

COURT OF APPEALS
DIVISION II

COMM. CR. 02-0114-2

STATE OF WASHINGTON

BY cm
DEPUTY

NO. 38323-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEROME CEASAR ALVERTO, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The fairness of the jury's verdict was compromised when the trial court erroneously admitted evidence that was extremely prejudicial, portraying Mr. Alverto as a "bad man," but not very probative of his guilt.
2. The trial court erred under ER 403 and ER 404(b) by admitting into evidence the spiral notebook "plan" where the unfair prejudice of the evidence was not exceeded by the probative value.
3. The trial court erred by denying Mr. Alverto's motion to exclude the notebook "plan."

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by admitting into evidence the spiral notebook "plan" where the notes within the notebook were extremely prejudicial but not very probative because the notes were dissimilar to the crime being tried.

III. STATEMENT OF THE CASE

On May 13, 2006, in the early-morning hours, Stephanie Wilson was attacked in her home by a masked intruder. RPVII 434. Ms. Wilson had arrived home that morning after an argument with her boyfriend at around 2:30 a.m. and went to sleep shortly after. RPVI 266. She was awakened later by a phone call from her ex-husband, Jerome Ceasar Alverto. RPVI 266-67.

She and Mr. Alverto had separated more than a year ago and had not been in contact for some time. RPVI 321. Ms. Wilson testified that she had never told Mr. Alverto where she lived. RPVI 362.

After the phone call, Ms. Wilson felt uneasy and texted her boyfriend, Eric Rogers, to tell him about it. RPVI 270. Mr. Rogers called her back from his cell phone and said he would come over, but Ms. Wilson told him to wait until morning. RPVI 270.

Ms. Wilson routinely locked all of the doors to her house except the entrance from the garage. RPVI 335. Now, Ms. Wilson activated her alarm system and went into her bathroom. RPVI 272. She was struck from behind by a wine bottle, which shattered on impact. RPVI 273. She fell and the intruder hit her repeatedly with the butt of his gun. RPVI 273-74. The intruder said as he hit her, "You shouldn't have married me." RPVI 274.

The intruder was dressed in dark clothes with a bandanna tied around his face. RPVI 275. Ms. Wilson testified that she recognized the intruder as Mr. Alverto. RPVI 275.

Ms. Wilson managed to escape the bedroom and raced downstairs, but the intruder caught up with her before she could exit. RPVI 280. Again, he hit her repeatedly with the butt of the gun and ordered her to turn off the alarm. RPVI 281.

Ms. Wilson tried to scratch the intruder to leave evidence in case of death, but testified that he was wearing a turtleneck that prevented her from making contact with his skin. RPVI 283-84.

Again, Ms. Wilson fled from the attacker, running out the front door calling for help. RPVI 284. Many of her neighbors heard Ms. Wilson's screams and called 9-1-1 around 4:50 a.m. RPVII 411.

As Ms. Wilson ran across the lawn toward her neighbor's house, the intruder shot her in the chest. RPVI 286. She collapsed and he shot her again, hitting her hand. RPVI 287. Ms. Wilson lay still, "playing dead." RPVI 288. She heard the man run away and began to get up, banging on her neighbor's door for help. RPVI 288.

The intruder returned and shot her again—hitting the back of her neck. RPVI 288. She collapsed and he dragged her down the steps to the lawn. RPVI 288. He shot her two more times in the face and head. RPVI

290. As she lay still, she heard him run off and the sound of tires screeching. RPVI 292.

A neighbor looked out his screen door to her, but would not let her in. RPVI 294. Ms. Wilson told him Mr. Alverto had shot her and gave him Mr. Alverto's address and the description of his cars. RPVI 294.

When police arrived, they found Ms. Wilson lying on her neighbor's porch. RPVII 469. After talking with Ms. Wilson, they put out an alert to other officers to go to Mr. Alverto's address and to look for his two vehicles. RPVII 439. When police went over to Ms. Wilson's home, they found Mr. Rogers there, standing in her driveway. RPVII 471. Mr. Rogers said he had just arrived and had entered the house with his garage opening and looked for Ms. Wilson. RPVII 472. He was released without further questioning. RPVII 472.

Ms. Wilson was transported to the hospital and received emergency treatment. RPVI 297. She was released from the hospital after six days. RP VII 396.

Meanwhile, one of the deputies dispatched to look for Mr. Alverto encountered him driving away from his own house in his car. RPVIII 512. It was 5:15 a.m. RPVIII 516. The deputy stopped Mr. Alverto and asked him for identification, which Mr. Alverto provided. RPVIII 513. Mr. Alverto was then arrested at gunpoint. RPVIII 513. Mr. Alverto denied

shooting Ms. Wilson and said he was on his way to go deer hunting.

RPVIII 515.

When arrested, Mr. Alverto was wearing a black shirt, blue jeans, and black shoes. RPVIII 531. He had no injuries to his face or neck and was not wearing a turtleneck. RPVIII 531. There was a small amount of blood on the bottom of his jeans,¹ but he otherwise did not have wine or blood on his person. RPVIII 514, 524, RPXI 965.

The deputies searched Mr. Alverto's car and found a .22 rifle in the backseat, a Smith and Wesson case containing .40 caliber ammunition. RPVIII 570. In the front seat, they found a small spiral notebook, brown leather work boots and black gloves. RPIX 750. A search of his house yielded a black nylon holster for a Smith and Wesson handgun and .40 caliber ammunition. RPVIII 569.

Later that morning, at a construction site two miles away from Ms. Wilson's house, police located a duffle bag that contained what turned out to be the weapon used in the attack, along with a leather jacket, two sets of handcuffs, a cell phone, a set of clothes, and a garage door opener that operated Ms. Wilson's garage door. RPIX 661-65, 721. A backpack inside the duffle contained trash bags, two stocking caps (one with nose and mouth holes), a photograph of Ms. Wilson with Mr. Rogers, and two

¹ Forensics matched the blood to Ms. Wilson. RPXI 1063-65.

bracelets, one inscribed "Love Stephanie". RPIX 756. In the pocket of the pair of jeans inside the duffel, police found a grocery list with Mr. Alverto's name printed across the top. RPIX 807.

Ms. Wilson's missing personal safe was found the next evening, still locked, inside a neighbor's garbage can. RPIX 671, 675.

Objection to Evidence of Notebook "Plan":

In the front passenger seat of Mr. Alverto's car, police found a spiral notebook with hand-written lists inside. RPIX 750-51. The State characterized this evidence as a "plan" for this crime. RPXIV 1397. In defense motions in limine, Mr. Alverto sought to exclude this evidence.

CP 32

The court ruled that the State could introduce the notebook into evidence, finding that the probative value was equal to the prejudice. RPYII 429-30. Twice during the trial, the court stated that where the probative value is equal to the prejudice, the evidence must be admitted. RPYII 429, RPXI 1033.

Sentencing:

Following jury trial, Mr. Alverto was convicted of Attempted Murder in the First Degree, Burglary in the First Degree, and Robbery in the First Degree. CP 127-28, CP 114, 116, 118. The jury also returned

special verdicts, finding that the defendant was armed during the commission of the crimes. CP 115, 117, 119.

Mr. Alverto was sentenced to 280.5 months for attempted murder, 48 months for first degree burglary, and 68 months for first degree burglary, all three with 60 months enhancement, making his actual sentence 460.5 months. CP 132.

This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE SPIRAL NOTEBOOK “PLAN” WHERE THE NOTES WITHIN THE NOTEBOOK WERE EXTREMELY PREJUDICIAL BUT NOT VERY PROBATIVE BECAUSE THE NOTES WERE DISSIMILAR TO THE CRIME BEING TRIED.

ER 403 provides that relevant evidence is excluded where “its probative value is substantially outweighed by the danger of unfair prejudice.” ER 404(b), provides that, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show [that he acted] in conformity therewith.” However, evidence of such crimes or acts is admissible for other reasons, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). To admit other crimes evidence, the court must define the applicable exception, determine relevance and balance the probative value against the prejudice of the evidence. *State v.*

Smith, 106 Wn.2d 772, 776-77, 725 P.2d 951 (1986). This evidence is admissible only if the court finds that the probative value “substantially outweighs the danger of unfair prejudice.” *Smith*, 106 Wn.2d at 776.

Evidentiary rulings are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999), *cert. denied*, 120 S.Ct. 285 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Absent an abuse of discretion, the appellate court does not disturb on appeal a trial court's rulings on motions in limine, the admissibility of evidence, and the admissibility and scope of expert testimony. *See Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 286-87, 686 P.2d 1102 (1984); *Hume v. American Disposal Co.*, 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

The State argued in this case that it should be permitted to introduce into evidence the spiral notebook found in Mr. Alverto's car. The contents of the notebook were as follows:

Page 1: “Remove Cell (GPS),” “5:30-6 a.m. (5 a.m.),” “Has to look natural. Cuts. Ransack truck and purse,” “1-425-867-5155,” “1-253-232-0051.” RPX 786.

Page 2, entitled “Tools”: “Gun, taser, knife, handcuffs, tape, shoe covers, gloves, flashlight, scarf or face mask.” “Use white face mask.” “Trash bags (2 large, 4 small).” “Stranger hair/condom.” RPX 786-87.

Page 3, entitled "Dress Code": "Dark pants, dark shirt, gloves, stocking cap and face mask." "Tape gloves to shirk." "Tape eyebrows." "Tape pants to shoe covers." "Tape pockets." RPX 787.

Page 4, entitled "Execute": "No communication." "Enter garage 5 a.m." "Wait until anyone answers, taser individual." "Handcuff right arm to left leg. Handcuff left arm to right leg." "Tape arms and tape legs together (added restraint)." RPX 787.

Page 5, entitled "Options": "Set her on fire." "Act out a car jacking gone bad." "Taser/stab her in the garage and smear blood in the garage." RPX 787.

The court initially reserved ruling on the admissibility of the notebook, but later found, over defense objection that the probative value was equal to the prejudice of the evidence. RP VII 429-30. The court held that the evidence was probative on the issue of identity. RP VII 430. In closing argument, the prosecutor calls the notebook a "plan for killing a woman," and a "plan of attack, a plan to kill Stephanie Wilson." RP 8/19/08 1290, RP XIV 1397. However, the notes do not refer to Ms. Wilson at all and in fact lists two phone numbers that do not belong to her.

The admission of this notebook was extremely damaging to Mr. Alverto's ability to be heard fairly by the jury. The notes within the notebook are disturbing and unfairly prejudicial, but not very probative on the question of whether Mr. Alverto was guilty of the crimes charged.

The admission of this evidence was erroneous for two reasons. First, the trial court applied an incorrect legal standard to evaluate the

admissibility of the evidence and therefore abused its discretion. Second, the unfair prejudice of this evidence is not outweighed by the probative value and therefore the evidence should have been excluded under both ER 403 and ER 404(b).

Even by the trial court's own scale, the probative value of the notebook did not *outweigh* the prejudice. The court erroneously believed that when the prejudice is equal to the probative value, then the evidence is admitted. The court found:

. . . I think that under 403, it is very prejudicial. It is also very probative. And it is my understanding from—I guess what I'm saying is, *even if it's equal in terms of prejudice and probative*, everything the State wants to admit is usually prejudicial to the defendant; that on balance it would be admissible to—in terms of being relevant to the issues in this case.

RP VII 429.² In fact, Washington Courts have clearly held that: “[i]n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Smith*, 106 Wn.2d at 776. Therefore, the trial court applied an incorrect standard when it held that when the probative value was equal to the prejudice, the evidence should be admitted. In this case, the prejudicial nature of the notebook cannot be overestimated. The notes written inside that notebook go far beyond the

² Later in the trial, the court again uses this erroneous statement of the balancing test, which is further evidence of the court's misunderstanding. RPXI 1033.

facts of the current charges and very likely served to inflame the jury. The court abused its discretion in admitting this evidence because it applied the wrong legal standard. That abuse of discretion requires reversal.

Further, even if the court had applied the correct standard, it is clear that the notebook should not have been admitted because the probative value does not outweigh the unfair prejudice. It is not entirely clear in this case if the evidence was admitted under ER 403 generally or ER 404(b). However, both rules provide guidance in evaluating the evidence's probative value.

This notebook contains disturbing and graphic details. Although it is generally related to what happened in the crimes charged, the details in the notebook are not very similar to what actually happened. The notebook discusses staging a car jacking, a taser, handcuffs and arson. RPX 786-87. None of that happened in the assault of Ms. Wilson. Nor is there any evidence the assailant in this case followed the "dress code" or plan detailed—taping gloves and eyebrows, white face mask. RPX 786-87. With so few specifics in common, the notebook "plan" is not very probative of Mr. Alverto's guilt of this crime and is more likely to be used by the jury for an improper purpose—painting Mr. Alverto as a bad person—rather than as evidence of his identity as the assailant.

The court found here that the notebook was not "bad act" evidence

that would be considered under ER 404(b). RPVII 430. Yet, the State argued in closing that this notebook was a “plan for killing a woman,” and then in rebuttal that it was a “plan of attack, a plan to kill Stephanie Wilson.” RP XIV 1397, RP 8/19/08 1290. Since Ms. Wilson is not mentioned by name in the notebook and in fact the phone numbers of others are specifically noted, this evidence could very well be evaluated under both ER 403 and ER 404(b).

However, even under ER 404(b), this notebook does not contain details of sufficient similarity to the crime charged to be probative of Mr. Alverto’s guilt. When bad acts evidence has been admitted under the common plan or scheme exception, the evidence is relevant when “an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” *State v. Lough*, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). “[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” *State v. DeVincentis*, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). Uniqueness is not required. *Id.* at 21. The trial court “need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” *Id.* at 13.

Other crimes evidence is also admissible to prove identity through the modus operandi exception. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). But, again, the similarities must be substantial to make

the evidence admissible. “The method employed in committing the act must be so unique that mere proof that an accused acted in a certain way at a certain time creates a high probability that he also committed the act charged.” *Coe*, 101 Wn.2d at 777. Even if the features of the crime are not individually unique, appearance of several features in the cases, especially when combined with a lack of dissimilarities, can create sufficient inference that they are not coincidental. *State v. Vy Thang*, 145 Wn.2d 630, 644, 41 P.3d 1159 (2002). However, “the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature.” *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). The requirement of uniqueness is stringent. *State v. Coe*, 101 Wn.2d 772, 777-78, 684 P.2d 668 (1984). Absent uniqueness, a lack of dissimilarities is required. *Thang*, 145 Wn.2d at 644.

One other Washington case considered the admissibility of a defendant’s general written “plan”. *State v. Whalon*, 1 Wn. App. 785, 464 P.2d 730, *review denied* 78 Wn.2d 992 (1970), involved a rape charge. In that case, like this one, the defendant was found in possession of a list that was characterized as “nine steps for the commission of a rape. *Whalon* at 787. Like here, Whalon’s list included a phone number that was not the victim’s. *Whalon* at 787. Unlike here, Whalon possessed this list three

months after the date of the crime of which he was charged. *Whalon* at 792. The court ultimately held that permitting this list into evidence was reversible error because: “we believe the yellow paper, containing the nine steps to commit a rape, was inflammatory far beyond its probative value and should not have been admitted.” *Whalon* at 794.

It is our view that this matter of the admission of evidence of independent and unrelated crimes, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment, should be surrounded with definite safeguards.

Whalon at 795.³ The court held that two pieces of evidence could be admitted upon retrial with a limiting instruction, but implies that the list of steps to commit a rape should not have been admitted at all, instruction or no instruction. 1 Wn. App. 785, 794. The *Whalon* court held that a retrial without this evidence was required to correct the error. *Whalon* at 794.

Whether admitted under ER 404(b) or more generally under ER 403, the trial court must find prior to admission that the notebook lists are more probative of Mr. Alverto’s guilt than unfairly prejudicial. The trial court here found the probative value was merely equal to the prejudicial effect. It is clear that this notebook, like the list in *Whalon*, “was

³ In *Whalon*, like in this case, the defendant did not request a limiting instruction. 1 Wn. App 785, 795.

inflammatory far beyond its probative value and should not have been admitted.” See *Whalon*, at 794. Thus, the trial court abused its discretion in permitting the prosecution to bring in the notebook and to argue to the jury that it was “a plan to kill Stephanie Wilson.” RP XIV 1397.

Therefore, Mr. Alverto’s convictions should be reversed.

V. CONCLUSION

The admission of the notebook as a supposed “plan” was in error because the probative value is far outweighed by the unfair prejudice of the evidence. The trial court abused its discretion in admitting this evidence because it applied the wrong legal standard and then erroneously admitted evidence even the judge found was not more probative than prejudicial. Therefore, Mr. Alverto’s convictions were tainted by erroneously admitted evidence and should be reversed.

DATED: May 27, 2009.

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CERTIFICATE OF SERVICE

I certify that on May 27, 2009, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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