71622-1

71622-1

NO. 71622-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AIGALELEI PUA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY E. ROBERTS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Constitutional Provisions

Federal:

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES

1. Under the invited error doctrine, a defendant may not create an error at trial and then complain about it on appeal. Pua agreed to the interrogatory that the trial court submitted to the jury to clarify the jury's verdicts on count 2. On appeal, Pua now claims that the interrogatory improperly coerced the jury. Is Pua's claim precluded from review because he agreed to the interrogatory at trial?

2. To obtain appellate relief from an error not objected to at trial, a defendant must show manifest constitutional error resulting in actual prejudice. The jury returned a verdict of "guilty" on second-degree assault and also circled "not guilty" on the lesser-included verdict form for that count. The trial court had the jury complete an interrogatory to clarify its verdict, to which Pua's counsel agreed. The jury returned five minutes later again finding Pua guilty of second-degree assault. Has Pua failed to show a manifest constitutional error resulting in actual prejudice to him?

3. To prevail on a claim of improper influence of a verdict, a defendant must establish a reasonably substantial possibility that the trial court improperly influenced the verdict. After the jury found Pua guilty of second-degree assault and completed

the lesser-included form for the same count, the trial court had the jury complete a neutrally-worded interrogatory. The jury answered the interrogatory "yes," again finding Pua guilty of second-degree assault. Has Pua failed to show that the trial court's interrogatory improperly influenced the verdict?

4. An error in admitting ER 404(b) evidence may be harmless for two reasons: 1) if the record is sufficiently complete for the appellate court to conclude that the trial court would have admitted the evidence if it had made the proper findings and balanced the probative value versus any prejudice, or 2) if the properly admitted evidence is such that the outcome of the trial would have been the same absent the error. The trial court did not find that an incident where Pua had driven a stolen car was ER 404(b) evidence, yet found the evidence relevant to Pua's motive for the assault and implicitly balanced the probative value versus prejudicial effect. Pua referenced the prior incident immediately before assaulting Phair, making it res gestae evidence. Was the trial court's error harmless because the record is sufficiently complete to show that it would have admitted the evidence if it had made the proper ER 404(b) findings, and because the evidence did not affect the verdict?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

On July 4, 2013, Joshua Phair went to Darcy Underwood's apartment to provide heroin to another friend. RP[1] 270-71; CP 1. Aigalelei Pua let Phair into the apartment and all appeared normal. RP 279. Phair had known Pua about two years and saw him on a regular basis. RP 254-56. But, Phair had not seen Pua for several months because Pua was upset over an incident when he had given Phair a ride. RP 255-57.

In that incident, the vehicle Pua was driving ran out of gas on I-5 and Pua became agitated. RP 255-56. He lifted a rag covering the ignition, showing Phair that the vehicle was stolen. RP 257. Pua gave Phair $5 and a gas can, and asked Phair to get gas. RP 259. After seeing the ignition, Phair decided that he would not return to the likely-stolen vehicle. RP 257-59. He took the $5, but did not return. RP 259. Later, Pua called Phair, upset that Phair had left him stranded. RP 262. Pua said that he would "tax" Phair next time they saw each other. RP 262. Phair understood that to

[1] The verbatim report of proceedings consists of five volumes consecutively paginated. This brief refers to the record as "RP" and by page number.

mean that Pua intended to "take everything [Phair] had. . . ." RP 262-63.

On July 4, at Underwood's apartment, Pua had Phair sit down with him at the dining room table. RP 279-80. He introduced Phair to another man, "Status." RP 280. Phair also saw a male he knew as "John" near the front door. RP 281. Pua brought up how Phair had left him stranded and told Phair to empty his pockets. RP 294-96. Phair decided to escape through the bedroom window. RP 298-99. He ran for the bedroom, but the window was blocked. RP 300-01. He fell back on the bed and Pua, Status, and John attacked him. RP 302.

Pua assaulted Phair with a bat 10-15 times on Phair's upper thigh. RP 309. Darcy Underwood and her son Pauly, who arrived during the attack, joined in. RP 303, 313. Pua and the others had Phair strip down to his boxer shorts and went through his pockets. RP 312-15. They divvied up the approximately $400 cash, half-ounce of heroin, wallet, phone, and other items. RP 307, 315. Pua told Phair that he "could have done it the easy way and just gave [sic] up [his] stuff and. . . this wouldn't have had to happen...." RP 315. He also said it would be worse for Phair if he called police. RP 322-23.

Phair's most severe injury was to his left thigh, where Pua had struck him with the bat. RP 308-09, 347-48. His thigh was deeply bruised and remains permanently indented. RP 347-48, 357, 364. He also had two black eyes, bled from his ear, and had bruises all over his body. RP 347-48, 356-59, 361-64.

Concerned about the repercussions, Phair did not contact police until the next day. RP 344. Although Phair did not know Status' and John's true names, King County Sheriff's Detective Scott Tompkins identified them as Harry Tootoo and Ioane Pua respectively.[2] RP 621-22.

2. JURY INSTRUCTIONS.

The State charged Pua, John, Status, Underwood, and Witherbee[3] with first-degree robbery, second-degree assault, and intimidating a witness. CP 1-2. The Honorable Mary Roberts presided over the joint jury trial of Pua and John.[4] RP 35-37; CP 68. The State added deadly weapon enhancements to each count prior to trial. RP 36; CP 18-19. For each defendant, the jury

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[2] Consistent with the testimony at trial and to avoid confusion between Aigalelei Pua and Ioane Pua, this brief will refer to Aigalelei Pua as "Pua," Ioane Pua as "John," and Harry Tootoo as "Status." No disrespect is intended.

[3] Underwood's son's true name was Paul Witherbee. RP 621; CP 1.

[4] At the time of trial, Underwood and Status had pled guilty and Witherbee was on warrant status. RP 20-34; Supp. CP __ (sub no. 33, State's Trial Memorandum at 3, filed January 14, 2014).

considered each charged count as well as the lesser-included charges of second-degree robbery, third-degree theft, and fourth-degree assault, and deadly weapon enhancements for each felony. RP 783-86; CP 26-28, 30, 95, 97, 99, 102-03,110, 112-13, 121. The jury received twenty total verdict and special verdict forms—ten for each defendant. RP 782-86; CP 21-30.

The jury convicted Pua of second-degree assault, with the deadly weapon enhancement, and third-degree theft. RP 783-84; CP 23-24, 28. The jury convicted John of fourth-degree assault and third-degree theft. RP 784-85. The jury acquitted both defendants of first-degree robbery, second-degree robbery, and intimidating a witness. RP 782-85; CP 21-22, 29.

The jury answered each special verdict form, even where it had acquitted the defendant of that charge. RP 783-86; CP 26-27, 30. For Pua, the jury also circled "not guilty" on the lesser-included form for count 2 despite finding Pua guilty of the greater charge, second-degree assault.[5] RP 783; CP 24-25.

The trial court polled the jury and the jurors confirmed that these were their unanimous verdicts. RP 786-89. The trial court

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[5] Due to a scrivener's error, the lesser-included charge was listed as third-degree assault rather than fourth-degree. RP 790-91; CP 25. Pua does not assign error to this. Br. of App. at 5, n.3.

excused the jury and discussed with counsel the verdict forms for Pua on count 2. RP 790-91. All agreed to excuse the jury until the next court day, Monday, to determine how to address the issue. RP 791-92, 795.

The trial court reconvened on Monday morning with counsel and addressed an interrogatory. RP 795. Pua's counsel agreed with the interrogatory, but proposed adding language that the lesser-included form had listed the charge as third-degree assault rather than fourth-degree due to a scrivener's error. RP 795. The court declined to add the language and Pua's counsel deferred to the court. RP 795-96. The jury reconvened at 1:30 p.m. and the court read the interrogatory, which stated:

> It is not the Court's intention to comment on your verdicts. There appears to be some ambiguity in the verdict that requires clarification. Please answer the following:
>
> Do you find the defendant, Aigaleilei [sic] Pua, guilty of assault in the second degree? Yes or No (circle one).
>
> If your answer is yes, stop here. Do not complete the remainder of this interrogatory. Only if your answer is no, then please answer the following:
>
> Do you find the defendant, Aigaleilei [sic] Pua, guilty of the lesser offense of assault in the fourth degree? Yes or No (circle one).

RP 801-02; CP 20. The trial court provided the jury with the interrogatory, original instructions and verdict forms. RP 797; CP 20-30, 68-126. The jury returned within five minutes, having answered the first question of the interrogatory "yes." RP 801-02. The trial court again polled the jurors and each confirmed that the verdict was unanimous. RP 802-04.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY HAD THE JURY COMPLETE AN INTERROGATORY TO CLARIFY ITS VERDICT ON COUNT 2.

Pua contends that his convictions must be reversed because the trial court implicitly coerced the jury by its interrogatory to clarify the verdict on count 2, second-degree assault. Pua's claim fails. Any error was invited by Pua. Even if this was not invited error, Pua did not raise it below, and fails to show manifest constitutional error that actually prejudiced his rights at trial. The jury declared its verdict of guilty on second-degree assault and confirmed that same verdict in the interrogatory. The trial court did not improperly influence the verdict.

a. Any Error Was Invited.

A defendant may not set up an error in the trial court and then complain of it on appeal. State v. Momah, 167 Wn.2d 140,

153, 217 P.3d 321 (2009). This well-established doctrine applies to jury instructions. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). It applies equally in cases where the defendant agreed to the instruction or procedure rather than proposing it himself. Momah, 167 Wn.2d at 155 (applying invited error doctrine in finding that courtroom closure during voir dire was not reversible error where the defendant affirmatively assented to and actively participated in the closure); State v. Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (invited error doctrine applied where all parties, including defendant, agreed to instruction).

Here, Pua agreed to the interrogatory to clarify the jury's verdicts on count 2.[6] 5RP 795. The only suggestion Pua's counsel made was to clarify that the original lesser-included offense instruction for count 2 contained a scrivener's error. 5RP 795.

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[6] After the trial court first addressed counsel for the State, the court inquired of Pua's counsel and he responded:

> Your Honor. It occurs to me that there were two separate issues. One was the ambiguity that arose from the verdict-the-the jury filling in Verdict Form B2 saying not guilty and then, of course, the-the scrivener's error denoting Assault III instead of Assault IV. *And I am largely in favor of the proposed Court's interrogatory to the jury*, but I wanted to throw it out there that there may be a need to clarify that there were two issues. And I've jotted down here that in the-after the word "clarification" in the second sentence, we could insert, "Additionally, Verdict Form B2 for Aigelelei Pua contained a typographical error." And I will defer to-to the Court whether that would be appropriate or not."

5RP 795 (emphasis added).

When the trial court rejected that suggestion, Pua's counsel deferred to the court. 5RP 796. Pua's counsel also asked that when the interrogatory was submitted to the jury that the jury be provided the full set of jury instructions. 5RP 796. The trial court agreed and did so. 5RP 796-95, 799-800. Lastly, Pua agreed to the trial court's procedure and instruction to the jury regarding the interrogatory. 5RP 796-97.

Moreover, after the jury first delivered its verdicts, Pua agreed to the jury's release until the next court day to allow the parties to determine how best to address the issue of the verdicts on count 2.[7] 5RP 790-91. Pua now claims that the interrogatory and release of the jury improperly coerced the jury to return a verdict. However, Pua invited any error by his agreement and this Court is precluded from addressing these claims.

b. Pua Waived Any Error.

The appellate court reviews a challenge to jury instructions *de novo*. State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007). A defendant must generally make a "*timely* and

[7] After the trial court iniatially read the jury's verdicts and recounted the two issues outside the presence of the jury, Pua's counsel responded, "I'm going to have to cogitate on what to do." 5RP 791. The court agreed and then confirmed that counsel for Pua and the State could return on Monday, the next court day. 5RP 791.

well-stated" objection to a jury instruction so that the trial court may correct any errors. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (emphasis in original); CrR 6.15(c). The appellate court may refuse to review any claim of error not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

As an exception to this rule, manifest constitutional errors may be challenged for the first time on appeal if a defendant demonstrates that (1) the error is manifest, and (2) the error is truly of constitutional dimension. RAP 2.5(a); O'Hara, 167 Wn.2d at 98. If an error is constitutional, it is manifest only if the defendant shows *actual* prejudice—meaning it is so obvious on the record that it warrants review. O'Hara, 167 Wn.2d at 99. The analysis "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). A trial court's intervention that improperly coerced a verdict is manifest constitutional error. State v. Ford, 171 Wn.2d 185, 188, 250 P.3d 97 (2011).

Pua's trial counsel agreed to the trial court's interrogatory. RP 795-96. Challenging the interrogatory for the first time on appeal, Pua fails to show manifest constitutional error that caused

him actual prejudice because the interrogatory did not improperly influence the verdict.

c. The Trial Court Did Not Improperly Coerce The Jury.

The Sixth Amendment and article I, sections 21 and 22 of the Washington Constitution guarantee a defendant the right to a jury trial in criminal cases. U.S. Const. amend. VI; art. I, §§ 21, 22. The right to a jury trial "embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978).

To prevail on a claim of improper judicial influence of a verdict, a defendant must establish a *reasonably substantial possibility* that the verdict was improperly influenced by the intervention. State v. Watkins, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983). This requires more than a mere tendency to influence or speculation. Id. at 177-78. The reviewing court considers all the circumstances of the trial court's intervention. Id. at 177.

Criminal Rule 6.15(f) embodies the broader principle that a jury must be free from judicial interference in reaching its verdict. Id. at 176. CrR 6.15(f)(2) states, "After jury deliberations have

begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."

The Washington Supreme Court has held that a trial court improperly influenced a verdict where it inquired into the history of a deliberating jury's vote count and questioned each juror as to the probability of reaching a verdict within thirty minutes. Boogaard, 90 Wn.2d at 736-38. The inquiry into the vote count alone is grounds for reversal. Id. at 738.

However, in Watkins, the trial court did not improperly influence the jury when it provided a neutrally-worded supplemental instruction clarifying an ambiguity in the verdict forms. 99 Wn.2d at 170, 178. The supplemental instruction clarified that the jury need not agree on acquittal of the greater charge prior to considering the lesser. Id. at 170, 178. In fact, Washington law has long recognized a trial court's authority to have a jury correct or clarify mistakes on the face of the verdict until the verdict has been received and filed. See e.g. State v. Badda, 68 Wn.2d 50, 60-62, 411 P.2d 411 (1966) (holding that trial court properly sent the jury back with corrected verdict forms when it discovered in reading

the initial verdicts that the forms listed the incorrect crime); CrR 6.16(a)(3) ("If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.").

Here, the trial court's neutrally-worded interrogatory did not improperly influence the jury's verdict. The trial court had the jury complete the interrogatory to clarify whether it was finding Pua "guilty" of count 2, second-degree assault, as circled on the verdict form, or "not guilty," as was circled on the lesser-included verdict form. CP 24-25. The interrogatory clarified that the jury was not to return a verdict on the lesser charge if it returned a guilty verdict on the greater. CP 20.

The jury's return with the completed interrogatory within 5 minutes supports the absolute lack of any improper influence or coercion by the trial court. RP 799-802; CP 20. The jury returned the same verdict—guilty of second-degree assault—but, this time, did not return a verdict as to the lesser-included offense. RP 799-802; CP 20.

Given the many verdict forms, it is reasonable that the jury simply misinterpreted the jury instructions to require a response on each form. The jury considered a total of *twenty verdict forms* for

Pua and his codefendant and the jury instructions totaled 58 pages without the verdict forms. RP 782-86; CP 21-30, 68-126. The jury answered each verdict and special verdict form, even answering the special verdict forms for the counts of which it had acquitted Pua or his codefendant. RP 782-86, 789-91; CP 26-27, 30.

Pua attempts to show that the trial court implicitly coerced the jury because the interrogatory directed the jury to write a response. This claim fails. The Supreme Court in Ford rejected a similar argument and found that the instruction to fill in a verdict form was not coercive because it mirrored the original instructions. 171 Wn.2d at 192.

Here, the interrogatory mirrored the original instructions and verdict forms. The concluding instruction informed the jury that, for each verdict form, "you must fill in the blank provided in Verdict Form . . . the words 'not guilty' or 'guilty' according to the decision you reach." CP 124-26. Each verdict form also included the instruction, "write in 'not guilty' or 'guilty.'" CP 124. The trial court's interrogatory restated these instructions by directing the jury to "please answer the following," and then to circle "Yes" or "No." CP 20.

Nor was the jury deprived of the "third option" available to them—unable to reach a verdict. See Br. of App. at 11. The verdict forms that the jury returned made it clear that they had reached a verdict—the question was *which* verdict. Moreover, the jury was given the original jury instructions with the interrogatory, which included the instruction that if they were unable to reach a verdict that they were to leave the verdict form blank. CP 124-26.

Jurors are presumed to follow the instructions provided. See e.g. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). This presumption is for *all* instructions provided. Ford, 171 Wn.2d at 192. The jurors were instructed that they should not "change your mind just for the purpose of reaching a verdict." CP 73. The jury confirmed that their verdicts were their unanimous verdicts, both after delivering their original verdicts and again after answering the interrogatory. RP 782, 786-89, 802-04.

In addition, the fact that the trial court received the jury's verdicts, but then excused them until the next court day did not improperly coerce the jury. RP 793. In having the jury complete the interrogatory, the trial court never implied that it would keep the jury until they had reached a verdict. The jury had already reached a verdict.

Pua cannot demonstrate a *reasonably substantial possibility* that the trial court's interrogatory improperly influenced the verdict. He cannot show manifest constitutional error that actually prejudiced him because the record does not show that the trial court's intervention influenced the verdict. Pua's conviction for second-degree assault should be affirmed.

2. THE TRIAL COURT PROPERLY ADMITTED RELEVANT EVIDENCE OF THE CIRCUMSTANCES OF PUA'S PREVIOUS ARGUMENT WITH THE VICTIM.

Pua asserts that the trial court erred by admitting evidence that he had been driving a stolen car when Phair left him stranded on the side of the freeway. This claim fails. This evidence was relevant and admissible as proof of Pua's motive in assaulting Phair and taking his property, and as res gestae. The trial court's error in failing to make the ER 404(b) findings on the record is harmless because the record is sufficient for review, and the trial's result would have been the same absent this evidence.

The appellate court reviews a trial court's interpretation of an evidentiary rule *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court correctly interpreted the rule,

then its decision to admit evidence is reviewed for an abuse of discretion. Id.

ER 404(b) prohibits the admission of "other crimes, wrongs, or acts. . . to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other purposes, such as to show motive or intent. ER 404(b). The list of other purposes in ER 404(b) is illustrative only. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Prior to admitting such evidence, the trial court must: 1) find by a preponderance of the evidence that the prior act occurred; 2) identify the purpose for which the evidence is offered; 3) determine whether the evidence is relevant to prove an element of the charged crime; and 4) weigh the probative value of the evidence against its prejudicial effect. Id. The analysis should be conducted on the record. Foxhoven, 161 Wn.2d at 175.

However, a trial court's failure to conduct the balancing on the record may be harmless in two circumstances. First, it is harmless if the record is sufficiently complete for the appellate court to determine that the trial court would have admitted the evidence if it had performed the balancing. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1998); State v. Gogolin, 45 Wn. App.

640, 645, 727 P.2d 683 (1986). Second, the error is harmless if, considering all the properly admitted evidence, the trial's outcome would have been the same absent the error. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002); see also Carleton, 82 Wn. App. at 686-87 (finding harmless error in erroneous admission of prior act evidence).

Here, the trial court found the evidence relevant, but did not conclude that it fell under ER 404(b). 1RP 103-04. However, the trial court essentially conducted an analysis of the evidence under ER 404(b), and the evidence was of minor significance to the trial as a whole. Thus, the error here is harmless for both reasons: 1) the record is sufficiently complete for this Court to find that the trial court would have admitted the evidence if it had conducted the ER 404(b) analysis, and 2) the error did not affect the trial's outcome.

First, the record shows that the trial court would have admitted the evidence that Phair believed Pua was driving a stolen car during the prior incident as relevant evidence under the res gestae and motive exceptions to ER 404(b).

Res gestae evidence is evidence that is "admissible to complete the story of the crime by establishing the immediate time

and place of its occurrence." State v. Brown , 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997). Although not listed under ER 404(b), res gestae is treated as another exception to that rule and is subject to the same analysis. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

Pua's reference to the prior incident *immediately before* the charged crimes of second-degree assault and first-degree robbery made the prior incident an inseparable part of the crime charged. Immediately prior to assaulting Phair with a bat, Pua explained that he was upset because Phair did not return with the gas and left Pua stranded. RP 293-94. Pua assaulted Phair when Phair did not empty his pockets as Pua requested. RP 294-314.

The full circumstances of the prior incident were relevant, including that Pua showed Phair the ignition, indicating that the car was stolen. That additional fact, the only fact to which Pua objected at trial and assigns error to on appeal, was critical to understand why Pua was so upset with Phair. Br. of App. at 14. Pua was upset not simply because Phair had left him on the freeway, but because Phair had left him in a stolen car.

Motive is another purpose for which prior acts evidence may be admitted. ER 404(b). As the Washington Supreme Court explained: "'Motive' is said to be the moving course, the impulse, the desire that induces criminal action on part of the accused. . . ." State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (quoting Black's Law Dictionary 1014 (6th rev. ed. 1990)). Motive evidence can include "evidence of quarrels and ill-feeling. . .if the evidence is of consequence to the action." State v. Stenson, 132 Wn.2d 668, 702-03, 940 P.2d 1239 (1997).

Here, the prior incident was relevant to motive because it established the impetus for Pua to assault Phair and take Phair's property. The fact that Phair left Pua stranded in a *stolen* car was necessary to show the degree of Pua's anger toward Phair. It explained why Pua held the grudge for several months, phoned Phair to inform him that he was upset and planned to "tax" Phair next time he saw him, and then beat Phair with a baseball bat severely enough to leave Phair with a permanent indentation on his thigh. RP 260-63.

While the trial court incorrectly concluded that the evidence did not fall under ER 404(b), it also adopted the deputy prosecutor's reasoning that the incident was relevant because it showed Pua's motive, which was essentially an analysis of the relevance and purpose of the evidence under ER 404(b). The trial court also responded to Pua's counsel's argument that the evidence was more prejudicial than probative. RP 104-05. Implicit in the trial court's response to counsel was its balancing of the probative value versus the prejudicial effect of the evidence. Considering this entire record and the relevance of the prior incident, the trial court's error in failing to conduct the ER 404(b) balancing explicitly on the record was harmless because the court clearly would have admitted the evidence under ER 404(b).

In the alternative, the trial court's error in admitting the evidence that Pua drove a stolen car in the prior incident was harmless considering the properly admitted evidence. The error in failing to strike Phair's testimony that he knew Pua to drive other stolen cars was also harmless. RP 258.

The erroneous admission of ER 404(b) evidence is subject to the non-constitutional harmless error standard of review. Everybodytalksabout, 145 Wn.2d at 468-69. Reversal is required

only "if the error, within reasonable probability, materially affected the outcome." Id. "The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole." Id.

Here, the other evidence established Pua's brutal assault on Phair. Phair testified in detail to the beating he suffered from Pua and his resulting injuries. RP 303-15, 346-48, 353-64. His mother, the detective, and the deputy all verified Phair's injuries. RP 169-70, 173-75, 183-85, 221, 227-28, 617.

The jury carefully considered all the evidence and returned verdicts acquitting Pua of the first-degree robbery, second-degree robbery, and intimidating a witness charges. Therefore, the jury clearly did not simply use the fact that Phair testified Pua had driven a stolen car and that he had known Pua to drive stolen cars in the past to conclude that Pua was a criminal-type and find him guilty of all charges. Instead, they found Pua guilty of only the more serious charge, second-degree assault, for which Phair's injuries corroborated his testimony. Thus, the result of the trial would have been the same considering all of the properly admitted evidence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Pua's convictions.

DATED this 6th day of January, 2015.

Respectfully submitted,

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By: S/ [signature]
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jan Trasen, the attorney for the respondent, at Jan@washapp.org, containing a copy of the Brief of Respondent, in State v. Aigalelei Pua, Cause No. 71622-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of January, 2015.

C Brame

Name:
Done in Seattle, Washington