

FILED
Court of Appeals
Division III
State of Washington
11/6/2018 11:22 AM

No. 35760-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY E. CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Julie M. McKay

APPELLANT'S REPLY BRIEF

Laura M. Chuang, Of Counsel, WSBA #36707
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

TABLE OF CONTENTS

A. INTRODUCTION3

B. ARGUMENT IN REPLY3

 1. The prior bad acts of striking walls, throwing objects, and yelling at others, should not have been admitted. Mr. Clark properly preserved an ER 404(b) objection, the State’s response was unable to explain the trial court’s failure to conduct part two of the required ER 404(b) analysis, and the *res gestae* exception does not apply.3

C. CONCLUSION.....6

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Boast, 87 Wn. 2d 447, 553 P.2d 1322 (1976)3, 5
State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997)6
State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995).....5

Washington Appellate Courts

State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006)4
State v. Slocum, 183 Wn. App. 438, 333 P.3d 541 (2014)5, 6

Washington Court Rules

ER 404(b)..... passim

A. INTRODUCTION

Appellant Anthony E. Clark accepts this opportunity to reply to the State's brief. Mr. Clark requests that the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The prior bad acts of striking walls, throwing objects, and yelling at others, should not have been admitted. Mr. Clark properly preserved an ER 404(b) objection, the State's response was unable to explain the trial court's failure to conduct part two of the required ER 404(b) analysis, and the *res gestae* exception does not apply.

This argument pertains to Issue 1 raised in Mr. Clark's opening brief. Mr. Clark argues the trial court erred by admitting evidence of his prior bad acts of striking walls, throwing objects, and yelling at others, because these acts were not directed at the victim Laura Thomas; Ms. Thomas did not recant during her testimony; the trial court failed to perform the proper ER 404(b) analysis; and its ruling was based on untenable reasoning. *See* Appellant's Opening Brief pgs. 12-19.

In response, the State questions whether Mr. Clark's defense counsel properly preserved an ER 404(b) objection to the admission of evidence that Mr. Clark struck walls, yelled at others, and threw objects. *See* Respondent's Brief pg. 16, fn. 9.

However, Mr. Clark properly preserved an ER 404(b) objection.

To preserve an issue for appellate review, "[o]bjections must be accompanied by a reasonably definite statement of the grounds . . . so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." *State v. Boast*, 87 Wn. 2d 447, 451, 553 P.2d 1322 (1976) (citations and internal quotations omitted).

Mr. Clark specifically objected to evidence admission under ER 404(b). (CP 33; RP 12). Defense counsel cited to ER 404(b) in his written motion in limine (CP 33), and also raised the issue orally during discussion over motions in limine: “[The evidence is] also 404(b) character evidence so it would be inadmissible.” (RP 12).

And, after the trial court heard testimony from Ms. Thomas in order to rule on the evidentiary objections (RP 14-15), defense counsel readdressed the argument with the court:

If I could address this, again I'm gonna, *I stand by my motion in limine* regarding the camping trip. I don't feel it's relevant, I don't feel there's anything aggressive or violent in nature that occurred on that date that would impact Ms. Thomas's subjective view that Mr. Clark is a threat.

To build off that point, I feel, again, hitting walls does not qualify. Now, if she had seen him get in a fight with somebody and saw a *propensity* for him to be physically violent towards another human being, I believe there would be a bet [sic] argument there. But again, just punching walls and raising his voice, I don't believe is enough. And again, if the court was to find that it was *probative*, I feel that it is *outweighed by its prejudicial impact*.

(RP 105) (emphasis added).

Defense counsel's argument reiterated the objection he previously raised in his motion in limine. (CP 33; RP 12, 105). Defense counsel unequivocally referred to his motion in limine, stating he was going to “build off that point” when speaking about Mr. Clark “punching walls and raising his voice”, and defense counsel used the word “propensity,” which refers to ER 404(b) evidence. ER 404(b) contemplates a criminal defendant's propensity to commit crimes and propensity is an inherent, traditional consideration of the rule's application. *See State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006). “ER 404(b) prohibits evidence of past misdeeds solely to prove a defendant's criminal *propensity*: 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.” *Id.* (emphasis added) (citation and internal quotations omitted). Moreover, the fourth part of the ER 404(b) analysis requires the trial court to “weigh the probative value [of the evidence] against its prejudicial effect.” *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). Defense counsel’s referral to that balancing test is merely a portion of the ER 404(b) analysis, and is proper argument as such. (RP 105). Mr. Clark preserved the evidentiary error under ER 404(b).

Additionally, the State was given the opportunity to respond to defense counsel’s 404(b) objection, as the State specifically cited to ER 404(b) in its response while claiming a *res gestae* exception applied. (RP 12-13); *see also Boast*, 87 Wn.2d at 451 (objections must inform judge of the issue raised and allow adversary opportunity to remedy the error). The trial court was sufficiently apprised of Mr. Clark’s grounds for objection, having heard the references to ER 404(b) from both parties. (RP 9, 12-13); *Boast*, 87 Wn.2d at 451.

The State also cites to *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995) to support its claim the trial court conducted a sufficient analysis on the record. *See* Respondent’s Brief pg. 17. However, in *Pirtle* the trial court was only conducting an ER 403 balancing test, not an ER 404(b) analysis, and the trial court stated that balancing test on the record. *Id.* at 650. *Pirtle* is distinguishable from this case, as here the court did not apply the proper standard to address admission of evidence under ER 404(b). (RP 107).

The State’s response also fails to explain the trial court’s misapplication of part two of the four-part ER 404(b) analysis. *See* Respondent’s Brief at 13. Part two requires

the court “identify the purpose for which the [prior bad acts] evidence is sought to be admitted.” *Slocum*, 183 Wn. App. at 448. The trial court did not identify a purpose for admission of the evidence, thus it did not conduct the proper 404(b) analysis. *Id.*; (RP 107).

As noted above, the State’s response acknowledges it offered the *res gestae* exception to ER 404(b). *See* Respondent’s Brief pgs. 9-10. However, the proffered evidence does not fall under the *res gestae* exception. *Res gestae* is evidence that is close in time to the charged incident. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). “Under [the *res gestae*] exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence.” *Id.* Here, there is no information in the record as to when Mr. Clark hit walls, yelled at others, and threw objects, so the *res gestae* exception does not apply. (RP 161).

C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Clark’s opening brief, his convictions should be reversed, or at a minimum, the case should be remanded for resentencing.

Respectfully submitted this 6th day of November, 2018.

/s/ Laura M. Chuang
Laura M. Chuang, WSBA #36707

/s/ Jill S. Reuter
Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35760-1-III
vs.)
ANTHONY E. CLARK) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 6, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Anthony Elijah Clark
37714 N. Sheets Road
Elk, WA 99009

Having obtained prior permission, I also served a copy on the Spokane County Prosecutor's Office at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 6th day of November, 2018.

/s/ Jill S. Reuter
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

November 06, 2018 - 11:22 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35760-1
Appellate Court Case Title: State of Washington v. Anthony Elijah Clark
Superior Court Case Number: 17-1-03477-1

The following documents have been uploaded:

- 357601_Briefs_20181106112139D3127457_2124.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief for filing 11.6.18.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- gverhoef@spokanecounty.org
- laura@ewalaw.com
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Jill Reuter - Email: jill@ewalaw.com
Address:
PO BOX 8302
SPOKANE, WA, 99203-0302
Phone: 509-731-3279

Note: The Filing Id is 20181106112139D3127457