

64243-0

64243-0

No. 64243-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARRELL JONES,

Appellant.

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

The Hon. Michael J. Fox

CLERK OF COURT
JAN 11 2011
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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted a prior domestic violence incident against the complainant's mother, allegedly involving Mr. Jones, under ER 404(b).

2. The prosecutor committed misconduct by denigrating the defense in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to trial by jury includes a fair determination of the evidence. The prior domestic violence incident, which was never proved in a court of law, was minimally relevant and extraordinarily prejudicial, compromising Mr. Jones's right to a fair trial by jury. U.S. Const. amends. VI, XIV; Const. Art. I, §§ 3, 21, 22.

2. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor denigrated the defense during an inflammatory closing argument, equating the jury's consideration of the complainant's prior testimony to the jury service of a disabled juror, whose disability should be patiently accommodated. Was the prosecutor's closing argument inflammatory, depriving Mr. Jones of a fair trial?

C. STATEMENT OF THE CASE

Darrell Jones and his girlfriend Ola Mae Milam were involved in a relationship until early May 2009. 8/26/09 RP 86-87.¹ They were raising their baby, Cherish, and lived in a house that Mr. Jones was leasing in Renton, along with Ms. Milam's two older children from previous relationships. Id. at 87. Following an argument, Mr. Jones began the process of moving out of the home with Cherish, although most of his belongings were still at the house, and he retained a key. Id. 86-88.

On May 4, 2009, Mr. Jones came home to pick up his car from Ms. Milam, but she was not there. 8/26/09 RP 89. He started to argue with Ms. Milam on the phone, and damaged his computer, which was sitting on a nearby table. Id. at 105. Jimmy King, Ms. Milam's 13 year-old son, saw this, and hearing the phone conversation between Mr. Jones and his mother, became enraged. Id. at 97-99. Mr. Jones stated that Jimmy King armed himself with a roasting fork and lunged at him when he entered the kitchen, forcing

¹ The verbatim report of proceedings consists of three volumes of transcripts from August 24, 2009, through September 4, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "8/24/09 RP __." Pre-trial rulings are contained within three volumes from the first trial, after which the jury acquitted on one count and was unable to reach a verdict on the remaining counts. The dates of the earlier proceeding were July 22, 2009 through July 24, 2009, before the Honorable Mary I. Yu.

Mr. Jones to disarm the teenager by pushing him and grabbing his arm. Id. at 98-101. Mr. Jones then called Ms. Milam again, informed her of what her son had tried to do, and told her to hurry home. Id. at 101-02. According to Mr. Jones, Jimmy King has always liked knives, so he quickly put all of the sharp objects in the kitchen out of the young man's reach. Id. at 106.

Jimmy King told the jury a different version of the events of May 4th. According to Jimmy, immediately after Mr. Jones entered the house and spoke with Ms. Milam by phone, Mr. Jones threw the phone at the wall, damaging the wall, before breaking the computer. 8/26/09 RP 17-18. At that point, according to Jimmy, Mr. Jones called Ms. Milam again, and while she was still listening, said he had a gun and threatened to shoot Jimmy. Id. at 22. Jimmy stated that Ms. Milam told him by phone to leave the house and to wait at a friend's house until she returned, but that Mr. Jones would not let him leave, and blocked his passage with his arm. Id. at 23. Jimmy stated that Mr. Jones punched him in the side of the head while he was still on the telephone call with Ms. Milam, and Jimmy fell into the kitchen sink from the place on the kitchen counter where he had been sitting. Id. at 21. Jimmy testified that he armed himself with the roasting fork for protection only. Id. at 22, 47-52.

Ms. Milam, who was driving back to Renton from Tacoma at the time she received the phone calls from Mr. Jones, called 911 four times. 8/25/09 RP 23-27. Ms. Milam arrived at the Renton residence at approximately the same time as law enforcement, who arrested Mr. Jones. Id. at 30, 96. He was charged with felony harassment, unlawful imprisonment, assault in the fourth degree, and malicious mischief. CP 54-56.

The police executed a material witness warrant for Ms. Milam in order to secure her cooperation at the first trial. Id. at 57. Pre-trial motions were decided by the Honorable Mary I. Yu. Among other pre-trial motions, the State moved to admit an alleged 2008 domestic violence incident between Mr. Jones and Ms. Milam, pursuant to ER 404(b). 7/23/09 RP 92. The State's application was based upon Ms. Milam's recantation of the allegations (the 911 calls and her criminal complaint) at the first trial, and to show why Jimmy had been afraid of Mr. Jones. Id. The prior domestic violence incident was admitted over the defendant's objection. Id. at 94, 107.² Ms. Milam testified while in custody during Mr. Jones's first trial, which resulted in an acquittal on the malicious mischief count and a mistrial after the jury

² The ER 404(b) testimony came in through Jimmy, after a short hearing, and through one of the detectives who investigated the alleged prior incident. 7/23/09 RP 100-08; 8/26/09 RP 37-40, 73-74.

was unable to reach a verdict on the remaining counts. 7/23/09 RP 5; 7/24/09 RP 39-45.

Jimmy King testified at the first trial pursuant to subpoena, and the State relied upon the assistance of his grandmother to produce him in court. 8/25/09 RP 122-27. At the second trial, the police were unable to locate Ms. Milam or her son, Jimmy, and were unable to serve a material witness warrant on her. 8/25/09 RP 56-57.³ The State asked to use the transcript of Jimmy's testimony from the first trial, arguing he was unavailable pursuant to ER 804. Id. at 122-27. Although defense counsel objected, the court allowed Jimmy's prior testimony to be presented through a reader from the prosecutor's office. Id. at 128-31. The Honorable Michael J. Fox also allowed the prior alleged domestic violence incident to be admitted, as it had been admitted at the prior trial. 8/26/09 RP 37-40, 74.

After the second trial, Mr. Jones was convicted of the lesser included offense of misdemeanor harassment and assault in the fourth degree. CP 105-08. He timely appeals. CP 109-113.

³ The State declined to seek a material witness warrant for Jimmy King, citing his age and inability to attend court without his mother. 8/25/09 RP 122-26.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION
IN ADMITTING A PRIOR ALLEGED ACT OF
DOMESTIC VIOLENCE AGAINST THE
COMPLAINANT'S MOTHER.

a. Evidence Rule 404(b) prohibits the admission of propensity evidence. Prior acts are generally inadmissible at trial, due to the great risk of prejudice to the accused:

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.

ER 404(b). The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)). Where the only relevance of the other acts is to show a propensity to commit similar acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

Before admitting such evidence, a trial court is obligated to: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

Here, the trial court erroneously admitted evidence that Mr. Jones had previously assaulted Ms. Milam, the complainant’s mother, despite the fact that all charges had been dismissed for failure to prosecute. 7/23/09 RP 107; 8/26/09 RP 74-75. Such evidence was irrelevant and highly prejudicial, permitting the jury to speculate concerning Mr. Jones’s propensity for violence.

b. The trial court abused its discretion by finding that the prior incident was relevant to the offense charged. In the context of ER 404(b),

[t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable.

State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even where the evidence is relevant, the court must balance the probative value against the prejudicial effect of the evidence before admitting it. Schaffer, 63 Wn. App. at 768 (citing ER 403).

To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)). Here, the trial court admitted evidence of the prior alleged assault on Ms. Milam, finding it relevant to the instant charges regarding Ms. Milam's teenaged son. Despite the court's ruling, the prior alleged assault had no plausible connection to the charges before the jury.

Here, the court failed to carefully consider the relevance of the prior incident to the instant charges. In addition, the court failed to give a limiting instruction, in order to cure the extreme prejudice to Mr. Jones caused by the introduction of the domestic violence allegations.

Under ER 404(b), the trial court must consider the introduction of prior bad acts, weighing probative value against prejudicial effect, balancing these concerns on the record. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); see also State v. Wade, 138 Wn.2d 460, 463, 979 P.2d 850 (1999). Without a thorough analysis on the record, an appellate court is unable to determine whether the trial court's ruling was based on a "careful and thoughtful consideration" of the issues. Saltarelli, 98 Wn.2d at 362. Where a trial court fails to conduct such a balancing act on the record, ER 404(b) "evidence is not properly admitted." Tharp, 96 Wn.2d at 597.

Here, the trial court made minimal efforts to balance the probative value against the prejudicial effect of the prior domestic violence allegations on the record, as required by ER 404(b). After erroneously stating that the prior allegations were relevant to explain Ms. Milam's testimony, the court indicated the evidence

could be introduced without a limiting instruction. Such actions are not the “careful and thoughtful” balancing test envisioned by ER 404(b) and Saltarelli, 98 Wn.2d at 362. By failing to perform such a balancing test, the court abused its discretion in admitting the evidence.

c. The prior incident lacked important indicia of reliability. Since the prior alleged incident did not result in a conviction or in any findings, the allegations were entirely based upon hearsay. 7/23/09 RP 94; 8/26/09 RP 74. During the first trial, Ms. Milam established herself as a witness who was willing to lie and to obfuscate the truth whenever possible. 7/23/09 RP 38-63. Although Ms. Milam initially signed a complaint as to the prior alleged incident, she later refused to testify against Mr. Jones and all charges were dismissed. 8/26/09 RP 74.

Since Ms. Milam absented herself from the second trial, there was no way for defense counsel to cross-examine her about the prior alleged incident admitted pursuant to ER 404(b). Since complainant Jimmy King's version of events was presented to the jury through prior testimony, pursuant to ER 804, he, too, could not be cross-examined concerning the veracity of his recollection of the alleged prior domestic violence incident against his mother.

Since the record reflects that the evidence concerning the prior alleged domestic violence incident lacked reliability and veracity, its introduction was error.

d. Erroneous admission of the prior incident affected the outcome of the trial, requiring reversal. An appellate court must reverse on ER 404(b) grounds if it determines within reasonable probabilities that the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); Tharp, 96 Wn.2d at 599.

Here, the introduction of the prior alleged domestic violence incident undoubtedly had an impact on the verdict in this case. It would be natural for the jury to have had an emotional response to hearing about Mr. Jones's alleged abuse of the complainant's mother, and his alleged taunting of the teenaged complainant concerning his failure to defend her. In this case where Mr. Jones was charged with the assault of Ms. Milam's son, the jury was invited to speculate that Mr. Jones was a violent individual, capable of untold abuse, if given the opportunity. The admission of this prior assault was irrelevant and highly prejudicial, and inevitably affected the verdict; thus, Mr. Jones's conviction must be reversed and remanded. Freeburg, 105 Wn. App. at 501, 507.

2. MR JONES'S CONSTITUTIONAL RIGHT TO
A FAIR TRIAL WAS VIOLATED BY
PROSECUTORIAL MISCONDUCT DURING
CLOSING ARGUMENT

a. Prosecutors have special duties which limit their

advocacy. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 3, 21, 22. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

b. The prosecutor’s closing argument was inflammatory, misstating the law and denigrating the defense. In the prosecutor’s rebuttal argument, she began by telling the jury that defense counsel’s argument was “offensive.” 8/26/09 RP 168. She continued to call Mr. Jones’s argument “offensive” five times in fewer than two pages of argument. Id. at 168-69. The prosecutor then unexpectedly invoked the theme of disability rights, impugning defense counsel in the process.

Earlier, defense counsel had argued that the jury should consider that it had not been permitted to weigh the credibility of the complainant, Jimmy King, since he had not been present in

court; the jury had been forced to rely solely upon his prior testimony. 8/26/09 RP 144.

In response, the prosecutor argued on rebuttal:

[Defense counsel] can stand here all afternoon and tell you that Jimmy and Ola Mae are liars, and it doesn't make it true. He can tell you all day long that the State can't prove its case because you didn't have an opportunity to physically see Jimmy or to hear Jimmy. Well, that's offensive, and let me tell you why that's offensive... this is why it's offensive: it's offensive because if you were all hearing-impaired or sight-impaired, you would still be qualified to sit on this jury. There would be accommodations made for you so that you could perceive Jimmy's testimony. You don't have to be able to see and hear and smell Jimmy Lee King to believe him. That is why it is offensive that [defense counsel] should ask you to just throw away, to totally discount Jimmy King's testimony.

8/26/09 RP 168-69 (emphasis added).

The prosecutor's denigration of the defense during closing argument by the implication that defense counsel had somehow insulted disabled jurors was inflammatory, and akin to inciting other forms of prejudice into closing argument. See, e.g., State v. Perez-Mejia, 134 Wn. App. 907, 915-16, 143 P.3d 838 (2006); State v. Cabrera, 700 N.W.2d 469, 475 (2005) ("The prosecutor is a 'minister of justice' whose obligation is 'to guard the rights of the accused as well as to enforce the rights of the public'") (citations

omitted). This type of rhetoric is improper, unduly prejudicial, and must be soundly rejected as a clear violation of Mr. Jones's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play").

c. Prosecutorial misconduct is properly before this court. Defense counsel did not object directly to the above remark. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict." State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); Reed, 102 Wn.2d at 145 (conviction reversed where prosecutor repeatedly

called defendant a liar and disparaged defendant's witnesses as outsiders driving fancy cars during closing argument).

Although the instances of misconduct quoted above were not objected to by defense counsel when made, the issues are nonetheless properly presented for the first time on appeal, since denigrating the defense in such a manner is so "flagrant and ill-intentioned" as to irrevocably prejudice the jury, lowering the burden of proof and impacting the verdict in this case – thus affecting Mr. Jones's constitutional right to due process. RAP 2.5(a)(3). Because Mr. Jones's conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

d. Reversal is required.

The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to

the instances of misconduct in the closing argument during Mr. Jones's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; therefore, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; see also U.S. v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to prosecutor's denigration of defense in closing argument, which court finds particularly egregious due to comments made during rebuttal, giving defense no opportunity to respond).

E. CONCLUSION

Mr. Jones's conviction must be dismissed due to the erroneous admission of ER 404(b) evidence and prosecutorial misconduct during closing argument.

DATED this 18th day of May, 2010.

Respectfully submitted,



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