

69206-2

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No. 69206-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MAURICE L. JORDAN,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated ER 401 and ER 402 by admitting letters written by Maurice Jordan to his father, when the letters were inflammatory insofar as they were indicative of a strained father-son relationship and sprinkled with profanity, but were entirely irrelevant to any material issue at trial.

2. The trial court violated ER 403 and ER 404(b) by admitting letters written by Maurice Jordan to his father on the erroneous grounds that the allegedly abusive nature of the letters demonstrated consciousness of guilt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence is admissible only if it is relevant and not unfairly prejudicial. ER 401, 402. Over objection, the trial court admitted three letters written by Mr. Jordan to his father, in which he expressed anger and sadness, and used profanity, but he did not discuss details of the case other than to dispute his father's version of events and to insist that his father appear at trial and testify truthfully. Did the trial court abuse its discretion in admitting the letters, even though the letters were merely indicated a dysfunctional father-son relationship, but were entirely irrelevant to any material issue at trial?

2. Evidence of acts other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts unless 1) it is relevant and necessary to prove the crime charged, and 2) its probative value is not outweighed by its potential for prejudice. ER 403, 404(b). Did the trial court abuse its discretion in admitting the inflammatory, profanity-laden letters as evidence of consciousness of guilt, even though the letters did not threaten his father, did not urge his father to commit perjury, or otherwise support an inference that Maurice Jordan had consciousness of guilt of the pending charges?

C. STATEMENT OF THE CASE

Maurice L. Jordan and his friend, Earl Howard, went to Maurice's father's house to use his barbecue to cook food that Mr. Howard purchased with food stamps. 7/17/12 RP 13-14, 62, 125. Maurice<sup>1</sup> and his father, Miller Jordan, had a strained relationship. 7/17/12 RP 23; 7/18/12 RP 79. Therefore, Miller Jordan stayed inside his house while Maurice and Howard barbecued in the backyard. 7/17/12 RP 127; 7/18/12 RP 27.

Maurice and Howard started to quarrel while they were cooking. 7/17/12 127; 7/18/12 RP 35-36; 7/19/12 RP 76-77. When they raised their

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<sup>1</sup>Because Maurice Jordan and his father, Miller Jordan, share the same last name, the defendant will be referred to by his first name only for the sake of clarity. No disrespect is intended.

voices and cursed at each other, Miller Jordan went outside and told them to leave. 7/17/12 RP 129; 7/18/12 28-29; 7/19/12 RP 77. The food was not fully cooked, so Miller Jordan gave Howard \$35 to compensate him for the food. 7/17/12 RP 16, 129-30; 7/18/12 RP 35-36; 7/19/12 RP 79.

Maurice was offended that Howard accepted the money from Miller Jordan when he was a guest at the house and had purchased the food with food stamps. 7/17/12 RP 16-17, 66-67; 7/19/12 RP 78-79. According to Howard, Maurice struck him from behind, wrestled with him, grabbed the money from his hand, and left the area. 7/17/12 RP 17-18, 26-28, 30-31, 32-33, 68, 72-73, 131-33. According to Maurice, the fight was mutual. 7/19/12 RP 80. Miller Jordan heard the disturbance and returned outside where he saw the men grappling and he called the police. 7/17/12 30, 133, 134; 7/18/12 RP 37-38, 44, 47, 127-28. Miller Jordan stated Maurice "was showing off more than anything else" for his ego. 7/18/12 RP 52. Howard suffered a cut over his eyebrow that required four stitches. 7/17/12 27.

The following day, Maurice called Howard and stated either "I thought this was over," or "It's not over with yet." 7/17/12 RP 36, 80, 86. Over the next several days, Maurice left two messages on Howard's cellular telephone, and stated, "I don't know why you called the police on

me; you caused me a lot of grief, now we'll see what happens," and "You better keep your mouth shut and be quiet." 7/17/12 RP 38, 123.

Maurice was charged with robbery in the second degree, assault in the fourth degree, and intimidating a witness and he represented himself at trial before a jury. CP 438-39. The State introduced three letters written by Maurice to his father. 7/11/12 RP 66-70. Miller Jordan gave the letters to the prosecuting attorney "[b]ecause they were insulting type of things, things you wouldn't say to your father." 7/17/12 RP 137. In the letters, Maurice used some profanity and expressed his disagreement with his father's version of the incident, but he encouraged his father to appear at trial and to tell the truth. Ex. 9, 10, 11. Over defense objections, the court admitted the letters as relevant to establish Maurice's consciousness of guilt. 7/11/12 RP 70-72.

Maurice was convicted of robbery in the second degree and assault in the fourth degree. CP 467, 468. He was acquitted of intimidating a witness. CP 469. At sentencing, the court ruled the assault merged into the robbery and imposed a standard range sentence. CP 471, 473.



D. ARGUMENT

**The trial court abused its discretion in admitting three letters written by Maurice Jordan to his father that were irrelevant and inflammatory, but had no bearing on his consciousness of guilt.**

While the charges were pending against him, Maurice sent three letters to his father who observed the latter part of the altercation between Maurice and Howard and was a witness for the State. The first letter was a general reflection on fate and chance, and did not refer to the pending case at all. Ex. 9. In the second letter, Maurice used profanity to express his anger and generalized disagreement with his father's witness statement and urged his father to appear at trial and testify truthfully. Ex. 10. In the third letter, Maurice used profanity to express his anger that his father talked to other people about the case, when he denied doing so. Ex. 11.

1. The letters were irrelevant to any fact of consequence but were inflammatory insofar as the letters were indicative of a strained father-son relationship and were sprinkled with profanity.

Only relevant evidence is admissible. ER 402. "Relevant evidence' means 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. Thus, "relevant" evidence must 1) tend to prove or disprove a fact, and

2) that fact must be of consequence to the outcome of the case, including any fact that provides direct or circumstantial evidence of any element of the charge or the defense. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (citing *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

The letters were irrelevant to any fact of consequence. None of the letters discuss details of the pending case at all, other than Mr. Jordan's characterization of Miller Jordan's version of the incident as "a fucking lie." As Miller Jordan noted, the letters "didn't mean anything, because they didn't even make sense." 7/18/12 RP 16. On the other hand, Miller Jordan also noted the inflammatory nature of the letters, in that "they were inappropriate to write – a son writing his father that." 7/18/12 RP 16. Although the letters amply demonstrated the difficult nature of the father-son relationship, they had no bearing whatsoever on whether Mr. Jordan committed robbery, assault, and intimidation of the alleged victim. Accordingly, the letters were inadmissible pursuant to ER 401 and ER 402.

2. The letters did not establish consciousness of guilt.

Evidence of a defendant's other conduct or character is not admissible unless it is relevant to the crime charged and its probative value is substantially outweighed by its potential for unfair prejudice. ER 403;<sup>2</sup> ER 404(b);<sup>3</sup> *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. LeFever*, 102 Wn.2d 777, 782, 690 P.2d 574 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

A trial court's evidentiary ruling is reviewed for abuse of discretion. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 169, 288 P.3d 1140 (2012). "An abuse of discretion exists when a trial court's exercise

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<sup>2</sup> ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>3</sup> 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.

of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (internal quotations omitted).

The trial court admitted the letters on the grounds “consciousness of guilt [is] shown by sending abusive or threatening letters to a potential witness.” 7/11/12 RP 71.

In many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one if forced to wonder whether the evidence is not directed to punish the ‘wicked’ generally rather than resolving the issue of guilt of the offense charged.

C. McCormick, *Evidence* (4<sup>th</sup> ed. 1992) p. 182. As this Court has cautioned in the in the context of flight as evidence of guilt:

[W]hile the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.

*State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001).

Here, the mere fact that Maurice wrote an allegedly abusive letter to his father, a potential witness against him, does not support a substantial and real inference of consciousness of guilt. An actual threat to a potential State witness, such as an offer to bribe the witness or an effort to prevent the witness from testifying or to secure false testimony, may be evidence of consciousness of guilt. See 5 Karl B. Tegland, *Washington Practice*:

*Evidence* § 404.29 (5<sup>th</sup> ed. 2007). However, a poor relationship with a witness as demonstrated by profanity-laden letters and a consciousness of pending charges, unaccompanied by any threats, are not synonymous with consciousness of guilt of those charges. The trial court's decision to the contrary was based on untenable grounds or reasons.

The trial court relied on *State v. Moran*, in which the court admitted a letter written by the defendant to a friend, while the defendant was incarcerated pending trial for first degree manslaughter. 119 Wn. App. 197, 199, 217-18, 81 P.3d 122 (2003). In the letter, the defendant asked the friend to speak with a witness who changed her mind about giving favorable testimony. In part, the letter read, "Jesse is being a bitch. she's telling my attorney that she thinks that I killed Steve now. Can you talk to the bitch. In her statement to the cop's she was behind me all the way now she's being a cunt." 119 Wn. App. at 217-18 (spelling and punctuation errors in original). The letter was signed, "Your homie Jeramie." *Id.* at 218. The trial court ruled the letter was probative because it "shows the defendant's propensity to try to influence people so that they will be cooperative and more favorable to him." *Id.* On appeal, the court agreed on the grounds the letter could "be reasonably interpreted as a request that [the friend] try to get [the witness] to change her mind about Moran's guilt and return to her initial favorable statement." *Id.* at 219.

The *Moran* court relied on *State v. McGhee*, in which the State introduced evidence that the defendant accused a State witness of signing a statement against him, called him a “snitch,” and drew his hand across his throat in a threatening manner. 57 Wn. App. 457, 459, 788 P.2d 603 (1990). On appeal, the court ruled the evidence was admissible pursuant to ER 404(b), on the grounds that evidence of threats against a witness was probative of guilty knowledge. *Id.* at 460-62. By contrast here, however, Maurice did not threaten his father at all. He simply used profane and pejorative language to characterize his father’s witness statement as a lie.

The *Moran* court also relied on *State v. Kosanke*, in which the State introduced evidence that the defendant and his wife repeatedly attempted to persuade the parents of a child witness to leave the state with the witness so she would not testify against him. 23 Wn.2d 211, 215, 160 P.2d 541 (1945). On appeal, the Court ruled the evidence was properly admitted, on the grounds that conduct intended to prevent a witness from appearing at trial was relevant and material to consciousness of guilt. *Id.* at 215-17. Here again, however, Maurice expressed his disagreement with his father’s version of events, but he never threatened his father or attempted to prevent his father from testifying. In fact, although Maurice characterized his father’s version of events as “a fucking lie,” he

encouraged his father to appear at trial, and he wrote “I just want you to show up and tell the truth.” Ex. 10 at 2.

*Moran* and the cases cited therein are inapposite and the trial court’s reliance on those cases was misplaced.

3. The erroneous admission of the letters was not harmless and reversal is required.

Improper admission of evidence constitutes reversible error 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). It is reasonably probable here that the outcome of Maurice’s trial would have been materially affected had the letters not been admitted.

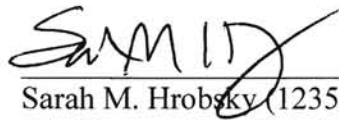
First, the jury’s passions were undoubtedly inflamed by the obviously dysfunctional relationship between Maurice and his father and by the use of profanity in letters to a parent. Second, the State repeatedly referred to the letters in closing argument, and quoted the term “tragedy” from one letter at least six times. 7/19/12 RP 113, 114, 117-18, 120, 127. Because the admission of the irrelevant but inflammatory letters prejudiced Maurice, his conviction should be reversed and the matter remanded for a new trial.

E. CONCLUSION

The erroneous admission of the irrelevant but inflammatory letters materially affected the outcome of Maurice's trial. For the foregoing reasons, Maurice respectfully requests this Court reverse his conviction for robbery in the second degree and remand for a new trial.

DATED this 2<sup>nd</sup> day of December 2013.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69206-2-I
v.	)	
	)	
MAURICE JORDAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF DECEMBER, 2013, 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"/> MAURICE JORDAN 902718 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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