

No. 69258-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WAYLAND,

Appellant.

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36

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in admitting evidence that Mr. Wayland mimed the shooting of three women prior to committing the charged crimes.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the rules of evidence, irrelevant evidence is inadmissible and even relevant evidence should be excluded if it is substantially more prejudicial than probative. Mr. Wayland was charged with Attempted Theft in the First Degree and Malicious Mischief in the Second Degree. The fact that Mr. Wayland was supposedly miming a shooting prior to the commission of the alleged crimes was irrelevant and highly prejudicial. Did the trial court abuse its discretion in admitting this inflammatory and irrelevant evidence?

C. STATEMENT OF THE CASE

At Joseph Wayland's trial, witnesses testified that he was seen in front of the Guild 45th Theatre acting strange. 6/5/12 RP 215; 6/6/12 RP 34. One theatre employee testified that she first noticed him standing at the window behind the concession stand, shrugging his shoulders. 6/5/12 RP 215. Mr. Wayland then made his hand into the shape of a gun, and gestured as though he was shooting her and the two

women standing with her. Id. at 216. A theatre employee locked the door and Mr. Wayland began yelling and banging on the door. Id. at 217.

When the manager attempted to enter the theatre, Mr. Wayland put his hands into the manager's jacket pockets and said "where is the cash, man." 6/6/12 RP 35. Mr. Wayland pulled a glove from one of the pockets, handed it back, and stated he was kidding. 6/6/12 RP 38-39. Mr. Wayland continued to bang on the theatre doors. Id. at 47. A woman who was driving by the theatre testified that she then saw Mr. Wayland pick up a stanchion and use it to break the theatre's box office window. 6/7/12 RP 99.

In a motion in limine, Mr. Wayland moved to exclude any description of the hand gestures that the women saw through the window of the theatre. RP 30. He argued that they were irrelevant and substantially more prejudicial than probative. 6/4/12 RP 33-34. The court excluded testimony that Mr. Wayland appeared to be making "gang symbols," but allowed testimony that Mr. Wayland had mimed a shooting. Id. at 38. The court based its ruling on a finding that the making of gun-related hand gestures was "predicate behavior that goes to his ability to form intent." Id. Mr. Wayland was convicted of

Malicious Mischief in the Second Degree. The jury hung on the count of Attempted Theft in the First Degree. 6/12/12 RP 4. Mr. Wayland appeals. CP 131-32.

D. ARGUMENT

The trial court abused its discretion in admitting evidence that Mr. Wayland mimed a shooting prior to committing the alleged crimes.

The trial court denied Mr. Wayland's motion in limine to exclude evidence that Mr. Wayland gestured to three witnesses as if he was shooting each of them with a gun. 6/4/12 RP 38. The evidence should have been excluded under ER 402 because it was irrelevant to the charges in this case. Even if it had been relevant, it was substantially more prejudicial than probative, and therefore its admission violated ER 403.

1. Irrelevant evidence is inadmissible, and evidence that is substantially more prejudicial than probative should be excluded.

The Rules of Evidence prohibit the admission of evidence that is not relevant. ER 402. Furthermore, even relevant evidence may be excluded if it is substantially more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a

danger of unfair prejudice exists.” State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776 (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

2. The evidence that Mr. Wayland mimed shooting the witnesses should have been excluded because it was irrelevant to the charges and was substantially more prejudicial than probative.

Mr. Wayland was charged with one count of Attempted Theft in the First Degree and Malicious Mischief in the Second Degree. CP 11. As to count one, the State was required to prove that Mr. Wayland attempted to wrongfully take property from the alleged victim, Brian Whitish. CP 11. As to count two, the State was required to prove that Mr. Wayland knowingly and maliciously caused damage to a window in the Guild 45th Theatre in excess of \$750. CP 12.

In denying Mr. Wayland's motion to exclude, the court allowed Sabrina Kellams to testify that before encountering Mr. Whitish or breaking the window, Mr. Wayland had mimed shooting her and two others from outside the theatre. 6/5/12 RP 216. Ms. Kellams testified:

[Mr. Wayland] lifted up his hand in the shape of a gun, like this, and looked at each one of us one at a time. First it was me, pulled it back, went bang, then Ashley, bang, and then Airyona.

Id. Ms. Kellams testified that Mr. Wayland mimed pulling the trigger and the gun recoiling after it fired. Id.

The threshold for admitting evidence under ER 401 is low. State v. Briejer, 172 Wn. App. 209, 225, 289 P.3d 698 (2012) (citing State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). However, it must make the existence of a fact "that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401; Briejer, 172 Wn. App. at 225.

Here, the evidence the State sought to admit made no fact of consequence to the ultimate determination any more or less probable. Mr. Whitish, the alleged victim of the attempted theft, was not present when Mr. Wayland mimed the shooting. 6/5/12 RP 218. Ms. Kellams and the two other women were not alleged as victims. CP 11-12. The fact that Mr. Wayland pretended to shoot the women in the theatre had

no bearing on his later alleged actions involving Mr. Whitish and the broken window.

Instead, the admission of this evidence acted only to arouse the jurors' emotions against Mr. Wayland by suggesting that prior to committing the alleged crimes, Mr. Wayland was threatening three women by pretending to shoot them. See State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (holding that "unfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury). This portrayed Mr. Wayland as dangerous and violent to the jury. Any probative value was substantially outweighed by the risk of unfair prejudice.

Mr. Wayland made these points at trial. 6/4/12 RP 30-31. The court denied the motion to exclude, making a broad finding that miming the shootings was "predicate behavior" that goes to Mr. Wayland's "ability to form intent." 6/4/12 RP 38. The court did not elaborate further. Id.

3. The court did not perform the required analysis for admission under ER 404(b).

Without additional information from the court, it is difficult to know whether the court intended to admit the evidence under ER

404(b). In order to admit the evidence as a prior bad act under ER

404(b), the court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.

State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

The court failed to perform this analysis. The record reflects no finding by the court that the act was shown, by a preponderance of the evidence, to have occurred. While an evidentiary hearing is not required to make this finding, the State did not make an offer of proof. State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). At one point, the court indicated “I think [the evidence] has relevance.” 6/4/12 RP 37. However, it did not make a direct finding as to relevance to an element of the charged crimes and it failed to weigh the probative value of the evidence against its prejudicial effect on the record.

In addition, if a trial court admits evidence under ER 404(b), a defendant is entitled to a limiting instruction upon request. Gresham, 173 Wn.2d at 423. Because the court made no findings under 404(b), Mr. Wayland had no reason to request such an instruction. Without the

proper analysis and limiting instruction, both of which were omitted here, ER 404(b) is an invalid basis for admission. State v. McCreven, 170 Wn. App. 444, 461, 284 P.3d 793 (2012) (finding the conviction must be reversed and the case remanded because the record is devoid of the court’s consideration of the relevance of admissibility of the inflammatory evidence).

4. The evidence is inadmissible under the *res gestae* doctrine because it is irrelevant and prejudicial.

The State may argue the evidence was properly admitted under the *res gestae* doctrine. Under this doctrine, “evidence of other crimes or misconduct 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, 571, 940 P.2d 546 (1997). “Where another offense constitutes a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible ‘in order that a complete picture be depicted for the jury.’” Id.

Res gestae evidence must meet the requirements of ER 401, ER 402, and ER 403. Briejer, 172 Wn. App. at 225. The *res gestae* doctrine “requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect.” State v. Acosta,

123 Wn. App. 424, 442, 98 P.3d 503 (2004); see ER 401, 402, 403.

Thus, it is inapplicable here under these rules for the reasons discussed above.

Furthermore, the *res gestae* doctrine demands a clear connection between the act and the crime later committed. See State v. Grier, 168 Wn. App. 635, 648, 278 P.3d 225 (2012) (finding that the defendant's brandishing of a gun and acting belligerently before a shooting was admissible because it showed a continuing course of action); State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584 (1987) (finding that a continuing course of provocative conduct, including defendant's brandishing of a gun, was admissible because it showed an absence of self-defense in a shooting).

Here, Mr. Wayland's miming of a shooting had no bearing on his later alleged criminal actions. He made no mention of a firearm, pretend or otherwise, in his interaction with Mr. Whitish. 6/6/12 RP 36-39. The breaking of the theatre window allegedly involved a stanchion on the sidewalk, not any kind of weapon Mr. Wayland had in his possession. 6/7/12 RP 99. A full and complete picture of the incident could be depicted for the jury without testimony regarding the

mimed shooting. Thus, it is not properly admitted under the *res gestae* doctrine. See Brown, 132 Wn.2d at 571.

5. The remedy is reversal and remand for a new trial.

Evidentiary errors require reversal 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). The irrelevant and inflammatory evidence admitted in this case made the jury view Mr. Wayland as dangerous and violent, causing them to convict on an improper basis. Absent this evidence, it is reasonably probable Mr. Wayland would have been acquitted. Mr. Wayland’s conviction should be reversed and his case remanded for a new trial at which evidence of the mimed shooting will be excluded.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Wayland's conviction and remand for a new trial.

DATED this 10th day of May, 2013.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MAY, 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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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MAY, 2013.

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