 271 P.3d 310 (2012)	7
<i>State v. Mason</i> , 160 Wn.2d 910, 162 P.3d 396 (2007)	4
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012) <i>review</i> <i>denied</i> , 176 Wn.2d 1015, 297 P.3d 708 (2013)	5
<i>State v. Pastrana</i> , 94 Wn. App. 463, 972 P.2d 557 (1999), <i>as amended</i> (May 21, 1999)	8
<i>State v. Pettus</i> , 89 Wn. App. 688, 951 P.2d 284 (1998)	8
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	4
<i>State v. Rodgers</i> , 146 Wn.2d 55, 43 P.3d 1 (2002).....	8
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	6
<i>State v. Slocum</i> , 183 Wn. App. 438, 333 P.3d 541 (2014)	5
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	8, 9

WASHINGTON STATUTES

RCW 9.94A.533..... 8
RCW 9A.32.030..... 7

OTHER AUTHORITIES

ER 609 6

ARGUMENT

I. THE TRIAL JUDGE SHOULD NOT HAVE OVERRULED MR. ANGUIANO’S OBJECTION TO EVIDENCE OF THE PRIOR BURGLARY.

A. Mr. Anguiano was prejudiced by the improper admission of propensity evidence.

Defense counsel argued that the prior burglary was “a prior bad act, which should not come in.” RP (5/27/15) 252. Despite this, Respondent erroneously claims that no objection “was ever made to the trial court.” Brief of Respondent, p. 24.

This is simply incorrect. Defense counsel argued against admission. His reference to “a prior bad act” was sufficiently specific to preserve the objection. RP (5/27/15) 252; *see, e.g., State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (accepting as sufficient an objection based on ‘prejudice’).¹

Mr. Anguiano, having lost his argument to exclude the evidence, was not obligated to object in front of the jury. Instead, as the losing party, he is “deemed to have a standing objection.” *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

¹ It is true that Mr. Anguiano did not specifically argue that admission would violate his right to due process. However, the constitutional error can be reviewed for the first time on appeal because the trial court “could have corrected the error,” given what it knew at the time. *O’Hara*, 167 Wn.2d at 100; RAP 2.5(a)(3).

The judge's ruling was not in any way tentative. RP (5/27/15) 252. Because of this, Mr. Anguiano was not required to "object at the time of admission." Brief of Respondent, p. 29; *Id.*

Respondent concedes that the trial judge "did not cover those factors which this court has stated should be covered when ruling about the admissibility of ER 404(b) information." Brief of Respondent, p. 25. This concession requires reversal. *See State v. McCreven*, 170 Wn. App. 444, 461, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013); *see also State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Respondent apparently agrees that the test for constitutional harmless error applies, but confuses that standard with the test for the sufficiency of the evidence. Brief of Respondent, pp. 30-32. In fact, the constitutional harmless error standard requires the state to "show the error was harmless beyond a reasonable doubt." *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014).

To meet this standard, the state must prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of

the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). This the state cannot do.²

Evidence of the prior burglary undermined Mr. Anguiano's credibility. The prejudice was magnified because the prior act was similar to the charged crime. *See State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998) (addressing ER 609) (citing *State v. Hardy*, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997)). In addition, the prosecutor relied heavily on the prior burglary in closing argument. RP (6/3/15) 944-945, 948-949, 960, 961, 997-998.

The error cannot be described as trivial or formal, and there is at least a possibility that it affected the outcome of the case. *Lorang*, 140 Wash.2d at 32. Absent the improperly admitted evidence, a reasonable juror could have voted to acquit. The convictions must be reversed. *Id.*³

B. The trial court improperly allowed the state to bolster its propensity evidence with hearsay records admitted without proper foundation.

Respondent does not address this argument. Accordingly, Mr.

Anguiano rests on the argument set forth in his Opening Brief.

² Having conflated the constitutional harmless error standard with the test for the sufficiency of the evidence, Respondent does not articulate an argument under either the constitutional standard or the non-constitutional standard. Brief of Respondent, pp. 30-37.

³ This is true even if the error is analyzed under the more lenient non-constitutional standard for harmless error. *See Appellant's Amended Opening Brief*, pp. 16-17.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. ANGUIANO OF MURDER BY EXTREME INDIFFERENCE.

A criminal defendant “may always challenge for the first time on appeal the sufficiency of the evidence supporting a conviction.” *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012). Respondent’s contrary suggestion is without merit. Brief of Respondent, p. 37.

Here, the evidence was sufficient for the first-degree felony murder conviction. However, the state failed to prove murder by extreme indifference under RCW 9A.32.030(1)(b).

A conviction under the statute may not be based on acts specifically aimed at and inflicted upon the deceased. *State v. Anderson*, 94 Wn.2d 176, 187-192, 616 P.2d 612 (1980).

This case involved a shootout between Mr. Anguiano (including his companions) and decedent Burkybile. RP (6/1/15) 659-662. It took place in an isolated rural area. RP (5/27/15) 270-271; RP (6/1/15) 652-653; RP (6/2/15) 866-868. The state did not prove that Mr. Anguiano, or his companions, knew Burkybile had a wife and two children inside. RP (6/2/15) 872.

Nor is this a case where the attack necessarily “placed many others at grave risk of death,” or took place in a “crowded” area. *State v. Pastrana*, 94 Wn. App. 463, 473, 972 P.2d 557 (1999), *as amended* (May

21, 1999) (citing *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998)). Furthermore, the validity of both *Pastrana* and *Pettus* has been called into question. *State v. Henderson*, 182 Wn.2d 734, 745, 344 P.3d 1207 (2015). The *Pettus* and *Pastrana* courts arguably lacked a full understanding of the elements of murder by extreme indifference. *Id.*

The evidence here was insufficient under *Anderson*. Mr. Anguiano should not have been convicted of murder by extreme indifference. The conviction for that offense must be reversed, and the charge dismissed with prejudice. *See State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1, 3 (2002).

III. THE UNIT OF PROSECUTION FOR FIREARM ENHANCEMENTS IS ONE ENHANCEMENT PER CRIME, REGARDLESS OF THE NUMBER OF FIREARMS PRESENT.

The statute governing firearm enhancements does not explicitly designate the unit of prosecution. RCW 9.94A.533(3). Applying the rule of lenity to the plain language, one enhancement may be imposed for each armed offense, regardless of the number of firearms used. *See State v. Sutherby*, 165 Wn.2d 870, 878-883, 204 P.3d 916 (2009) (applying the rule of lenity “to avoid turning a single transaction into multiple offenses”).

Separate enhancements may be imposed when a jury returns both a deadly weapon verdict and a firearm verdict. *State v. DeSantiago*, 149

Wn.2d 402, 407, 410, 68 P.3d 1065 (2003). However, the statute cannot be stretched to allow more than one enhancement per offense if the offender was armed with multiple firearms. *See Sutherby*, 165 Wn.2d at 878-879.

Respondent relies on statements by the *DeSantiago* court that were unnecessary to its decision. In that case, “the jury found that the defendants were armed with both a firearm (a gun) and a deadly weapon (a knife).” *DeSantiago*, 149 Wn.2d at 407. The court’s statement of the issue was “Do both the firearm enhancement and the deadly weapon enhancement apply to a single offense committed with two weapons?” *Id.*, at 410. The case did not involve multiple firearms.

A statement in an opinion is dicta “when it is not necessary to the court's decision in a case.” *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). In *DeSantiago*, any statements regarding multiple firearms were unnecessary to the court’s decision.

The imposition of six consecutive firearm enhancements violated Mr. Anguiano’s double jeopardy rights. *Sutherby*, 165 Wn.2d at 878-883.

IV. MR. ANGUIANO’S ATTORNEY DID NOT ADMIT OR ACKNOWLEDGE ANY PRIOR FELONY CONVICTIONS.

The state’s claim that Mr. Anguiano’s attorney acknowledged prior criminal history is not supported by the record, and in fact requires manipulation of what occurred to be argued. Respondent quotes defense counsel out of context, and erroneously claims that he affirmatively acknowledged prior convictions. Brief of Respondent, p. 43. In fact, counsel was careful to preface the remarks quoted by Respondent:

[B]y the State’s calculation, we end up with—you know, a top end of a range that’s 497 months, according to the memorandum that was supplied.
RP 341⁴ (emphasis added).

By framing his discussion in terms of the state’s calculation and the state’s memorandum, defense counsel made clear that he was not making an affirmative acknowledgment.

As Respondent points out, mere acquiescence isn’t sufficient to relieve the state of its burden to prove prior convictions. Brief of Respondent, p. 43 (citing *State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012)). No such proof was offered here. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

⁴ Respondent erroneously cites to RP 340.

CONCLUSION

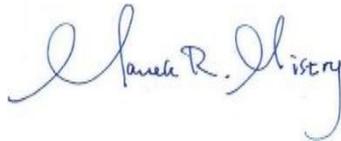
Mr. Anguiano's convictions must be reversed. All charges, except the murder by extreme indifference, must be remanded for a new trial. In the alternative, the sentence and four of the firearm enhancements must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on January 13, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 13, 2017.



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