

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

THE STATE OF WASHINGTON,	)	No. 81184-3-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DENG MAER KUMDAK,	)	
	)	
Appellant.	)	

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BOWMAN, J. — The State charged Deng Maer Kumdak with second degree burglary and third degree assault. At trial, the court admitted homophobic statements Kumdak made during the incident. Kumdak appeals, arguing the evidence was not relevant and undue prejudice outweighed any probative value. We conclude that the evidence was relevant to whether Kumdak was the first aggressor, the probative value of the evidence outweighed any potential undue prejudice, and any error was harmless. We affirm the conviction but remand to amend the judgment and sentence to clarify that the Department of Corrections may not satisfy Kumdak’s legal financial obligations out of his Social Security benefits.

FACTS

At around 5:00 p.m. on October 13, 2019, Kumdak tried to buy vodka at Bartell Drugs. The cashier refused to sell him alcohol because he had sold Kumdak a bottle of vodka a few hours earlier and Kumdak was obviously

intoxicated. Kumdak became angry and verbally abusive, swearing at the cashier. The cashier paged his store manager to come to the front register and “help explain” why he could not sell Kumdak alcohol.

The manager saw Kumdak “pounding on the counter” and “yelling” and swearing at the cashier, saying, “ ‘You are gay.’ ” The manager asked Kumdak to leave and called security when Kumdak refused. As the security guard approached the counter, he could hear Kumdak “yelling mother fucker.” Kumdak “spoke in like a feminine voice and made some feminine gestures” and repeatedly called the cashier “fucking gay.” Kumdak yelled at the cashier, “Why are you like that” and asked others, “[W]hy is he fucking gay.” The manager asked security to tell Kumdak to leave.

The security guard told Kumdak to “stop his verbal attack on” the cashier and to leave the store multiple times. But Kumdak did not leave and threatened to “fucking kick [his] ass” and take his gun. The security guard told the cashier to call 911. The situation then escalated into a physical altercation, with the guard trying to tase Kumdak. The two men “[w]restled” and Kumdak took the Taser from the guard’s hand. The guard drew his handgun, pointed it at Kumdak’s chest, and told him to stop resisting and drop the Taser. Instead, Kumdak bent back the security guard’s thumb “all the way” and tried to break his fingers in an effort take the gun.

Police arrived and saw the guard straddling Kumdak on the ground. The guard had his left hand around Kumdak’s neck and his gun in the other hand. The police arrested Kumdak. The security guard went to the hospital for injuries to both arms and his right hand and elbow.

The State charged Kumdak with third degree assault and second degree burglary. Kumdak argued self-defense. The court instructed the jury that Kumdak had no right to claim self-defense if they “find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant’s acts and conduct provoked or commenced the fight.” The jury acquitted Kumdak of the assault and burglary charges but convicted him of first degree criminal trespass. The court imposed a 12-month suspended sentence and 109 days in jail with credit for time served, leaving Kumdak’s “jail term . . . satisfied.”

Kumdak appeals.

## ANALYSIS

### Admission of Homophobic Epithets

Kumdak argues that the trial court erred by admitting evidence of his homophobic statements because they were irrelevant and much more prejudicial than probative. He claims the statements “undoubtedly materially affected the outcome of trial.” We disagree.

We review a trial court’s decision to admit or exclude evidence for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds or reasons. Gunderson, 181 Wn.2d at 922.

Generally, all “relevant evidence” is admissible. ER 402. “Relevant evidence” has “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. The threshold to admit relevant

evidence is very low, and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The court may exclude relevant evidence “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.” ER 403; State v. Scherf, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). The party seeking to exclude the evidence has the burden of proving unfair prejudice. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). Evidence is unfairly prejudicial if it is likely to elicit “an emotional response rather than a rational decision.” State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Unfair prejudice is that caused by evidence of “ ‘scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’ ” Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States of Am. v. Roark, 753 F.2d 991, 994 (11th Cir. 1985) (quoting United States of Am. v. McRae, 593 F.2d 700, 707 (5th Cir. 1979))). We afford trial courts broad discretion “in balancing the probative value of evidence against its potential prejudicial impact.” State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

Here, the trial court weighed on the record the probative value of the testimony against its potential for prejudice. The trial court found Kumdak’s homophobic statements admissible because they were “relevant to show [his] alleged level of intoxication and his escalation in the store” and “highly relevant to the State’s theory of how abusive or violent he ultimately became.” We agree that the testimony was probative of Kumdak’s level of aggression. And

Kumdak's level of aggression was relevant to the issue of whether he was the first aggressor and, ultimately, the viability of his self-defense claim.<sup>1</sup>

The court acknowledged that the homophobic statements were "very prejudicial for sure." But it concluded that the prejudice did not substantially outweigh the probative value of the evidence and that it would be difficult to "sanitize it out" "given how intimately related to the incident itself the words were." It pointed out that the statements were "really part and parcel of what's at least alleged to have been Mr. Kumdak's sort of rapid escalation in the store when he was denied service." The court also invited Kumdak to "let me know if there are any curative measures that you think are appropriate." Kumdak offered none.<sup>2</sup>

Testimony about Kumdak's homophobic statements was not of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. Carson, 123 Wn.2d at 223. The trial court did not abuse its discretion in determining that the statements were admissible.

And even if the prejudice substantially outweighed the probative value of the evidence, improperly admitted evidence may amount to harmless error. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Evidentiary error

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<sup>1</sup> A "first aggressor" instruction explains to the jury that the State may disprove self-defense "by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." State v. Grott, 195 Wn.2d 256, 268, 458 P.3d 750 (2020). The provoking act must be intentional conduct reasonably likely to provoke a belligerent response. State v. Sullivan, 196 Wn. App. 277, 289-90, 383 P.3d 574 (2016). "[W]ords alone do not constitute sufficient provocation" for a first aggressor. State v. Riley, 137 Wn.2d 904, 910-11, 976 P.2d 624 (1999). But words may be relevant in establishing a course of conduct that would support a first aggressor argument. See Riley, 137 Wn.2d at 908-09; State v. Kee, 6 Wn. App. 2d 874, 880-82, 431 P.3d 1080 (2018).

<sup>2</sup> While Kumdak did not ask for a curative instruction, the trial court instructed the jury, "As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference."

requires reversal only if it leads to prejudice. Neal, 144 Wn.2d at 611. “An error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” Neal, 144 Wn.2d at 611 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Improperly admitted evidence is harmless if it is of minor significance in relation to the evidence as a whole. Neal, 144 Wn.2d at 611.

Here, the jury acquitted Kumdak of both assault and burglary. Instead, it convicted Kumdak of first degree criminal trespass, which the court instructed the jury was a lesser included crime of burglary in the second degree. As described in the jury instruction, a person commits first degree criminal trespass if they knowingly enter or remain unlawfully in a building. The evidence at trial was overwhelming that Kumdak unlawfully remained in the store after the manager and security guard repeatedly told him to leave and that he continued to insult the cashier. Kumdak then turned his verbal assault on the security guard, which quickly escalated into a physical altercation. Kumdak’s counsel conceded in closing argument that Kumdak remained unlawfully in the store but insisted that Kumdak “didn’t remain unlawfully in Bartell’s with the intent to commit a crime. He stayed there and probably still wanted his alcohol.” Kumdak fails to show that evidence of his homophobic epithets materially affect the outcome of the trial. Any error was harmless.

#### Modification of Judgment and Sentence

Kumdak requests remand for modification of his judgment and sentence to reflect that the Department of Corrections cannot satisfy the \$500 victim penalty

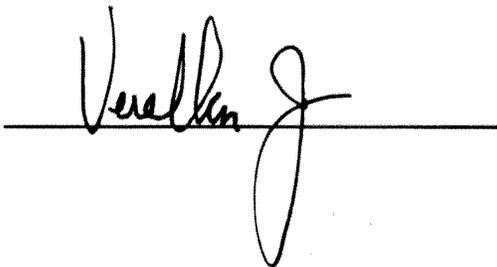
assessment imposed against him by withholding Social Security income. The State has no objection.

Kumdak's judgment and sentence currently states, "Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender." But "Social Security benefits [can]not be used for debt retirement." State v. Dillon, 12 Wn. App. 2d 133, 153, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020) (citing State v. Catling, 193 Wn.2d 252, 266, 438 P.3d 1174 (2019)). Because Kumdak has no employment, income, or assets and may receive Social Security benefits in the future, we remand to amend his judgment and sentence to reflect that the legal financial obligation may not be satisfied out of any funds subject to the Social Security Act's anti-attachment statute, 42 U.S.C. § 407(a). Dillon, 12 Wn. App. 2d at 153; Catling, 193 Wn.2d at 266.

We affirm Kumdak's conviction for first degree criminal trespass.

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

WE CONCUR:

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