

66022-5

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NO. 66022-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM BROWN,

Appellant.

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

REPLY BRIEF

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DIVISION ONE
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STATE OF WASHINGTON

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A. ARGUMENT

1. WHERE 404(b) EVIDENCE WAS ERRONEOUSLY ADMITTED, AFFECTING THE OUTCOME OF THE TRIAL, REVERSAL IS REQUIRED.

a. The issue was preserved for appeal. The State suggests that even though defense counsel for Mr. Brown timely objected to Ms. Brittain's testimony concerning his alleged prior drug activity, that defense counsel did not properly state a basis for this objection. Resp. Brief at 15. The State suggests that Mr. Brown has waived this issue on appeal.

A cursory examination of the trial record, however, reveals that defense counsel thoroughly preserved this issue. 8/16/10 RP 194-97. At a sidebar immediately following this exchange, defense counsel made a complete record of her objections to Ms. Brittain's testimony:

Ms. Brittain was testifying about previously undisclosed information that she was – it seemed to be derived from hearsay. She was speaking about 404(b) evidence. She was speaking about information that had already been – evidence that had already been suppressed previously.

8/16/10 RP 194 (emphasis added).

During this sidebar, defense counsel referred to the phrases “404(b)” and “previously suppressed evidence” at least four

additional times. Id. at 194-96. The defense objected based upon 404(b), prejudice, hearsay, relevance, and the violation of the defense's motions in limine. Id.

The defense next stated:

And I don't think just because a witness is dishonest, whether we're at her interview or in court, that should grant leeway for the State to allow all sorts of evidence in that otherwise would be inadmissible, including hearsay, 404(b), and previously suppressed evidence, which is drug dealing. And that's not a loophole for them.

And that is why I objected several times. You overruled them, and irrelevant information, 404(b) information, was heard by the jury. And I think that it's prejudicial.

8/16/10 RP 194-95 (emphasis added).

In response, the trial court stated to the defense: "Granted, you made timely objections." 8/16/10 RP 197.

It seems clear, from an examination of the record, that the defense did not waive this issue, and properly preserved it for appeal.

b. Erroneous admission of the 404(b) evidence 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); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).¹

Here, the introduction of the alleged prior bad acts clearly had an impact on the verdict. Prior to the admission of the ER 404(b) testimony, Mr. Brown had exercised his constitutional right to remain silent and the jury had not heard anything about his background.

The admission of these alleged bad acts was irrelevant and highly prejudicial, and inevitably affected the verdict. State v. Freeburg, 105 Wn. App. 492, 501, 507, 20 P.3d 984 (2001). The harmless error standard is not met by speculating that a hypothetical reasonable juror relying on the properly admitted evidence could have reached the same verdict, but rather requires the State prove this specific jury would have reached the same verdict. State v. Anderson, 112 Wn. App. 828, 827, 51 P.3d 179 (2002), review denied, 149 Wn.2d 1022 (2003). Because of the prejudice flowing from the statement elicited by the State, particularly here where the record reflects that this specific jury struggled to reach a verdict at all, the State cannot establish that this jury would have reached the

¹ 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); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

same result had it not heard the statement. Thus, reversal is required.

B. CONCLUSION.

For the foregoing reasons, Mr. Brown respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 26th day of August, 2011.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] WILLIAM BROWN 304 15 TH ST SE #9 AUBURN, WA 98002	(X) () ()	U.S. MAIL HAND DELIVERY _____

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2011.

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