

69629-7

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NO. 69629-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES DIXON,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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TABLE OF CONTENTS

A. ARGUMENT..... 1

 By introducing evidence that Dixon had a suspiciously large amount of cash in his pocket, the prosecution impermissibly sought a conviction by claiming Dixon was guilty of more serious crimes than the charged offense..... 1

 1. The \$1255 cash in Dixon’s pocket was not relevant or probative of the charged offense..... 1

 2. The prejudicial effect of the improperly admitted evidence of uncharged criminal conduct undermined the fairness of the trial 5

B. CONCLUSION..... 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993)..... 5

State v. Dinges, 48 Wn.2d 152, 292 P.2d 361 (1956) 2

State v. Tharp, 27 Wn.App. 198, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). 3

State v. Vasquez, _ Wn.2d _, _ P.3d _, 2013 WL 3864265 (2013) 4

State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994)..... 1

Washington Court of Appeals Decisions

State v. Lillard, 122 Wn.App. 422, 93 P.3d 969 (2004)..... 3

State v. Ramos, 164 Wn.App. 327, 263 P.3d 1268 (2011) 5

State v. Stockton, 91 Wn.App. 35, 955 P.2d 805 (1998) 5

State v. Wade, 98 Wn.App. 328, 989 P.2d 576, 580 (1999)..... 5, 7

Statutes

RCW 69.50.4013 1

Court Rules

ER 403 2

ER 404 2

Other Authorities

Edward Cleary, McCormick’s Law of Evidence sec. 190, at 448 (2d ed.1972) 3

A. ARGUMENT.

The prosecution introduced evidence that Dixon had a suspiciously large amount of cash in his pocket to impermissibly obtain a conviction based on the likelihood that Dixon was guilty of more serious crimes than the charged offense

The prosecution sets forth a puzzling view of the law that would allow the State to paint the accused as committing more serious offenses as background testimony relevant to the possibility the accused committed a lesser serious crime. Because the erroneous admission of distinctly prejudicial evidence painting Dixon as a drug dealer denied him a fair trial, reversal is required.

1. *The \$1255 cash in Dixon's pocket was not relevant or probative of the charged offense.*

Dixon was charged with the single offense of possession of a controlled substance, which requires proof that he had drugs in his possession or control. RCW 69.50.4013; *see also State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). The State claims that the \$1255 Dixon had in his pocket when arrested is relevant to whether he possessed the drugs found in the trash can because possession of a controlled substance is a lesser offense of possession with intent to sell and delivery of a controlled substance. Response Brief at 8. It contends

that the greater offenses are “connected and relevant” to the lesser offense of simple possession. *Id.*

This logic is directly contrary to ER 403 and ER 404(b). “A defendant must be tried for the offense charged in the indictment or information.” *State v. Dinges*, 48 Wn.2d 152, 154, 292 P.2d 361 (1956). Evidence of other bad acts or suspicious conduct is unduly prejudicial unless it is “relevant and necessary to prove *an essential ingredient* of the crime charged.” *Id.* (emphasis in original). It is impermissible to convict a person on the basis that the defendant may have committed a more serious crime that has not been charged. *Id.*

The State asserts the money is relevant to simple possession because the lack of “items” in “his possession could be argued as evidence that the defendant was not involved in drug activity.” Response Brief at 7. However, Dixon was not charged with being “involved in drug activity.” He was charged with possession of two specific baggies, one containing 0.31 grams of cocaine and the other containing 0.22 grams of methamphetamine. RP 133. By eliciting Dixon’s money for the purpose of showing Dixon was “involved in drug activity,” the prosecution seeks a conviction based on propensity and the innuendo of drug dealing. The money let the jury infer Dixon

made a profit from selling drugs, not that he possessed the drugs in the trash can.

The prosecution also generically asserts that the large sum of cash in Mr. Dixon's pocket was part of the *res gestae*. Response Brief at 11-12. But tellingly, the State never explains how this evidence was inextricably intertwined with the incident, as it was revealed only in a post-arrest search.

The *res gestae* doctrine permits the admission of evidence “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980) (quoting Edward Cleary, McCormick's Law of Evidence sec. 190, at 448 (2d ed.1972)), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). To be admissible under the *res gestae* exception, each incident must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Tharp*, 96 Wn.2d at 594. They must be part of a “string of connected offenses.” *State v. Lillard*, 122 Wn.App. 422, 431, 93 P.3d 969 (2004).

Dixon's money was not necessary to complete the story of the offense. He did not touch, display, mention, or motion toward the money in his pocket before or after his arrest. The money had no role in

whether Dixon possessed the baggies in the trash can and the prosecution offers no legitimate explanation other than an ambiguous and generic assertion that it provides “background” and the illegitimate claim that it shows his involvement in amorphous uncharged drug activity. Response Brief at 7, 12.

The only logical relevance of the \$1255 is propensity as a drug seller. A large amount of cash is the prototypical fact from which jurors may infer the intent to deliver drugs in one’s possession. *See State v. Vasquez*, _ Wn.2d _, _ P.3d _, 2013 WL 3864265, *3(2013).

The State emphasized that Dixon’s money was taken as “unlawful drug proceeds.” RP 76-78. It highlighted that he was stopped in an area known for selling drugs. RP 34, 60, 81. It urged the jury to view the amount of money a highly suspicious, insinuating that it could not have been gained legitimately. RP 163. The money served the purpose of showing Dixon most likely sold drugs and because he sold drugs, it is more likely that he possessed both baggies of drugs found in the trash can. As propensity is an improper basis for admission, admitting the evidence constitutes an abuse of discretion.

2. *The prejudicial effect of the improperly admitted evidence of uncharged criminal conduct undermined the fairness of the trial.*

The prosecution downplays the prejudicial effect of evidence depicting Dixon as a drug seller, contrary to cases recognizing its highly prejudicial effect. When a defendant is charged with a single count of delivery of cocaine, it is impermissible to suggest to the jury that the defendant would continue selling drugs or had sold drugs on other occasions. *State v. Ramos*, 164 Wn.App. 327, 340-41, 263 P.3d 1268 (2011). Such an argument by a prosecutor is so prejudicial as to be reversible error even without an objection, as no instruction could cure the prejudicial effect. *Id.* at 341.

Allegations of drug dealing are not relevant to a witness's credibility. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). An accused person's prior drug use is "highly prejudicial." *State v. Stockton*, 91 Wn.App. 35, 41, 955 P.2d 805 (1998). The fact that a person has possessed drugs in the past, or sold drugs on another occasion, does not permit the jury to infer he is likely to have that same intent at the time of the charged offense. *State v. Wade*, 98 Wn.App. 328, 336, 989 P.2d 576, 580 (1999).

The prejudicial effect of implying Dixon was a drug dealer must be viewed in the context of the weakness of the prosecution's evidence that he possessed both baggies of drugs found in the trash can. It is not enough that the jury could find he put one baggie in the trash can – the single count of possession required proof beyond a reasonable doubt Dixon possessed both. CP 39, 57. The baggies were not the same – they contained different drugs and had “completely different” packaging. RP 70, 87. One baggie was apparently visible on top of the trash can but the police had to search around the trash can to locate the second baggie in a different part of the trash can. RP 68, 86. These two different baggies were found in an area the police knew as an “open air drug market,” so Dixon was not the only potential drug possessor in the vicinity. RP 34, 39. The police who saw Dixon move toward the trash can did not see him holding two separate items. RP 64, 104. Officer Drake described it as “a light colored object,” not two suck objects. RP 104.

Where Dixon was only charged with simple possession of two different baggies of drugs, the evidence portraying him as involved in drug trafficking let the jury to conclude that because he had so much money, he was the type of person who would be involved in criminal

activity, including profiting from drug sales, and thus was more likely to possess both baggies. Because “the outcome of the trial would have different” without evidence that Dixon had the cash typical of a drug seller when arrested, “the trial court's error in admitting this evidence was not harmless. *Wade*, 98 Wn.App. at 338.

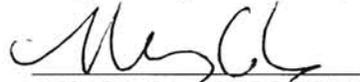
Finally, the prosecution presents a distracting claim of unpreserved error. Response Brief at 17-19. Dixon objected to the admission of the money based on its lack of relevance and unduly prejudicial effect. RP 16-17. The testimony labeling the money as “unlawful drug proceeds” demonstrates the harmful effect of the judge’s ruling and but for that incorrect ruling, the prosecution would not have been able to encourage the jury to convict Dixon based on the likelihood that his ill-gotten gains were derived from drug activity. The prosecution’s use of the suspiciously large and ill-gotten money demonstrates that Dixon was denied a fair trial by the prejudicial effect of the improperly admitted evidence.

B. CONCLUSION.

For the forgoing reasons and those presented in the Opening Brief, James Dixon respectfully requests this Court reverse his conviction and order a new trial.

DATED this 31st day of July 2013.

Respectfully submitted,



NANCY P. COLLINS (28806)

Washington Appellate Project (91052)

Attorneys for Appellant

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

STATE OF WASHINGTON,
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JAMES DIXON,
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NO. 69629-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2013, 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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SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |
| <p>[X] JAMES DIXON
931178
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVE
WALLA WALLA, WA 99362</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
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