

NO. 35187-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW STONE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01128-7

BRIEF OF RESPONDENT

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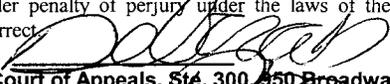
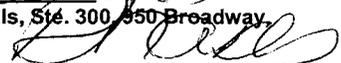
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 11, 2007, Port Orchard, WA. 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left. 

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in allowing the state to introduce evidence that Stone was involved in an earlier altercation on the night of the charged assault when the evidence was admissible to show a continuing course of provocative conduct, contradicted Stone's claim of self-defense, and was admissible under the res gestae exception to ER 404(b)?

2. Whether the trial court abused its discretion by precluding the defense from cross examining the victim about the defense allegation that the victim was seeking reimbursement for an unrelated assault when a trial court may refuse cross examination where the evidence is merely argumentative or speculative and when the offer of proof below failed to produce any evidence to support the defense allegation?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Matthew Stone was charged by a first amended information filed in Kitsap County Superior Court with one count of assault in the second degree with a special allegation that he was armed with a deadly weapon. CP 65. Following a jury trial, Stone was found guilty of assault in the second degree, and the trial court imposed a standard range sentence. CP 94. This appeal followed.

B. FACTS

The charge in the present case, assault in the second degree, stemmed from an assault that occurred outside of a tavern on February 26, 2005 in which Stone assaulted an individual named Joseph Bollinger. See CP 1. Prior to trial, the State filed a memorandum of authorities in which it sought to introduce evidence that prior to the assault of the named victim outside the tavern, Stone had been involved in an altercation with another individual inside the bar in which he demonstrated aggressive behavior. CP 27-30. In particular, the State alleged that a bouncer at the tavern had witnessed Stone's involvement in a verbal altercation, and that after the two separated, Stone was seen staring at the individual in an aggressive manner and rubbing his knuckles. CP 28. The State cited a similar case involving a bar fight, *State v. Thompson*, 47 Wn. App. 1, 11 (1987), in support of its request. CP 29. Stone, however, objected to the admission of the previous confrontation, arguing that since the previous altercation did not involve the same victim, the evidence should not be admitted. RP 28-29.

The trial court initially reserved ruling on the issue. RP 30. The next day, the trial ruled that it found that the acts occurred by a preponderance of the evidence, were being offered as *res gestae* evidence, and were relevant to show Stone's demeanor, mood, and aggressiveness within 15 minutes or so before the charged assault. RP 33-34. The court, however, held that the

probative value was outweighed by possible prejudice, and thus held that the evidence was not admissible in the State's case in chief. RP 35-36. The court noted, however, that if Stone was raising a claim of self-defense or a claim that someone else was the first aggressor, then the evidence became more relevant and may be admissible. RP 35-36. Later, Stone did inform the court that it was raising self-defense as a defense, and the trial court stated that the door was opened in this regard, and the State's proposed evidence was ultimately admitted in rebuttal. RP 131-32, 239-41.

At trial, the evidence showed that at approximately 10 or 11 pm on February 26, 2005, Joseph Bollinger and a friend went to the Horse and Cow Bar. RP 53-54. Mr. Bollinger and his friend sat in the bar area talking, and Mr. Bollinger had one or two glasses of beer. RP 54-56. Nothing unusual happened inside the bar, and Mr. Bollinger only spoke with his friend and the bartender. RP 55. After a few hours, Mr. Bollinger got ready to leave the bar, but because his friend was talking to someone else in the bar, Mr. Bollinger went outside and waited for his friend. RP 56-57. Several other people were outside talking, and Mr. Bollinger heard someone yell, "Hey" or "What's up" in his direction. RP 59. Mr. Bollinger didn't know if the comment was directed at him, and thought at the time that the comment was directed at someone else. RP 59-60. Mr. Bollinger did look at the person who had yelled in his direction and later identified this person as Stone. RP

59-60. Mr. Bollinger described that things then happened “pretty quick,” and that he had turned to look behind him to see if the comment had been directed at someone else. RP 60-61. When he turned back around, Mr. Bollinger “didn’t have much time at all” as Stone came towards him and swung his right hand at him in an attempt to punch him. RP 62. Mr. Bollinger put up his left hand to block the punch, but Stone was still able to land the blow and struck Mr. Bollinger’s left cheek. RP 62-63. Mr. Bollinger responded by pushing Stone forward and security guards immediately intervened. RP 62-63. Mr. Bollinger had never met Stone before and did not talk to him prior to the assault, although Mr. Bollinger was later able to recall that he had seen Stone in the bar before the assault, but they had not had any conversations or disagreements in the bar. RP 69.

After the bouncers had intervened, Mr. Bollinger got a good look at Stone, and noticed that Stone’s right fist was closed and he had something “shiny” that looked like metal across his knuckles. RP 64-65. There was no further interaction between Stone and Mr. Bollinger, and Stone hurried into a car and left the scene. RP 66. Mr. Bollinger remained at the scene approximately 15 to 20 minutes until the police arrived and he was able to give a statement to the officers. RP 67.

Deputy Schon Montague responded to the scene and spoke with Mr. Bollinger. RP 109-10. Deputy Montague saw that Mr. Bollinger had a two-

inch by one-half-inch raised bruise on the left side of his face and saw that this bruise was bleeding. RP 111. Deputy Montague did not speak with Stone, however, as Stone had left before the Deputy arrived. RP 118.

Jason Peebles, a security officer at the Horse and Cow, also testified. RP 134. Mr. Peebles was working in the early morning hours of February 26, 2005, and saw Stone in the bar. RP 136, 139. Mr. Peebles noticed that Stone moved a metal object that looked like “metal knuckles” from one of his pockets to another. RP 140-41. Mr. Peebles reported this to two of the other security guards at the bar, and then continued watching Mr. Stone and followed him to various parts of the bar. RP 142. Mr. Peebles lost track of Stone when he left a restroom, and Mr. Peebles, therefore, did not witness the assault outside the bar. RP 142, 144.

After the event, Mr. Bollinger went home rather than seeking medical attention. RP 67-68. Eventually, however, Mr. Bollinger did seek medical attention, as he explained in the following testimony,

I went – Actually, I went to the doctor probably like a week and a half afterwards or so because, at the time, I didn't want to go because I just didn't have any medical, and I didn't -- I mean, like – It just kept getting worse too, really. Because, at first, I was just – it was pretty much swelled up for a while. It wasn't really – It wasn't really swollen too bad. It was just that I couldn't eat real good like anything solid or nothing. So that's when I knew like something other than maybe just a bruise or whatever.

RP 68. Mr. Bollinger then went to Harrison Hospital and was informed he had a zygoma fracture. RP 68-69.

Prior to the defense cross-examination of Mr. Bollinger, the court held a hearing outside the presence of the jury regarding the scope of the cross examination RP 74. Earlier in the day, Stone had informed the court that it was seeking to cross-examine Mr. Bollinger regarding potentially false information contained in a victim impact statement that Mr. Bollinger had submitted. RP 38. Stone alleged that “upon reviewing the victim impact statement, it appears that Mr. Bollinger included bills relating to services performed by medical personnel not relating to this incident.” RP 38. Stone alleged that there had been a second incident about 11 days later where Mr. Bollinger had been assaulted by someone else, and that Mr. Bollinger “appears to be trying to recover expenses from both fights as a part of restitution in this matter.” RP 38. Stone, thus, sought to cross examine Mr. Bollinger about these alleged discrepancies in the victim impact statement, but stated that it was not trying to admit the actual victim impact statement. RP 38-40. The trial court stated it would allow Stone to make an offer of proof outside the presence of the jury before deciding the matter. RP 43.

In the offer of proof, Stone inquired about the bills that Mr. Bollinger had attached to the victim impact statement, but Mr. Bollinger explained that there were bills with two different dates because one was for his initial visit

and once was for a check up where he was examined for possible nerve damage to the cheekbone, but none was found. RP 79. When asked if he had gone to the hospital on the second date because of a second fight, Mr. Bollinger stated, “Uhm, I don’t think so. Huh-uh. I don’t know.” RP 79. Stone did not make any further offer of proof regarding the existence of the “second fight” and did not offer any other evidence to show that any of the medical bills related to this later event.

At the conclusion of the offer of proof, the trial court indicated that, as far as it could tell, both medical bills were related to the case. RP 79. The court then ruled,

I don’t know if you want to try to impeach the witness on these. But I think it’s pretty scanty at this point and so I’m going to -- you know, things may develop later on; I will give you that opportunity – but I’m not going to allow cross-examination regarding this unless there’s something new you can come up with. I will give you the opportunity in the morning if you want to ask more questions about it.

RP 80. The defense counsel told the court that she had received medical reports for a second assault, but defense counsel never produced these documents, never made any offer of proof regarding their contents, did not ever seek to introduce the documents, and never explained how, if at all, these additional reports might relate to the medical bills in the victim impact statement. RP 80. The trial court, therefore, ruled that, at the least, defense

counsel was going to have to produce some evidence that the fees from the second assault had been included in the victim impact statement, and the court needed “substantially more evidence that indicates something sufficient to back up what counsel’s arguments are.” RP 80-81. Stone, however, made no further offer of proof.

At the conclusion of the State’s case, a stipulation was read to the jury that stated that Mr. Bollinger sought medical attention related to the injury he suffered on February 26th, and that the medical examination revealed a fracture of the left zygoma or cheekbone. RP 160-61.

Stone subsequently testified, and admitted that he had punched Mr. Bollinger, but denied using brass knuckles. RP 213, 216. Stone also claimed that he acted in self defense, and that Mr. Bollinger had taken the first swing, but had missed. RP 212. Stone also stated that the punch he landed to Mr. Bollinger’s face caused Mr. Bollinger to stagger a little, and that “within a second of that happening” he was being tackled by the bouncers. RP 214. Stone also denied that he had acted aggressively towards anyone inside the bar that night, and denied being involved in any sort of argument inside the bar. RP 221, 223

In rebuttal, the State recalled Mr. Peebles, who testified that on the night in question he was talking to two regular customers (a male and a

female) and saw their involvement in an a dispute with Stone. RP 239-40. The couple had been sitting at a table, and when the male later got up and left the table, Stone came and sat down next to the female, who politely asked Stone to leave. RP 239. The male then came back and asked Stone to get out of his chair, asked him to leave them alone, and words were exchanged. RP 239-40. Mr. Peebles stepped in and said, "Hey, nothing needs to go down." RP 239-40. Although the incident did not become physical, Mr. Peebles stated that it was "close" to becoming physical. RP 243.

Stone then went out onto the dance floor, and Mr. Peebles started watching him. RP 240. Stone stood on the dance floor with a group of guys and had a "very upset look on his face." RP 240. Mr. Peebles described that Stone continued to "down look" on the male at the table, and explained that "down look" or "mad dogging" were terms used to describe a person using an aggressive facial expression. RP 241. Mr. Peebles also saw Stone rubbing his knuckles, and this was also the time when he first saw Stone transfer a possible weapon from one pocket to another. RP 241.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT STONE WAS INVOLVED IN A EARLIER ALTERCATION ON THE NIGHT OF THE CHARGED ASSAULT BECAUSE THE EVIDENCE WAS ADMISSIBLE TO SHOW A CONTINUING COURSE OF PROVOCATIVE CONDUCT, CONTRADICTED STONE'S CLAIM OF SELF-DEFENSE, AND WAS ADMISSIBLE UNDER THE RES GESTAE EXCEPTION TO ER 404(B).

Stone argues that the trial court abused its discretion by allowing the admission of evidence regarding his involvement in a confrontation with another individual on the night of the assault. App.'s Br. at 7. This claim is without merit because, pursuant to *State v. Thompson*, the evidence was admissible because it was as res gestae evidence, contradicted Stone's claim of self-defense, and showed a continuing course of provocative conduct during the course of the evening.

Under ER 404(b), 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. In addition to determining the purpose of the evidence and its relevance, a trial court must also weigh the probative value against its prejudicial effect, and the trial court's balancing in

this regard is reviewed for an abuse of discretion. *State v. Lough*, 125 Wn.2d 847, 862-63, 889 P.2d 487 (1995), citing *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); *State v. Roth*, 75 Wn. App. 808, 823, 881 P.2d 268 (1994); *State v. Herzog*, 73 Wn. App. 34, 50, 867 P.2d 648, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994). Deference is given to the trial court because issues of relevance are generally to be determined by the trial court, with review limited to whether the trial court abused its discretion. *Lough*, 125 Wn.2d at 861, citing *State v. Lane*, 125 Wn.2d 825, 834-835, 889 P.2d 929 (1995); *State v. Bacotgarcia*, 59 Wn. App. 815, 824, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020, 811 P.2d 219 (1991); *State v. Wermerskirchen*, 497 N.W.2d 235, 243 n. 3 (1993).

Under the res gestae doctrine, ER 404 (b) evidence is admissible “to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (quoting Edward Cleary, McCormick's Law of Evidence sec. 190, at 448 (2d ed.1972)), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). To be admissible under the res gestae exception, each incident must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Tharp*, 96 Wn.2d at 594, 637 P.2d 961. Our Supreme Court has applied the res gestae doctrine to events occurring up to two days

before the crime charged. *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995).

The use of prior bad acts to rebut “any material assertion by a party” is a well-established exception to ER 404(b). *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999) (quoting 5 Karl B. Tegland, *Washington Practice: Evidence* sec. 114, at 391, sec. 117, at 411 (3d ed.1989)). In *Hernandez*, for instance, evidence of a prior assault was admissible to rebut the defendant's defense that the victim's death was an accident. *Hernandez*, 99 Wash. App. at 323.

Furthermore, evidence that contradicts a defendant's self-defense testimony has been admitted under ER 404(b). *State v. Thompson*, 47 Wn. App. 1, 12, 733 P.2d 584 (1987). In *Thompson*, the defendant was charged with murder and assault after shooting two victims in the parking lot of a tavern. *Thompson*, 47 Wn.App at 2. The defendant, however, claimed self-defense. *Thompson*, 47 Wn.App at 3, 10-11. The surviving victim testified that the defendant and a friend approached the two victims and asked about marijuana. *Thompson*, 47 Wn.App at 4. Then, “without a word to anyone,” Thompson pulled out a gun, and shot both victims. *Thompson*, 47 Wn.App at 4. The State also introduced evidence concerning two events that took place in the hour prior to the shooting. First, a witness testified that he had seen the defendant and two other men leaving the tavern, and observed the defendant

yelling, "I'm going to kill the bastard" and brandishing a gun. *Thompson*, 47 Wn.App at 4. Second, two other witnesses testified that they had been driving by when they observed a fight in which one person was being attacked by three other people. *Thompson*, 47 Wn.App at 4. Thompson was identified as one of the attackers. *Thompson*, 47 Wn.App at 4. One of the witnesses then rolled down his window and suggested to the men that they "make a fair fight out of it." *Thompson*, 47 Wn.App at 4. Thompson responded by pointing a gun at the truck and stating that he did not like the remark. *Thompson*, 47 Wn.App at 4.

On appeal, Thompson argued that the testimony concerning these two earlier events was not relevant to any of the 404(b) purposes such as identity, motive, and intent, etc. *Thompson*, 47 Wn.App at 10. The court of appeals, however, held that the testimony of the witnesses concerning these prior acts was "relevant because it tends to contradict Thompson's testimony that his acts of shooting were in self-defense, because it showed a continuing course of provocative conduct during the course of an evening." *Thompson*, 47 Wn.App at 11-12. The court also held that the evidence was relevant under the res gestae exception, and was properly admitted by the trial court. *Thompson*, 47 Wn.App at 12, citing: *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1324 (1981)(defendant was convicted of second degree assault and reckless endangerment arising out of a series of Halloween shooting

incidents, and the court held that it was not error to admit evidence of prior rifle-pointing incidents to show frame of mind); *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)(defendant was charged with felony murder, and the court held that evidence of a series of criminal events which culminated in the murder was admissible under the res gestae exception because its purpose was to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. (Footnote omitted.)

In the present case, the evidence of Stone's earlier altercation in the bar was evidence of earlier provocative conduct occurring near in time to the charged offense. This evidence, therefore, was properly admitted (as was similar evidence in *Thompson*) to contradict Stone's claim of self-defense and the evidence was also properly admitted under the res gestae exception. For all of these reasons, Stone's argument that the trial court abused its discretion must fail.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING THE DEFENSE FROM CROSS EXAMINING THE VICTIM ABOUT THE DEFENSE ALLEGATION THAT THE VICTIM WAS SEEKING REIMBURSEMENT FOR AN UNRELATED ASSAULT BECAUSE A TRIAL COURT MAY REFUSE CROSS EXAMINATION WHERE THE EVIDENCE IS MERELY ARGUMENTATIVE OR SPECULATIVE AND BECAUSE THE OFFER OF PROOF BELOW FAILED TO PRODUCE ANY EVIDENCE TO SUPPORT THE DEFENSE ALLEGATION.

Stone next claims that the trial court erred in precluding him from cross examining the victim regarding what Stone believed was an attempt by the victim to fraudulently recover “reimbursement for an unrelated assault.” App.’s Br. at 14. This claim is without merit because Stone was allowed to make an offer of proof regarding the alleged fraudulent inclusion of unrelated expenses in the victim impact statement but failed to show any evidence that there had been a “second assault” or that any of the medical expenses included in the victim impact statement related to this “second assault.”

Although cross-examination to show bias or interest is generally a matter of right, trial courts have discretion to prohibit questioning where the claimed bias or interest is speculative or remote. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993); *State v. Ferguson*, 100 Wn.2d 131, 138-39, 667 P.2d 68 (1983); *State v. Buss*, 76 Wn. App. 780, 887 P.2d 920 (1995).

Similarly, a trial court may refuse cross-examination where the evidence only remotely shows bias or is merely argumentative or speculative. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). A trial court's limitation on the scope of cross-examination is reviewed only for manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). Likewise, substantive evidence must be relevant, ER 402, and a court's decision excluding such evidence is discretionary. *State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987).

Stone claims on appeal that Mr. Bollinger submitted a victim impact statement that “included injuries he claimed were caused by Mr. Stone as well as reimbursement for injuries caused by another individual,” and that Mr. Bollinger “was attempting to obtain financial assistance in paying for all of his medical bills, both related and unrelated to his encounter with Mr. Stone.” App.’s Br. at 18 (citing RP 39), App.’s Br. at 19. In support of this claim, however, Stone only cites to a portion of the record where defense counsel raised the allegation of fraud without any evidence to support the claim that the victim had “submitted a document under the penalty of perjury that’s false.” See RP 38-39, 42.

The trial court stated that it was important to know more about the defense claim that victim was allegedly trying to seek assistance for injuries unrelated to the charges at hand, and that Stone would be allowed to cross

examine the victim in that regard, but there would first need to be an offer of proof made outside the presence of the jury. RP 43.

When defense counsel was given the opportunity to make an offer of proof regarding this allegation, the offer failed to establish any evidence that Mr. Bollinger was incorrectly seeking restitution for an unrelated event. Rather, Mr. Bollinger explained that there were bills with two different dates because one was for his initial visit and once was for a check-up where he was examined for possible nerve damage to the cheekbone, but none was found. RP 79. Furthermore, the trial court noted that the actual victim impact statement appeared to only relate to injuries stemming from the case at bar, and thus the offer failed to support the allegations made by defense counsel. See RP 79-81.¹ The court, however, made it clear that if Stone had additional evidence to present on this subject he could re-raise the issue. RP 80. Stone, however, made no further offer of proof.

As mentioned above, a trial court has the discretion to prohibit questioning where, as in the present case, the evidence is merely argumentative or speculative. *See Benn*, 120 Wn.2d at 651; *Ferguson*, 100

¹ The Appellant has not included the actual Victim Impact Statement in its designation of clerk's papers. The State has reviewed the document, however, and there is nothing in that document that suggests that Mr. Bollinger was claiming that he incurred costs from the assault at issue that were actual costs incurred from some other event. In any event, there is nothing in the record before this court (either in the form of written documents or oral offers of proof) that would appropriately be considered evidence of a potential fraud that was ultimately excluded by the trial court.

Wn.2d at 138-39; *Roberts*, 25 Wn. App. at 834. The trial court, therefore, did not abuse its discretion in precluding cross-examination in front of the jury on the issue of the alleged fraud unless there was a further offer of proof from Stone, as Stone had failed to produce any evidence showing that Mr. Bollinger had been involved in a “second fight” or had made any false claims in the victim impact statement. RP 80.

In short, Stone’s claim on appeal that Mr. Bollinger had been involved in an altercation following the incident with Mr. Stone and “was attempting to obtain financial assistance in paying for all of his medical bills, both related and unrelated to his encounter with Mr. Stone,” is not supported by the record, despite the fact that the trial court gave Stone several opportunities to make an offer of proof in this regard. App.’s Br. at 18-19. Rather, the actual offer of proof made below failed to show any evidence that the victim had “included bills relating to services performed by medical personnel related to this incident,” or had “apparently submitted a document under penalty of perjury that’s false.” RP 38-39, 42. The trial court, therefore, did not err in precluding Stone from cross-examining the witness without first making a further offer of proof. RP 80-81. For all of these reasons, Stone’s argument that the trial court abused its discretion must fail.

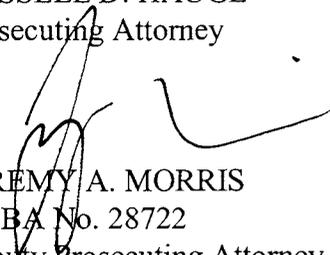
IV. CONCLUSION

For the foregoing reasons, Stone's conviction and sentence should be affirmed.

DATED May 11, 2007.

Respectfully submitted,

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