

65308-3

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No. 65308-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC COSTON,

Appellant.

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FILED
APR 11 2011
CLERK OF COURT

REPLY BRIEF OF APPELLANT

APPEAL FROM KING COUNTY SUPERIOR COURT

THE HONORABLE THERESA DOYLE

LEE H. ROUSSO
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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES..... i

II. APPELLANT’S REPLY BRIEF..... 1

A. TABLE OF AUTHORITIES

Washington Cases

State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995).....2
State v. Tharp, 96 Wash.2d 591, 594, 637 P.2d 961 (1981).....2

State Statues

RCW 9.94A.537(4).....1, 2

Evidence Rules

ER 401.....3
ER 402.....3
ER 403.....3
ER 404(b).....1, 2, 3

Appellant Eric Coston replies as follows to the Brief of Respondent:

INTRODUCTION

The overarching question that animates any appeal is this: “Did the defendant receive a fair trial?” Here, Eric Coston did not receive a fair trial. Instead, the proceedings were tainted by the introduction and admission of extremely prejudicial evidence.

As discussed further herein, the State’s brief generally avoids the issues raised on this appeal and, instead, focuses on arguments not made by Coston. For example, Coston has not argued that RCW 9.94A.537(4) changes any rule of evidence. Likewise, Coston has not argued that ER 404(b) applies in this case. Nonetheless, this is where the State focuses its arguments.

REPLY TO STATE’S ARGUMENT

A. Evidence of recent incarceration is highly prejudicial. RCW 9.94A.537(4) represents Legislative acknowledgement of this fact.

Even the Legislature, which is hardly in the business of protecting criminal defendants, recognizes that evidence of recent incarceration is extremely prejudicial. Accordingly, the Legislature has determined that where rapid recidivism is alleged, the issue should be decided at a separate hearing. This is not to suggest that the Legislature created a new rule of

evidence. It did not. Evidence of recent incarceration is *always* highly prejudicial and no special rules are needed.

While RCW 9.94A.537(4) is not a rule of evidence, it does dovetail with ER 404(b), as both recognize a *res gestae* exception to inadmissibility. Under this 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. *State v. Lane*, 125 Wash.2d 825, 831, 889 P.2d 929 (1995).¹ Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury." *State v. Tharp*, 96 Wash.2d 591, 594, 637 P.2d 961 (1981). The letters at issue here are not evidence of the *res gestae* of the crime as they did not establish "the immediate place and time of its occurrence." Instead, the letters were written months ahead of time. Likewise, the march from the letters to the crime did not in any way constitute an "unbroken chain of events."¹

Furthermore, having cited to four letters containing allegedly incriminating statements, the State fails to explain why it was necessary to admit the entire stack into evidence. If Judge Doyle had simply admitted

¹ With respect to evidence of incarceration itself, it is the *res gestae* of crimes such as Escape and Assaulting a Correctional Officer. The dispute here is over whether the letters are evidence of incarceration.

the four letters actually used by the State, the prejudicial impact of the evidence would have been far less severe. Once again, we believe this stack of letters, which sat on the bar throughout trial, simply screamed “prison!” to the jury.

B. The letters, other than those specifically admissible to show planning or intent, should have been excluded under ER 401, 402 and 403. These issues were properly preserved for appeal.

The State argues that the defense waived any objection to the letters under ER 404(b) and therefore cannot argue ER 404(b) on appeal. However, the reference to ER 404(b) on page 14 of the Appellant’s Opening Brief only discusses ER 404(b) in the hypothetical. Except for the few letters actually referenced at trial, the other letters should have been excluded under ER 401, 402 and 403.

C. Appellant concedes that *State v. Winston* applies and DV conviction may be entered without submitting the issue to jury.

Appellant concedes that *State v. Winston* negates the argument that the DV conviction was improperly entered. Nonetheless, we renew the argument that the use of the letters to establish a domestic relationship was improper. Ms. Burdick could have simply testified to the length of their relationship and their past dating. Accordingly, the use of the letters was

both prejudicial and superfluous, especially since the State gained nothing by having the conviction designated as DV.

CONCLUSION

The trial of Eric Coston was not a fair one. Judge Doyle tried to accommodate competing interests, but erred in a way that exposed the jury to far too much toxic evidence. This Court should vacate the conviction and grant Coston a new trial.

Respectfully submitted this the 18th day of April, 2011.

A handwritten signature in black ink, appearing to read "Lee H. Rousso", with a long horizontal line extending to the right.

Lee H. Rousso, WSBA #33340
Attorney for Eric Coston

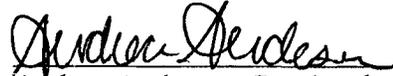
1 **CERTIFICATE OF SERVICE**

2 I, Andrea Andersen, hereby certify that on April 18, 2011, I mailed a copy of the
3 appellant's response brief by way of U.S. mail to:

4 Richard Johnson, Court Administrator/Clerk
5 Court of Appeals: Division I
6 600 University St
7 Seattle, WA 98101-1176

8 Bridgette Maryman, Deputy Prosecuting Attorney
9 W554 King County Courthouse
10 516 3rd Avenue
11 Seattle, WA 98104

12 DATED this 18th day of April, 2011.

13 
14 Andrea Andersen, Paralegal
15 For Lee H. Rousso

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April 18, 2011

Richard Johnson, Court Administrator/Clerk
Court of Appeals: Division I
600 University St
Seattle, WA 98101-1176

Re: Eric Coston 65308-3-1

Dear Mr. Johnson,

Enclosed please find appellant Eric Coston's reply brief.

Cordially,



Andrea Andersen, (Paralegal)
for Lee H. Rousso

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