29513-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MERLE W. HARVEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Prosecuting Attorney

Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

(1) The trial court abused its discretion by admitting evidence of other misconduct.

(2) Witnesses' expressions of opinion regarding the ultimate issue of guilt violated defendant's right to a jury trial.

II.

ISSUES PRESENTED

(1) Did the trial court err in admitting evidence of defendant's involvement in the theft of two vehicles and eluding pursuant to Evidence Rule ("ER") 404(b) to show defendant's consciousness of guilt?

(2) Did witnesses' use of "victim" to refer to the deceased at trial violate defendant's right to a trial by jury?

III.

STATEMENT OF THE CASE

Appellant/defendant Merle Harvey was charged in the Spokane County Superior Court with two counts of first degree murder while armed with a firearm and two counts of unlawful possession of a firearm.

CP 1-2 and 51-52. It was alleged that he killed two men during a disagreement regarding a trade of vehicles while unlawfully possessing two firearms. CP 27-39.

The matter was assigned to the Honorable Tari S. Eitzen for trial. RP 1 *et seq.* An extensive number of motions were filed before trial. One was a motion to exclude evidence of defendant's actions post-killing while fleeing the scene of the crime. CP 8-12. A lengthy pre-trial hearing was held pursuant to ER 404(b) concerning the defendant's post-killing actions, including his theft of a vehicle in Idaho and a theft of another vehicle in Washington to facilitate his escape from the crime scene. RP 41-80. The trial court entered factual findings and legal conclusions that evidence of defendant's post-killing flight was admissible as part of the *res gestae* of the charged crimes. RP 77-80; 190-192.

The trial court then conducted a CrR 3.5 hearing to determine the admissibility of the defendant's statements to law enforcement officers. After the hearing, the trial court entered factual findings and legal conclusions therefrom which ruled that defendant's statements were admissible at trial. CP 400-408. RP 92-179.

The jury convicted the defendant as charged. CP 307, 308, 309, 310, 311, 312. The trial court sentenced the defendant. CP 411-422. This appeal timely followed. CP 425-438.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S FLIGHT FROM THE SCENE OF THE MURDERS.

Initially, defendant claims the trial court erred in admitting evidence of defendant's post-murder flight and activities to facilitate that flight. The record reflects that the trial court carefully considered and weighed the evidence before admitting only the most pertinent evidence. There was no abuse of discretion.

The Washington State Supreme Court restated the standard for examining evidentiary rulings under an abuse of discretion standard:

> Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In short, discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court. *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

State v. Elmore, 139 Wn.2d 250, 284, 985 P.2d 289 (1999), *cert. denied* 531 U.S. 837, 148 L. Ed. 2d 57, 121 S. Ct. 98 (2000).

The decision to admit evidence of other crimes or bad acts under ER 404(b), as with any other evidence ruling, is reviewed for abuse of

discretion.[1] *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); *State v. Bacotgarcia*, 59 Wn. App. 815, 824, 801 P.2d 993 (1990), *review denied* 116 Wn.2d 1020 (1991) (*citing State v. Goebel*, 40 Wn.2d 18, 240 P.2d 251 (1952) [pre-rule decision]). The test has also been characterized as: whether any reasonable judge would rule as did the trial judge. *State v. Nelson*, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

Evidence of the flight of a person after the commission of a crime is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence. *State v. Bruton,* 66 Wn.2d 111, 112, 401 P.2d 340 (1965). This principle is based upon the rationale that flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution. *Id.,* at 112. Evidence of flight must be sufficient to create a reasonable and substantive inference that the defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.

Here, no speculation is required to reasonably and substantively infer that defendant's flight from a double murder crime scene was to

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[1] Admission of evidence under ER 404(b) does not present a constitutional issue. *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

evade arrest and prosecution. The defendant drove away from the shooting scene, and then stole a vehicle in Spokane when his vehicle broke down. RP 115-116, 855, 864. The defendant travelled to another State, Idaho, then stole another vehicle when his first stolen vehicle broke down. RP 116. Thereafter, defendant was in Kennewick on his way to a hot springs in Oregon when the stolen vehicle also broke down and defendant was forced to steal yet another vehicle to try and further his flight from the double murder. RP 118, 855-857, 864. Defendant eluded law enforcement during a dangerous pursuit and escaped arrest in Kennewick. RP 557-558. Defendant's flight to avoid arrest and prosecution for the double murder only ended when he was found walking through a wheat field by Kennewick police and arrested. RP 569-570.

Evidence is admissible pursuant to ER 404(b) only where it is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs any prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary where the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. *State v. Dennison,* 115 Wn.2d at 628. As noted, the decision to admit evidence under ER 404(b) rests within the trial court's discretion.

State v. Walker, 75 Wn. App. 101, 108, 879 P.2d 957 (1994), *review denied,* 125 Wn.2d 1015, 890 P.2d 20 (1995).

Here, the trial court engaged in the cited analysis and admitted the evidence of defendant's activities in fleeing the scene of the double murder as *res gestae* thereof. ER 404(b) specifically identifies *res gestae* as one of the purposes for permitting evidence of other bad acts. This evidence squarely fit that purpose of the rule. The evidence of flight included defendant's escape to Idaho where he stole a vehicle to continue his flight when his initial escape vehicle broke down. Defendant readily admitted to law enforcement that his plan was to escape to Oregon. RP 864. This evidence helped explain the events of the incident on September 26, 2009 and was highly relevant. *See State v. Lillard,* 122 Wn. App. 422, 93 P.3d 969 (2004) (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 of a crime or to provide the immediate context for events close in both time and place to the charged crime).

The trial court properly applied ER 404(b) in its analysis of this evidence. It carefully considered the proffered testimony, limited the evidence to the most probative examples. The trial court offered to give a limiting instruction regarding the use of the evidence to the jury, yet defendant elected not to request such an instruction. Under these facts there

simply could be no abuse of discretion. There was no error in admitting this evidence.

B. WITNESS USE OF THE TERM "VICTIM" DID NOT CONSTITUTE AN OPINION REGARDING THE ULTIMATE ISSUE OF GUILT.

Defendant next contends that the reference to the deceased as "victims" constituted an opinion as to the defendant's guilt and thus, violated his constitutional right to a jury trial. Initially, in determining whether statements are impermissible opinion testimony, the court will generally consider the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Here, officers responding to the reported scene of a shooting with multiple people wounded merely referred to those individuals as "victims." Initially, the record reflects that the statements were inadvertently introduced since the trial court had ruled that witnesses were not to use the term "victim" when referring to the deceased. RP 210. Applying the *Demery* factors to the subject testimony. First, the witnesses involved were law enforcement officers who generally made the reference to the deceased as "victims" in the innocuous context of relating why they

responded and what they observed upon arrival at the shooting scene. For example, Officer Oien testified: "responded to a shots fired call with possible victims" (RP 315); "medics did some preliminary treatment and loaded victims up and left scene" (RP 322); "secured crime scene...made sure they had quick ingress and egress so they could treat the victim on the scene as best as possible". RP 322-323. However, Officer Oien also referred to the deceased as "subjects" or by name during that same testimony. The record reflects no objection by defendant to Officer Oien's testimony; however, the trial court reminded the prosecutor to consult with the officer regarding a defense counsel concern. RP 323.

Thereafter, several officers testified without referencing the deceased as "victims." The next reference occurred during Detective Madsen's testimony when he related what his Sergeant said during the telephone call when the detective was called to the scene. Detective Madsen testified, "sergeant called...regarding shooting at 1310 W. Boone...there were two victims who had been shot and they were not expected to live...the victims had been removed...to the hospital." RP 732-733 The record reflects no formal objection; however, the prosecutor was directed to remind the witness of the court's ruling at a bench conference. RP 733.

Thereafter, several more witnesses testified without any reference to the deceased as "victims" until Detective Gilmore testified about being briefed by patrol officers. Detective Gilmore testified, "briefing...that two male victims had been taken to the hospital...potential suspects...had fled...one woman was reported as a witness, and the girlfriend of one of the victims, persons shot." RP 831. Detective Gilmore thereafter testified at great length (RP 831-909) without ever referring to the deceased as "victims."

The subject statements merely related the circumstances as perceived by the witnesses or others in setting the scene of a shooting that ultimately resulted in a double homicide. These statements were intermixed with references to the deceased as "subjects" or by name which diminished the impact of such statements. The jury knew before ever hearing any witness refer to the deceased as "victims" that defendant was claiming that he committed the killings in self-defense based upon the actions by the deceased. Finally, the other evidence presented to the jury characterized the deceased as subjects or used their proper names. None of the statements by the witnesses constituted an opinion on the ultimate issue before the jury.

ER 704 provides, in pertinent part: "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it

embraces an ultimate issue to be decided by the trier of fact." Under ER 704, a witness may testify as to matters of law, yet not give a legal conclusion which includes testimony that a specific law applies to the case, or that the defendant's conduct violated that specific law. *State v. Olmedo,* 112 Wn. App. 525, 532, 49 P.3d 960 (2002). Here, none of the witnesses stated their opinion on the defendant's guilt when inadvertently referring to the deceased as "victims." The witnesses were all fact witnesses who related nothing more. None of the witnesses offered an opinion that defendant was guilty of the crimes charged. In the end this case came down to the credibility of the direct and circumstantial evidence versus the testimony of the defendant that he acted in self-defense. Accordingly, the defendant's right to a trial by jury was neither impeded nor violated by the subject testimony.

V.

CONCLUSION

For the reasons stated, the convictions should be affirmed.

Respectfully submitted this 10th day of August, 2011.

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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent, v. MERLE W. HARVEY, Appellant,	)	NO. 29513-3-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 15, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Janet Gemberling
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and mailed a copy to:

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8/15/2011 (Date) Spokane, WA (Place) Kathleen L Quinn (Signature)