

NO. 43325-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JANSSEN,

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
A. ASSIGNMENT OF ERROR.....	1
Issue pertaining to assignment of error	1
B. STATEMENT OF THE CASE.....	1
1. Procedural History.....	1
2. Substantive Facts.....	2
C. ARGUMENT	6
THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT AND HIGHLY INFLAMMATORY EVIDENCE OF JANSSEN’S POST-ARREST ASSAULT ON THE ARRESTING OFFICER.	6
D. CONCLUSION.....	12

TABLE OF AUTHORITIES

Washington Cases

Lockwood v. AC & S, 109 Wn.2d 235, 744 P.2d 605 (1987)	7, 10
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	9
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426, <u>review denied</u> , 133 Wn.2d 1019 (1997)	7
<u>State v. Pogue</u> , 104 Wn. App. 981, 17 P.3d 1272 (2001)	11
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	9
<u>State v. Vreen</u> , 143 Wn.2d 923, 26 P.3d 236 (2001)	7

Statutes

RCW 9A.36.011(a)	8
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Rules

ER 401.....	6
ER 402.....	6
ER 403.....	6
ER 404(b).....	9

A. ASSIGNMENT OF ERROR

The trial court deprived appellant of a fair trial by admitting irrelevant and unfairly prejudicial evidence.

Issue pertaining to assignment of error

Appellant was charged with two counts of first degree assault based on allegations that he fired a shotgun at two corrections officers. Over defense objection the court admitted evidence that, when later apprehended, appellant kicked one of the arresting officers. Where this evidence was not relevant to any element of the charged offense and served only to demonstrate a propensity for injurious conduct, did admission of the evidence deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The Cowlitz County Prosecuting Attorney charged appellant Richard Janssen with two counts of first degree assault, unlawful possession of a firearm, possession of an unlawful firearm, two counts of harassment, and custodial assault. CP 32-35. Janssen entered guilty pleas to the weapons charges, the harassment charges, and the custodial assault; the first degree assault charges proceeded to jury trial before the Honorable Michael Evans. CP 91-100. The jury returned a guilty verdict

on count I and convicted Janssen of the lesser offense of second degree assault on count II. It found that Janssen was armed with a firearm on both counts. CP 192-99. The court found Janssen was a persistent offender and sentenced him to life in prison without the possibility of early release. CP 200, 202. Janssen filed this timely appeal. CP 208.

2. Substantive Facts

Richard Janssen was serving a community custody sentence in January 2011, and he was required to check in with his Community Corrections officer, Eric Morgan, on a monthly basis. 1RP¹ 93. Although he had kept his previous appointments and was always friendly and presentable, Janssen missed his appointment on January 19, 2011. 1RP 94, 108. A warrant was issued for his arrest. 1RP 94.

On February 10, 2011, Morgan and his partner, Tracy Peters, were in the community conducting home visits and looking for offenders with outstanding warrants. 1RP 96-97, 110-11. They spotted Janssen while driving and made eye contact with him. 1RP 97-98, 112. Morgan made a U-turn and pulled up behind Janssen, intending to arrest him. 1RP 99. Before either officer could get out of the car, however, Janssen pulled a shotgun from under his coat and fired in their direction. 1RP 100, 108,

¹ The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—3/29/12, 4/5/12, 4/9- 10/12; 2RP—4/10/12 (part B); 3RP—4/11/12, 4/13/12.

113-14. A pellet of birdshot hit the hood of their car, chipping the paint. 1RP 101; 2RP 177, 251.

Morgan and Peters ducked under the dashboard of the car, and Morgan put the car in reverse while Peters radioed for assistance. 1RP 102, 114. Janssen fired a second time, and a pellet of birdshot cracked the driver's side windshield. 1RP 102; 2RP 251. Janssen then turned and ran off. 1RP 103, 115.

Residents in the area heard gunshots and looked outside. 1RP 122, 130. They saw Janssen with a shotgun and saw him run between two houses toward an alley. 1RP 122-24, 130-31, 134. Others saw Janssen run down the alley holding a shotgun. 138, 143. He was then seen trying to enter through the back door of a house. He tried to shoot at the door, but the gun was jammed, so he threw it under the house. 1RP 147.

Longview police officers responded to the area and saw Janssen running into the front yard of a residence. He held nothing in his hands. 2RP 160, 188, 190. Officer Shawn Close yelled for Janssen to stop and put his hands in the air. Janssen put his hands up but then began backing away in the direction he had come. 2RP 161, 190. When Janssen again approached the front yard, Close ordered him to stop and get on the ground, and Janssen complied. 2RP 162, 191-92. Officer Terry Reece put his knee on Janssen's shoulder to pin him to the ground, placed handcuffs

on Janssen, and searched him for weapons, finding none. 2RP 163-64. When Reece informed Janssen of his rights, Janssen invoked them. 1RP 5-6, 15.

Officer Chris Angel helped take Janssen into custody. After Janssen invoked his rights, Angel and other officers walked Janssen to a waiting patrol car. Although Janssen was compliant at first, he became out of control and struggled with Angel, kicking him and breaking his ankle. 1RP 16; 2RP 221.

Officers Close and Reece heard the struggle and ran to the patrol car to help. Close saw Janssen and two officers go to the ground, and he helped hold Janssen down while Reece retrieved a hobble to strap on Janssen's feet and a spit hood for his face. 2RP 176, 193. Janssen said he was White Power and he had friends, and he made threats against the officers and their families. 1RP 11-12, 20; 2RP 194. He also made a comment about shooting at the community corrections officers. 1RP 13, 27; 2RP 194.

Janssen was charged with first degree assault of the corrections officers as well as harassment relating to the threats he made after his arrest. CP 32-35. After a CrR 3.5 hearing in which the court ruled his statements during the struggle were admissible, Janssen pleaded guilty to the harassment charges, two weapons charges, and an unrelated custodial

assault charge. He proceeded to trial on the two charges of first degree assault. CP 91-100; 1RP 55-56, 66. Janssen entered pleas to the non-strike offenses so that his statements about associating with White Power would not be presented at trial. 1RP 80. The parties agreed, however, that Janssen's threats against the officers and their families would still be admissible. 1RP 58-59, 77.

Defense counsel moved in limine to exclude allegations that Janssen kicked Angel during the struggle and broke his ankle. 1RP 73-75. Counsel argued that because Janssen was not charged with assaulting Angel, that evidence was irrelevant. The only charges before the jury were the assaults against the corrections officers, and the fact that he later kicked another officer during his arrest did not establish any element of the charged offenses. 1RP 74-75. The State responded that Janssen's demeanor toward the arresting officers was relevant as circumstantial evidence that he acted with intent to inflict great bodily harm when he fired a shotgun at the corrections officers. 1RP 75. The court excluded evidence that Angel's ankle was broken but ruled that evidence Janssen kicked Angel had some relevance. 1RP 78.

The State argued in closing that Janssen's words and conduct toward the arresting officers left no doubt as to what his intent was when he fired the gun at the corrections officers. 3RP 357. Defense counsel

countered that the evidence demonstrated Janssen's intent to avoid arrest, and his conduct toward the arresting officers showed only how angry he was at being arrested, not his earlier intent in firing the gun. 3RP 361-62.

C. ARGUMENT

THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT AND HIGHLY INFLAMMATORY EVIDENCE OF JANSSEN'S POST-ARREST ASSAULT ON THE ARRESTING OFFICER.

Prior to trial, defense counsel moved to exclude evidence that, as he was taken into custody, Janssen kicked one of the arresting officers. The court denied the motion, finding the evidence had some relevance to the charge that Janssen assaulted the corrections officers with a shotgun. Because evidence of Janssen's demeanor on arrest was not only irrelevant but also highly prejudicial, the court erred in admitting it.

Evidence must be relevant to be admissible. ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. "The term 'unfair prejudice' as it is used in Rule 403 usually refers to prejudice that results from evidence that is more likely to cause an emotional

response than a rational decision by the jury.” Lockwood v. AC & S, 109 Wn.2d 235, 257, 744 P.2d 605 (1987).

A trial court’s decision as to the admissibility of evidence is reviewed for an abuse of discretion. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

In Perrett, the defendant was arrested for second degree assault with a deadly weapon after he pointed a shotgun at a tenant. 86 Wn. App. at 314. Police arrested the defendant and, after advising him of his Miranda rights, asked him to produce the shotgun he used. Perrett refused, saying the last time the sheriffs took his guns, he did not get them back. Id. at 315. Perrett moved to exclude this statement, but the trial court admitted it, explaining that the jury needed to understand the totality of the circumstances to judge Perrett’s demeanor on arrest. Id. at 319.

On appeal, this Court held that admission of the post-arrest statement was an abuse of discretion because Perrett’s demeanor on arrest was not relevant to any element of the crime charged. Moreover, the statement was unfairly prejudicial, as it raised the inference that he had

committed a prior crime with a gun and thus it was more likely he committed the charged offense. Id. at 319-20.

The facts are similar here. Like Perrett, Janssen was charged with assaulting someone with a shotgun, and the trial court admitted evidence of his post-arrest demeanor. As in Perrett, that evidence was not relevant to any element of the charged offense.

The issue in this case was whether Janssen intended to inflict great bodily harm when he assaulted the corrections officers with a shotgun. See RCW 9A.36.011(a)². His post-arrest demeanor, including his assault on Angel, does not make this element more or less likely. The jury could only speculate that Janssen's post-arrest attitude mirrored his attitude at the time of the alleged assaults. Moreover, intervening events undercut any connection between the two events. The evidence showed that Janssen ran from the scene of the shooting through a series of yards and alleys until he was finally apprehended by police officers. He was then cooperative when taken into custody and silent when read his rights. It was only after being moved to the patrol car that Janssen began struggling with the arresting officers. There was no evidence that his demeanor at that point had anything to do with his earlier intent toward the corrections

² "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm...[a]ssaults another with a firearm...." RCW 9A.36.011(a).

officers. Thus, as in Perrett, Janssen's post-arrest demeanor was irrelevant to the charged offense, and the trial court erred in admitting the evidence.

The only relevance that evidence of Janssen's assault on the arresting officer could have had was to establish Janssen's propensity to commit similar acts. The evidence rules prohibit the use of other crimes, wrongs, or acts to prove the defendant had the propensity to commit the charged offense, however. ER 404(b).

Other conduct evidence may be admitted to establish the defendant's intent in committing the charged offense, but only if the court first (1) finds by a preponderance of the evidence that the misconduct occurred, (2) identifies the purpose for which the evidence is sought to be introduced, (3) determines whether the evidence is relevant to prove an element of the crime charged, and (4) weighs the probative value against the prejudicial effect. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). In doubtful cases, evidence of the defendant's other crimes, wrongs, or acts should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, the court did not explicitly conduct this required analysis on the record. Instead, after summarizing the State's argument that Janssen's post-arrest conduct was circumstantial evidence of his intent to inflict great bodily harm, the court asked how much time had passed between the

charged assault and the arrest. When the State responded that Janssen had been apprehended within ten minutes, the court ruled that Janssen's post-arrest kicking of the officers would be admitted because it had some relevance. 1RP 77-78. The court gave no indication that it weighed the probative value of this evidence against its prejudicial effect, however.

As discussed above, the trial court erroneously concluded that evidence of Janssen's post-arrest assault on the arresting officer was relevant. Even if the evidence had some relevance, however, its prejudicial impact mandated its exclusion. Because of the court's ruling, the jury heard that Janssen became out of control when he was moved to the patrol car after his arrest. He started kicking and bucking, taking himself, Angel, and another officer to the ground, where he had to be restrained with a hobble to keep him from kicking the officers again. 2RP 167, 193, 200, 206, 221.

While this evidence shed no light on Janssen's earlier intent, it certainly portrayed him in a negative light, as a man prone to injurious conduct. This character evidence invited the jury to render a verdict based on an emotional response rather than a rational decision. See Lockwood, 109 Wn.2d at 257. Thus, any minimal relevance the evidence might have had was outweighed by the unfairly prejudicial effect, and the court abused its discretion in admitting the evidence.

If the only relevance to other acts evidence is to show the defendant's propensity to commit similar acts, admission of the evidence may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). Reversal is required if there is a reasonable probability that the erroneous admission of evidence materially affected the outcome of the case. Id. at 988.

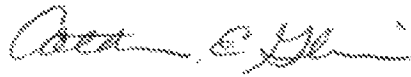
Here, the circumstances of the charged offense suggested that Janssen did not intend to inflict great bodily harm but merely wanted to avoid apprehension. The gun he fired had a shortened barrel, causing the birdshot it was loaded with to disperse more quickly and decreasing its effective range. 2RP 171, 177-78. Moreover, the spent shotgun shells were found 77-89 feet from the location of the corrections officers' car when the shots were fired, and the pellets caused only minor damage to the officers' car. 2RP 246. Given this evidence, there is a reasonable probability the jury would not have found Janssen intended to inflict great bodily harm had it not learned of his violent behavior upon arrest. The court's error in admitting this evidence was not harmless, and Janssen is entitled to a new trial.

D. CONCLUSION

The court abused its discretion and denied Janssen a fair trial by admitting highly prejudicial evidence with no probative value. Janssen is entitled to a new trial.

DATED this 28th day of August, 2012.

Respectfully submitted,



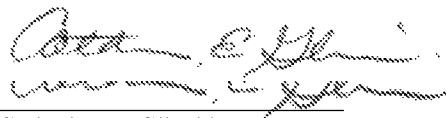
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