

NO. 70911-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARTH OLSEN,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

OPENING BRIEF OF APPELLANT

JAN TRASEN  
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when admitting prior-acts evidence under ER 404(b).

2. The trial court abused its discretion when admitting evidence seized from Mr. Olsen's pockets upon his arrest, in violation of ER 404(b) and ER 403.

3. The trial court failed to conduct the appropriate analysis required by ER 403 before admitting the evidence seized from Mr. Olsen's pockets.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of misconduct other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts. Although the trial court admitted evidence of another alleged act from earlier that evening, purportedly as "res gestae," the evidence was used to imply Mr. Olsen had a propensity to sexually harass baristas at coffee stands. Did the trial court abuse its discretion, committing prejudicial error in admitting this evidence?

2. In order for evidence of uncharged misconduct to be admissible, the trial court must determine whether the evidence is

relevant to a material issue, identify the purpose for which the evidence is being introduced, and balance the probative value of the evidence against the danger of unfair prejudice. Here, the prosecution sought to introduce scraps of paper seized from Mr. Olsen’s pocket, containing a description and the license plate number of the barista’s car. The court ruled the evidence was admissible for purposes of identification, although identification was not contested at trial. Did the trial court abuse its discretion when admitting this evidence, without conducting the proper balancing test?

C. STATEMENT OF THE CASE

Just before daybreak on February 26, 2013, Garth Olsen was looking for a cup of coffee. RP 464-70. An experienced commercial pilot, he had fallen on hard times, had lost his home and his family, and following a rough night, found himself wandering around after a few too many drinks, looking for an open coffee shop in Renton. Id.

Mr. Olsen walked to the Cowgirls Espresso Stand on Lake Washington Boulevard, near the Boeing plant. RP 196, 288-30. He spoke with Marisa M., who had just arrived for her shift at the espresso stand, at approximately 4:15 a.m. RP 200-03. Cowgirls Espresso is a “bikini barista” stand – it is “painted like a cow ... white with black

spots,” and the costumes worn by the employees consist of bikinis and lingerie. RP 231. After speaking with Ms. M., Mr. Olsen walked away while Ms. M. proceeded with her usual routine for the morning -- turning off the alarm, locking herself inside the stand, turning on the lights, and changing into her costume in the stand’s restroom portion. RP 212-13.

While Ms. M. was changing her clothing, she heard a loud noise outside and looked up. RP 213. Ms. M. saw a man’s face in the window and felt afraid, after he made insulting remarks regarding her skimpy attire. RP 227.

After calling 911, Ms. M. waited inside the espresso stand for the police to respond. RP 214. When the Renton police arrived a few minutes later, the man who had peered into the window had walked away. RP 288-90.

Officer Eric Stevens saw Mr. Olsen walking north on Lake Washington Boulevard. RP 288-90. Officer Stevens recognized Mr. Olsen from a call earlier the same evening, at another espresso stand approximately two miles away. RP 282. In the earlier incident, Mr. Olsen had not been arrested, but received a trespass admonishment for being disorderly. RP 180-87, 284-87.

After the Cowgirls incident, Officer Stevens attempted to stop Mr. Olsen by using his lights and public address system, but Mr. Olsen began to run. RP 291. Officer Stevens pursued him on foot and placed him under arrest. Id. Upon searching Mr. Olsen, Officer Stevens found several slips of paper, including one with Ms. M.'s license plate number and car description, as well as the website for Cowgirls Espresso. RP 295-96. Mr. Olsen was charged with one count of voyeurism. CP 1-8.

The trial court, over objection, permitted the jury to hear about the earlier incident at the Big Foot Java espresso stand, two miles away. RP 12-17, 155-57, 180-87, 284-87. Also over Mr. Olsen's objection, the trial court admitted the slips of paper from Mr. Olsen's pockets. RP 70-75, 76, 147-49, 160, 291-96.

Following a jury trial before the Honorable Dean Lum, Mr. Olsen was convicted as charged. CP 58.

D. ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE  
ERROR IN ADMITTING PROPENSITY EVIDENCE  
UNDER ER 404(b).

The trial court admitted evidence of an unrelated incident from earlier the same evening, resulting in a trespass admonishment from a

coffee stand several miles away. RP 155-57.<sup>1</sup> The court also admitted notes found in Mr. Olsen's pocket, containing a description of the alleged victim's vehicle and her license plate number. RP 76, 149, 160. These rulings were erroneous. The additional evidence was used for the forbidden purpose of proving action in conformity therewith. The admission of this evidence was unfairly prejudicial and irrelevant, and a new trial is required.

- a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App.

328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404

(b) provides:

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.

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<sup>1</sup> Over objection, the court admitted the disparaging statements Mr. Olsen purportedly made about the purity of baristas in the prior trespass incident. RP 155-57.

The “forbidden inference” of propensity to act in conformity with prior acts “is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person’s guilt or innocence.” Wade, 98 Wn. App. at 336. Evidence of prior crimes, wrongs, or acts is presumptively inadmissible. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

If the State offers evidence of other acts, the court must “closely scrutinize” it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). ER 404(b) is “a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.”

Gresham, 173 Wn.2d at 420-21 (citing Saltarelli, 98 Wn.2d at 362) (emphasis added).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. See Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5<sup>th</sup> Cir. 1974)).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Fisher, 165 Wn.2d at 745. Evidence of other misconduct should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). “[C]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). In doubtful cases, “the scale should be tipped in favor of the defendant” and the evidence should be excluded. Smith, 106 Wn.2d at 776.

This Court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court's ruling admitting evidence is reviewed for abuse of discretion. Id. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). As explained below, the trial court's admission of evidence of Mr. Olsen's earlier and unrelated incident at another espresso stand was manifestly unreasonable, because it was irrelevant and substantially more prejudicial than probative. The error is prejudicial and merits reversal.

b. Evidence of the prior incident at the Big Foot Java espresso stand was not relevant.

The testimony of the officers concerning the midnight disorderly conduct at another coffee stand was not relevant to proving an essential element of the crime with which Mr. Olsen was charged, but was merely offered to show that he had a propensity for bothering baristas.

The trial court concluded the allegations concerning the prior incident were admissible as res gestae under ER 404(b). RP 155-57.

Mr. Olsen objected, arguing that the two incidents at separate and unrelated coffee stands, miles apart, did not form an unbroken chain of events or transactions. RP 16. The jury did not need to hear of the prior incident at Big Foot Java – which, incidentally, did not involve allegations of peeping or voyeurism, but was a disorderly person call – in order to understand the second incident at Cowgirls Espresso. Id. Furthermore, admission of the prior incident was unfairly prejudicial, likely to cause the jury to assume that Mr. Olsen is “the type of person who does this type of behavior ... [who] goes out and harasses baristas.” RP 16.

The only effect of this testimony was to improperly imply that because Mr. Olsen may have made angry statements impugning the purity of the baristas at the first coffee stand, he must have said similarly vile things to the complainant several hours later at Cowgirls Espresso, as well as peeping into her window. This is precisely the purpose forbidden by ER 404(b).

In State v. Pogue, the trial court admitted evidence of prior acts to rebut a defense, but this Court reversed, finding the evidence was admitted to show a propensity to act in conformity with prior behavior. 104 Wn. App. 981, 982, 17 P.3d 1272 (2001). Pogue involved a

prosecution for possession of cocaine. 104 Wn. App. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. This Court pointed out that “[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.” Id. at 985.

Similarly here, the only logical relevance of the officers’ testimony on the prior coffee stand incident is based on a propensity argument: Because Mr. Olsen was allegedly disrespectful to a different barista earlier that night, it is more likely that he was also behaving inappropriately at Cowgirls Espresso a few hours later. RP 16. As in Pogue, the admission of the earlier uncharged act violated ER 404(b), and there was no valid argument to support admission of the evidence.

Although the State purportedly offered the earlier uncharged incident to prove Mr. Olsen’s mental state, it is not clear how the State could hope to establish an essential element of voyeurism<sup>2</sup> through an

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<sup>2</sup> Under RCW 9A.44.115, voyeurism is thus defined:

unrelated act which took place several hours earlier in a separate location with a different victim. RP 155; RCW 9A.44.115. The only way the prior incident proves mental state in this case is through a forbidden propensity implication.

Similarly, in State v. Holmes, this Court reversed a defendant's burglary conviction, holding:

Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (emphasis added); see also Wade, 98 Wn. App. at 334 ("When the State offers evidence of prior acts to demonstrate intent, there must be a logical

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(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable

theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense.”).

As in all of the foregoing cases, the prior misconduct evidence in this case was ostensibly admitted for a proper purpose, but its only relevance was for the improper purpose of proving action in conformity therewith. Its admission therefore violated ER 404(b).

Additionally, the admission of the allegations regarding the earlier incident violated ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative. To permit the jury to hear about Mr. Olsen’s belligerent behavior at the Big Foot Java location earlier in the evening was unfairly prejudicial. Smith, 106 Wn.2d at 776.

In closing argument, the deputy prosecutor emphasized the prior act more than once. RP 380, 392. The deputy prosecutor even argued at one point, “Well, this really was kind of the theme he was going with that night because when he was first contacted by the officers at the other barista stand, the Big Foot Java, this is what he told officers at that time, “All the baristas in the area are f’in’ whores.” RP 392

(emphasis added).<sup>3</sup> The fact that the prosecutor referred to Mr. Olsen's prior conduct as part of a "theme" was an improper signal to the jury to consider the prior act for improper propensity purposes.

The State's argument was substantially more prejudicial than probative. The argument invited the jury to do precisely what is forbidden – to use the evidence of the uncharged prior act "for the purpose of proving his character and showing that the person acted in conformity with that character." Gresham, 173 Wn.2d at 420-21.

- c. The prior incident does not fall within the res gestae of the voyeurism charge, because it does not give immediate context or complete a necessary part of the story.

Under the res gestae or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in both time and place to the charged crime. State v. Warren, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006); State v. Lilliard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Evidence of other activity constituting an unbroken sequence of events leading to the crime charged is admissible if it is necessary to provide the jury with the entire story of what transpired.

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<sup>3</sup> The salty language allegedly used by Mr. Olsen was not similarly sanitized at trial. RP 187, 227, 282.

State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1982). Each crime must be a link in the chain and each must be like a piece in a mosaic, which is necessarily admitted in order that a complete picture be depicted for the jury. Id. Like other ER 404(b) evidence, res gestae evidence must be relevant for a purpose other than showing propensity and must not be unduly prejudicial. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

In State v. Trickler, the trial court admitted evidence under the res gestae exception, but this Court reversed because the prejudicial effect of evidence admitted pursuant to ER 404(b) outweighed its probative value. 106 Wn. App. 727, 734, 25 P.3d 445 (2001). The defendant was prosecuted for possession of a stolen credit card and the trial court allowed admission of other stolen items found on the defendant at the time of the arrest that belonged to individuals other than the owner of the stolen credit card. Id. at 733. The State argued that this evidence was admissible under res gestae because it was so connected in time, place, and circumstances that it was necessary for the jury's understanding. Id. In rejecting this argument, this Court reasoned that the defendant's possession of other allegedly stolen items was not an inseparable part of his possession of the stolen credit card

and concluded that permitting the jury to hear this superfluous information was highly prejudicial and merited reversal, particularly because the defendant “was not charged” with the other misconduct. Id. at 734.

Similarly, it was superfluous and unfairly prejudicial in the instant case for the jury to hear that Mr. Olsen had been contacted by law enforcement and given a trespass admonishment earlier in the evening, following his altercation at the Big Foot Java coffee stand. The earlier event – a disorderly person call -- is not an inseparable part of Mr. Olsen’s alleged voyeurism at the Cowgirls Espresso stand, nearly two miles away, and was not necessary to provide context for an alleged sex crime.

Evidence admitted under the res gestae exception must be relevant and must not be unduly prejudicial. Lane, 125 Wn.2d at 834. As previously discussed, this evidence had minimal if any probative value and was extremely prejudicial in nature. The jury could understand the context of the crime charged without hearing this evidence. The prior incident at the first coffee stand is not a “piece in the mosaic” necessary for the complete picture; therefore the trial court erred in admitting it under the res gestae exception of ER 404(b).

- d. The notes in Mr. Olsen's pocket were also improperly admitted under ER 404(b) and ER 403.

As discussed above, when the State offers evidence of other misconduct at trial, the court must "closely scrutinize" the evidence to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. Saltarelli, 98 Wn.2d at 362.

The note purportedly recovered from Mr. Olsen's pocket contained a description of Ms. M.'s vehicle, her license plate number, and the website for Cowgirls Espresso stand. RP 72-75. Mr. Olsen argued that were this piece of evidence admitted, the jury would lose sight of the crime with which he was actually charged (voyeurism), and rather, the evidence would inflame the jury's passions to speculate on the potential danger to the alleged victim, considering possible future crimes with which Mr. Olsen was not even charged. RP 74-76. Mr. Olsen also argued that the note-paper was cumulative evidence of identification, since the show-up procedure was ruled admissible by the trial court. Id.

Following argument, the trial court ruled that the note recovered from Mr. Olsen's pocket was admissible, stating, "The fact that it is damaging, apparently very damaging, to the Defense case, doesn't

mean that it's unfairly prejudicial under Evidence Rule 403." RP 76.

The court also held that the note was admissible to prove identity. Id.

As discussed, "[C]areful consideration and weighing of both relevance and prejudice" must be conducted by the trial court when admitting ER 404(b) evidence. Sutherby, 165 Wn.2d at 886 (noting the potential for prejudice is highest in sex cases). Here, the trial court failed to conduct the requisite balancing test with the "careful consideration" demanded by our case law, leading to the admission of evidence that inflamed and distracted the jury.<sup>4</sup>

e. Reversal is required.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, our Supreme Court held the trial court abused its discretion under ER 403 by

admitting evidence of the plaintiff's immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, as in Salas, the risk of prejudice inherent in admitting evidence of alleged prior misconduct is at least an order of magnitude greater. Indeed, "in sex cases, ... the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury. See also State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002) ("An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.").

It is reasonably probable that Mr. Olsen would not have been convicted if not for the erroneous admission of the irrelevant and

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<sup>4</sup> The deputy prosecutor compounded the ER 404(b) error by referring to the improperly admitted note in closing argument, arguing that Mr. Olsen had written down

unfairly prejudicial allegations concerning the prior misconduct at the other coffee stand, and without the admission of the note from his pocket. Without the admission of the propensity evidence and the prosecutor's emphasis upon it during closing, a reasonable jury would have reached a different result.

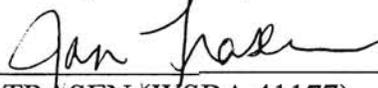
Accordingly, this Court should reverse and remand for a new trial at which evidence of the prior misconduct will be excluded.

E. CONCLUSION

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

DATED this 10<sup>th</sup> day of April, 2013.

Respectfully submitted,



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JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

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Ms. M.'s license plate number "so he could, you know, look her up later." RP 384.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70911-9-I
v.	)	
	)	
GARTH OLSEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING 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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<input checked="" type="checkbox"/> GARTH OLSEN 25434 SE 219 <sup>TH</sup> ST MAPLE VALLEY, WA 98038	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF APRIL, 2014.

x \_\_\_\_\_ 

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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710