

COURT OF APPEALS NO. 63757-6-I

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

REC'D

DEC 21 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON

v.

DAMARIO DILLARD,

Appellant.

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

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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1 Edward J. Imwinkelried,
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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PREJUDICIAL PROPENSITY EVIDENCE.

In his opening brief, Dillard assigned error to the court's admission of evidence Laura Jeffries saw Dillard cleaning a gun the day before the shooting; specifically, that Jeffries saw Dillard wiping the bullets with a black, "gang flag" – presumably to remove his fingerprints – before reloading the bullets into the gun. 18RP 128, 130; 19RP 23-24. As Dillard argued, this evidence was not relevant to Dillard's intent, as it happened the day before the shooting and the shooting itself was the result of a chance encounter. Moreover, it was highly prejudicial because it showed a readiness or intent to commit crimes *generally*. Brief of Appellant (BOA) at 18-23

In response, the state asserts Jeffries' testimony constituted "eyewitness testimony that placed a loaded gun in Dillard's hands only a day or so before the shooting," and established "that Dillard loaded that gun himself." Regardless, however, the testimony did not add anything to the state's case. Dillard admitted to having a gun – *as well as shooting it* – during the event in question. Accordingly, the state's argument that the evidence "was highly

relevant, probative evidence of Dillard's intent" should be rejected. See Brief of Respondent (BOR) at 12. Under the circumstances, Jeffries' testimony was way more prejudicial than probative. The balance should have been tipped in Dillard's favor. See e.g. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

The state next argues the evidence was relevant because "the jury could reasonably infer that Dillard wiped the cartridges in an effort to avoid leaving physical evidence behind, which is also probative of Dillard's intent." BOR at 12. However, Jeffries' testimony was that this happened a day before the shooting – before Dillard knew he would be encountering Horton, Harris or Rogers. As a result, the acts are indicative only of an amorphous intent to commit wrongdoing and concomitant effort to evade the consequences. They are not indicative of Dillard's intent toward any of the victims in this case. And while Dillard's use of a "black bandanna or 'flag'" may be evidence of his purported Deuce 8 membership, the state already had plenty evidence of that. See 13RP 32; 14RP 94; 15RP 136; 18RP 49-50; 18RP 125.

As an aside, the state asserts in a footnote that the challenged evidence "does not appear to fall under the rubric of ER 404(b) at all." BOR at 13, n.5. But contrary to the state's

characterization, the evidence did not merely involve “[l]oading a gun.” Id. Rather, it involved wiping bullets with a gang flag, ostensibly to remove fingerprints, before reloading them. The connotation is bad. Presumably, if everything were on the up-and-up, there would be no need to wipe fingerprints off the bullets. Accordingly, Dillard maintains his challenge is properly analyzed under ER 404(b).

The state correctly points out that the lower court’s decision is reviewed for an abuse of discretion. However, that standard does not insulate the lower court’s ruling altogether. See e.g. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (court abused its discretion in admitting testimony and CPS records regarding abuse of stepchildren as evidence defendant physically abused his current stepchildren was not relevant to whether he sexually abused former stepdaughter).

Moreover, the cases cited by the state to support the court’s ruling are inapposite. BOR at 14 (citing State v. Gentry, 125 Wn.2d 570, 598, 888 P.2d 1105 (1995); State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); State v. Massey, 60 Wn. App. 131, 145, 803 P.2d 340 (1990), abrogated on other grounds, State v. Broadway, 133 Wn.2d 118, 129-31, 942 P.2d 363 (1997)). In

Gentry, the court cited Massey and noted that evidence the defendant brought a gun to the murder cite supported an inference of premeditation. In Bingham, the fact that the defendant put a gun by the door after he took a ball from kids supported an inference of premeditation when the defendant subsequently shot one of the adults who came to the door five minutes later.

But here, Dillard did not know he would be encountering Horton, Harris or Rogers at the time he wiped off the bullets. There is no nexus between what Dillard did the day before the shooting and the shooting itself, because the shooting was unanticipated at the time Dillard supposedly wiped the bullets. Moreover, there was no question here that Dillard possessed a gun on the day of the shooting – he admitted it. Accordingly, what he did with the gun the day before was of no relevance.

Finally, the state asserts Dillard's argument is self-defeating:

Dillard maintains that the trial court's ruling was erroneous because this evidence "showed an intent or readiness to commit assault or other crimes, *generally*," rather than the specific crimes as issue here, and that the error was prejudicial because Dillard's defense was "his lack of intent to assault anyone." Opening Brief of Appellant, at 22-23 (*italics in original*). This is a completely self-defeating argument. Dillard's defense was indeed that he did not intend to assault anyone. Ex. 277; RP (4/30/09) 104. He also claimed that he was carrying a gun

because it was "just a habit." RP (4/30/09) 130. Accordingly, evidence proving that Dillard had the intent and was ready to commit an assault with the gun only a day prior to the shooting at issue was clearly admissible because it directly rebutted Dillard's claims.

BOR at 16.

The state's response takes advantage of undersigned counsel's poorly expressed thought. Characterized more aptly, Dillard's actions in wiping off the bullets evidences an amorphous intent or readiness to commit crime, not necessarily assault or any crime in particular, but crime in general. His acts are suggestive of *general* criminality. And an amorphous criminal intent does not translate into intent to assault a particular individual. The trial court erred in concluding otherwise.

II. THE COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL.

In his opening brief, Dillard assigned as error the trial court's denial of his motion for a mistrial after the jury was allowed to hear evidence he stole the gun he had the night of the shooting. BOA at 24-28. In its response, the state asserts Dillard misconstrued the portion of the statement inadvertently played for the jury. BOR at 20. According to the state, the portion of Dillard's statement that

was muted during the trial but played during deliberations is the following:

RAMIREZ: How many days you had [sic] the 40 caliber before the shooting?

DILLARD: I got it the day before that happened. *I stole it from somebody.*

RAMIREZ: *You stole it from somebody.*

DILLARD: *Yeah.*

BOR at 21 (italics in respondent's brief) (citing Pretrial Ex. 6, pg. 14; Ex. 277). Assuming the state is correct, however, Dillard was still prejudiced.

In arguing otherwise, the state points out the trial judge observed Dillard's statement, "I stole it from somebody" was so soft (in the judge's opinion) as to be virtually inaudible. BOR at 22 (citing Ex. 277; RP (5/7/09) 9). However, not everyone listening to the tape had that same experience. As defense counsel Don Minor attested: "I did hear that portion from the audio, and the State was not successful in muting or turning down the volume for that which was played." RP (5/7/10) 10.

Moreover, as the state points out in its response, the detective repeated Dillard's statement, thereby giving jurors two opportunities to hear it. See BOR at 22. And while the jury was

instructed the questions asked by the detective are not evidence, Dillard adopted the detective's question/statement as his own when he responded, "Yeah," thereby making the detective's statement evidence.

The state further claims that Dillard's admission was "only minimally prejudicial" in light of his other admissions, such as firing the gun out the window and firing during the shooting. BOR at 22. However, the issue at trial was intent. That Dillard fired shots out the window did not indicate any intent to harm the victims in this case. And Dillard testified he fired into the air during the shooting. That Dillard stole a gun from someone would, in jurors' minds, make him seem more likely to assault someone as well. In other words, the admission of this evidence made jurors more likely to convict based on a "forbidden inference." See e.g. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (where improper testimony relates to a defendant's prior criminal conduct, such evidence impermissibly "shifts the jury's attention to the defendant's propensity for criminality, the forbidden inference. . . .") (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), rev. denied, 133 Wn.2d 1019 (1997).

Next, the state argues there was no error because the court indicated it would have admitted the statement as part of the “res gestae of how Dillard got the gun[.]” BOR at 23. The “res gestae” exception to ER 404(b) allows admission of uncharged acts that are “inseparable psychologically” from the charged acts, permitting the introduction of the uncharged acts when “evidence about the charged crime will naturally pique the jury's curiosity about the aspect of the transaction the uncharged misconduct relates to, and forcing the witness to avoid that aspect of the case will leave the jurors dangling and suspicious.” 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 6:30, at 6-111 (Rev. Ed. Supp.2005) (citations omitted). Assuming arguendo the trial court was not engaging in revisionist history about what it would have ruled,¹ any such ruling would have been error, as there was no dispute that Dillard had the gun on the day of the shooting, and in fact, fired it. How he obtained it was not “inseparable psychologically” from the charged acts and was therefore irrelevant.

¹ See BOA at 26-27 (citing portions of the record where court stated it would not admit other bad behavior by Dillard).

Finally, the state claims that the jurors' verdicts on the lesser included assault offenses somehow shows jurors were not unduly prejudiced by Dillard's admission he stole the gun from somebody. The state is incorrect. It is possible jurors would not have convicted Dillard of anything had they not heard of his penchant for criminality.

III. APPLICATION OF THE FELONY MURDER RULE
HERE VIOLATES EQUAL PROTECTION AND DUE
PROCESS.

If not the state's only theory, felony murder based on being an accomplice to assault was the state's main theory. See e.g. RP (5/4/09) 28 (defendant knowingly aided in assaults), 31 ("doesn't matter if he's trying not to hit them"), 34 ("He only has to be once again aiding another to do so"), 35 ("The defendant doesn't have to do these things, all he has to do is aid in doing them or he has to basically be present and ready to assist with knowledge that that is helping"), 37 ("The defendant was committing or attempting to commit assault in the first degree or assault in the second degree once the defendant or accomplices caused the death of Antwon Horton in furtherance of committing"), 38 ("If the defendant is aiding in an assault on another person, and the accomplice kills that other person, that's murder in the second degree"). In the portions of

closing argument cited by the state, with one exception,² the prosecutor is arguing intent to commit assault, not necessarily intent to kill. BOR at 25 (RP (5/4/09) 14-17, 28, 37-39).

Regardless, the state asserts this Court already rejected Dillard's equal protection claim:

Dillard claims that Armstrong^[3] did not address his argument that felony murder and manslaughter are the same crime when the underlying felony is assault. Opening Brief of Appellant, at 29. Dillard is incorrect. See Armstrong, at 340-41 (citing Wanrow^[4]).

BOR (footnotes omitted) at 26.

In the portion of Armstrong cited by the state, this Court noted:

In State v. Wanrow, our supreme court concluded that felony murder based on assault does not violate equal protection even though the same acts could have given rise to charges of manslaughter, second degree assault, or second degree felony murder. The court concluded that the statute did not give the prosecutor unfettered discretion because the elements of the possible crimes were different, requiring different proof for each. Thus, where two crimes require proof of different elements, they do not violate the right to equal protection of the laws.

² RP (5/4/09) 35-36).

³ State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048, rev. denied, 164 Wn.2d 1035 (2008).

⁴ State v. Wanrow, 91 Wn.2d 301, 311-12, 588 P.2d 1320 (1978).

Armstrong, 143 Wn. App. at 340-41 (footnotes omitted) (citing Wanrow, 91 Wn.2d at 311-12).

In Wanrow, the court declined to apply the doctrine of merger to the crime of second degree felony-murder. In other words, it refused to hold that the assault resulting in the homicide is merged with the homicide so as to lose its separate identity, and therefore, that a death resulting from a felonious assault cannot be felony-murder. Wanrow, 91 Wn.2d at 302-309.

In subsection II of the opinion, the court addressed Wanrow's argument the court was required "as a matter of constitutional law to adopt the merger doctrine in cases where second degree assault is the underlying felony." Wanrow, 91 Wn.2d at 309. The court noted that in a previous opinion, it had held the view that the merger doctrine did not involve constitutional issues. Wanrow, 91 Wn.2d at 309 (citing State v. Thompson, 88 Wn.2d 13, 17, 558 P.2d 202 (1977)). The Wanrow Court noted a strong dissent disagreed, raising the very constitutional questions urged by Wanrow. Moreover, the petitioner in Thompson had appealed to the United States Supreme Court alleging the felony murder statute unconstitutionally deprived her of due process and equal protection. The appeal was dismissed, however, for want of

a substantial federal question. Thompson v. Washington, 434 U.S. 898, 98 S. Ct. 290, 54 L. Ed. 2d 185 (1977).

The Wanrow Court noted that the United States Supreme Court had unequivocally ruled that a summary dismissal of an appeal for want of a substantial federal question is “a decision on the merits.” Wanrow, 91 Wn.2d at 309. The court therefore held: “That court’s dismissal of the appeal in Thompson is therefore binding on this court as a decision on the merits of the federal constitutional issues of due process and equal protection raised there.” Id. at 310.

The court nevertheless added that “[e]ven if Thompson were not controlling on the constitutional questions, however, we would reach the same result, for we find no violations of due process or equal protection in the felony murder rule.” Wanrow, at 311. Significant here, in addressing Wanrow’s equal protection argument, the court stated:

Petitioner also argues that the felony-murder rule gives the prosecutor an unconstitutional degree of discretion to choose the statute under which her acts will be prosecuted in violation of equal protection guarantees. Under the facts of this case, she points out, the prosecutor could charge second degree assault, manslaughter, or second degree murder. Petitioner relies on Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956) in which we held that a statute

which prescribes different degrees of punishment for the same acts committed under the same circumstances by persons in similar situations violates equal protection.

We have also held, however, that no constitutional defect exists when the crimes which the prosecutor has discretion to charge have different elements. State v. Reid, 66 Wn.2d 243, 401 P.2d 988 (1965). That is the case here. Although the events giving rise to the prosecution of petitioner may support charges for varying crimes carrying varying punishments, the elements of those crimes are different. Proof of the elements of one does not constitute proof of the elements of another.

Wanrow, 91 Wn.2d at 312 (emphasis added).

But because the court already held it was bound by the action of the United States Supreme Court in Thompson, this portion of the Wanrow decision is arguably dicta and therefore not controlling here. See e.g. Pedersen v. Klinkert, 56 Wash.2d 313, 317, 352 P.2d 1025 (1960) (“dicta” is language in an opinion that was not necessary to the decision in the case).

In any event, Wanrow's analysis is faulty in that proof of the elements of manslaughter (i.e. a reckless killing) does indeed constitute proof of second degree felony murder where, as here, it is based on second degree assault (i.e. recklessly inflicting injury). See BOA at 34; CP 129 (to convict second degree murder), 154

(definition assault second degree). Accordingly, this Court decision in Armstrong, which relies on Wanrow, should be reconsidered.⁵

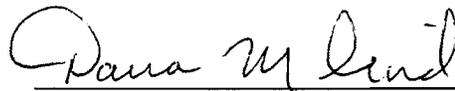
B. CONCLUSION

For the reasons stated in this reply and in Dillard's opening appellate brief, his convictions should be reversed.

Dated this 21st day of December, 2010.

Respectfully submitted,

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⁵ This Court's decision in State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), should also be reconsidered, as it relies on Armstrong.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63757-6-I
)	
DAMARIO DILLARD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAMARIO DILLARD
DOC NO. 332257
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*

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