

FILED
August 19, 2016
Court of Appeals
Division I
State of Washington

NO. 73955-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRANT, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald Eaton, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE EVENTS OCCURRING ONE AND TWO MONTHS EARLIER WERE NOT RES GESTAE OF THE CHARGED CRIME	1
2. THE PREJUDICE FROM PRIOR DOMESTIC INCIDENTS FAR OUTWEIGHED ANY MIMINAL PROBATIVE VALUE	3
3. THE PROSECUTOR WENT BEYOND THE BOUNDS OF FAIR ARGUMENT BY REFERRING TO DEFENSE COUNSEL’S ARGUMENT AS “OFFENSIVE.” .	4
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Ashley</u> ___ Wn.2d ___, 375 P.3d 673 (2016).....	3
<u>State v. Briejer</u> 172 Wn. App. 209, 289 P.3d 698 (2012).....	2
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	1
<u>State v. Foxhoven</u> 161 Wn.2d 168, 163 P.3d 786 (2007).....	1
<u>State v. Gonzales</u> 111 Wn. App. 276, 45 P.3d 205 (2002).....	5
<u>State v. Grier</u> 168 Wn. App. 635, 278 P.3d 225 (2012).....	1, 2
<u>State v. Gunderson</u> 181 Wn.2d 916, 337 P.3d 1090 (2014).....	3
<u>State v. Haviland</u> 186 Wn. App. 214, 345 P.3d 831 <u>rev. denied</u> , 183 Wn.2d 1012 (2015).....	2
<u>State v. Hughes</u> 118 Wn. App. 713, 77 P.3d 681 (2003).....	2
<u>State v. Lillard</u> 122 Wn. App. 422, 93 P.3d 969 (2004).....	2
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	5
<u>State v. Mutchler</u> 53 Wn. App. 898, 771 P.2d 1168 (1989).....	2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Negrete</u> 72 Wn. App. 62, 863 P.2d 137 (1993).....	5
<u>State v. Powell</u> 126 Wn.2d 244, 893 P.2d 615 (1995).....	2
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	1
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	5
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	5

FEDERAL CASES

<u>Bruno v. Rushen</u> 721 F.2d 1193 (9th Cir.1983)	5
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5
<u>United States v. Frascone</u> 747 F.2d 953 (5th Cir. 1984)	5

RULES, STATUTES AND OTHER AUTHORITIES

ER 404	1, 3
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A. ARGUMENT IN REPLY

1. THE EVENTS OCCURRING ONE AND TWO MONTHS EARLIER WERE NOT RES GESTAE OF THE CHARGED CRIME.

ER 404(b) categorically excludes prior domestic violence from being admitted at trial unless the proponent of the evidence establishes that the incidents occurred, that they are relevant to a non-propensity purpose, and that the probative value substantially outweighs the inherent danger of unfair prejudice. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court must carefully and explicitly consider these factors on the record. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). The State claims the February incident in which Brant refused to leave his wife's home and the March incident in which she found wedding photos, a shotgun, and a suicide note in his bedroom were admissible despite ER 404(b) because they were part of the res gestae of the charged incidents. This argument should be rejected. The February and March incidents were too remote in time and were of an entirely different character from the allegations in the charged incident.

Res gestae evidence is admissible to “complete the crime story by establishing the immediate time and place of its occurrence.” State v. Grier, 168 Wn. App. 635, 645, 278 P.3d 225 (2012) (quoting State v. Hughes, 118

Wn. App. 713, 725, 77 P.3d 681 (2003)). The evidence “must compose ‘inseparable parts of the whole deed or criminal scheme.’” State v. Haviland, 186 Wn. App. 214, 223, 345 P.3d 831, rev. denied, 183 Wn.2d 1012 (2015) (quoting State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989)). Admission of evidence under the res gestae rule is limited to evidence showing “the immediate context for events close in both time and place to the charged crime.” State v. Briejer, 172 Wn. App. 209, 224, 289 P.3d 698 (2012) (quoting State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004); State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995)).

Immediacy is thus an essential component of what makes evidence part of the res gestae of a crime. Briejer, 172 Wn. App. at 224; Grier, 168 Wn. App. at 645. The February and March incidents that occurred one and two months before the offense in this case cannot be res gestae; they are simply too remote in time. They do not show the immediate time and place of the charged offense.

In addition to the temporal separation, the February and March incidents are not logically part of the story of the events that occurred that April day. Brant’s wife testified that the April incident “changed everything.” RP 117. Prior to that, Brant had never laid hands on her and she had not been afraid of him. RP 117. The February and March events were not part of an ongoing story including the April incident because the

April incident was, by Deanna Brant's own admission, an outlier, a drastic change from what had gone before. RP 117.

2. THE PREJUDICE FROM PRIOR DOMESTIC INCIDENTS FAR OUTWEIGHED ANY MINIMAL PROBATIVE VALUE.

To guard against the "heightened prejudicial effect" from prior domestic violence incidents, such incidents must be excluded unless the State can establish their "overriding probative value." State v. Ashley, ___ Wn.2d ___, 375 P.3d 673 (2016) (citing State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014)). Gunderson, tells us that prior domestic violence is not admissible merely because it is minimally probative of an element of one of the charged offenses. The court must carefully balance that probative nature against the inherent prejudice. The evidence must be excluded under ER 404(b) unless the court finds "overriding probative value." Gunderson, 181 Wn.2d at 925.

The prior incidents have only minimal relevance to whether Brant believed he was permitted to enter the home. According to Deanna Brant, Brant did not live in the house, she had told him not to come inside, and he had physically pushed her out of the way. RP 99, 112. According to him, she neither tried to stop him nor asked him to leave at that time. RP 238-40. A prior incident in which he refused to leave when asked has minimal bearing on his knowledge; the jury was far more likely to use it for the

improper purpose of his propensity to disregard her wishes. There is no overriding probative value to counter this unfair prejudice.

The State also claims the March incident was essential to its case because otherwise Deanna Brant's possession of the shotgun might appear unreasonable. Brief of Respondent at 14. But making her conduct (in taking the shotgun a month earlier) appear reasonable has no relevance to whether Brant unlawfully entered her home a month later. The tangential relevance to explain why she had the shotgun does not override the prejudice of making him appear unstable.

The probative value vis-à-vis Deanna Brant's fear is also minimal and far outweighed by the prejudice. She testified that these prior incidents did not cause her fear; it was the April 22 incident that changed everything and made her afraid. RP 117. Overall, the State has failed to point to any probative value that could amount to the overriding value necessary to outweigh the inherent prejudice from prior domestic incidents.

3. THE PROSECUTOR WENT BEYOND THE BOUNDS OF FAIR ARGUMENT BY REFERRING TO DEFENSE COUNSEL'S ARGUMENT AS "OFFENSIVE."

Brant agrees with the State that it was fair argument to draw reasonable inferences from the evidence regarding Deanna Brant's credibility. Brant does not object to the aspects of the prosecutor's argument that were responses to the attacks by defense counsel on Deanna Brant's

credibility as a witness. Brant objects to the prosecutor's characterization of these arguments as "offensive." With that remark, the prosecutor crossed the line into disparagement of defense counsel.

A prosecutor may not "disparagingly comment on defense counsel's role." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011) (citing State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993)). Defense counsel's constitutionally mandated job is to cast doubt on the State's case using all the tools at his disposal. See, e.g., Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (effective assistance of counsel is essential to ensure adversarial testing of the State's case). In using the circumstances of the case to cast doubt on Deanna Brant's credibility, defense counsel was doing no more and no less than his constitutionally mandated job. By denigrating that job as "offensive," the prosecutor was implicitly and improperly "'draw[ing] the cloak of righteousness'" around the State. State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (quoting United States v. Frascone, 747 F.2d 953 (5th Cir. 1984)).

Statements maligning defense counsel can "severely damage" an accused person's ability to present his case. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014) (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir.1983)). It was improper and a violation of Brant's constitutional

right to counsel for the State to disparage his attorney during closing argument.

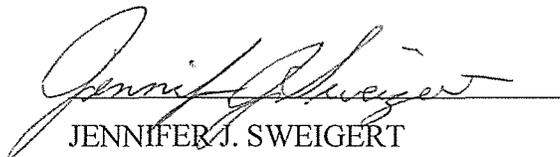
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Brant requests this Court reverse his convictions.

DATED this 19th day of August, 2016.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", written over a horizontal line.

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