

NO. 38821-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE RYAN McMILLAN

Appellant.

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

The Honorable James Stonier, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

PM 7-30-09

See
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
CLERK OF COURT
1000 1ST AVENUE
SEASIDE, WA 98138
360-876-2736

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

A. ASSIGNMENT OF ERROR..... 1

 ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

B. STATEMENT OF THE CASE..... 2

 1. PROCEDURAL HISTORY 2

 2. SUBSTANTIVE FACTS 2

a. Background facts 2

b. Pretrial motion to exclude McMillan’s statement 4

c. Trial testimony 7

C. ARGUMENT..... 11

 THE TRIAL COURT VIOLATED MCMILLAN’S DUE PROCESS
 RIGHT TO A FAIR TRIAL BY ADMITTING UNFAIRLY
 PREJUDICIAL EVIDENCE OF THE CIRCUMSTANCES
 FOLLOWING HIS ARREST ON UNRELATED CHARGES..... 11

D. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Cases

<u>In re Parentage of Jannot</u> , 110 Wn. App. 16, 37 P.3d 1265 (2002), <u>affirmed</u> , 149 Wn.2d 123 (2003)	12
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987).....	17
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	16
<u>State v. Bruton</u> , 66 Wn.2d 111, 401 P.2d 340 (1965).....	13
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	12
<u>State v. Evans</u> , 96 Wn.2d 1, 633 P.2d 83 (1981).....	11
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	11
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001).....	13, 15, 17
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	11
<u>State v. Sexsmith</u> , 138 Wn. App. 497, 157 P.3d 901 (2007), <u>review denied</u> , 163 Wn.2d 1014 (2008)	12
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	12
<u>State v. Turner</u> , 29 Wn. App. 282, 627 P.2d 1324, <u>review denied</u> , 95 Wn.2d 1030 (1981)	16

Statutes

RCW 9A.56.190.....	2
RCW 9A.56.200(1)(a)	2
RCW 9A.82.050(1).....	2

Rules

ER 404(b).....	4, 7, 11, 12, 13
----------------	------------------

Constitutional Provisions

Const. art. 1 § 3	11
U.S. Const. amend 14	11
U.S. Const. amend 5	11

A. ASSIGNMENT OF ERROR

The court's improper admission of irrelevant and unfairly prejudicial evidence of the circumstances surrounding appellant's arrest on an unrelated charge denied him a fair trial.

Issue pertaining to assignment of error

Appellant gave a false name at a traffic stop, and he was arrested for driving without a license and obstructing. In a search incident to arrest, police found drugs in the trunk of his car. Appellant had two other pending drug charges at the time. After his arrest, appellant was questioned about a robbery which had occurred almost two years earlier. When he was being transported to jail, appellant told the arresting officer that he had given a false name during the traffic stop because he was looking at a lot of time. Appellant was charged with robbery, and the court admitted his statement to establish his consciousness of guilt on that charge. Where the statement was not substantially probative of appellant's guilt or innocence in this case, and admission of the statement unfairly exposed appellant to an inference that he was guilty based on his criminal propensity, did the court's erroneous admission of the statement deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On October 21, 2008, the Cowlitz County Prosecuting Attorney charged appellant Jesse Ryan McMillan with first degree robbery and first degree trafficking in stolen property. CP 4-5; RCW 9A.56.190; RCW 9A.56.200(1)(a); RCW 9A.82.050(1). The case proceeded to jury trial before the Honorable James Stonier, and the jury entered guilty verdicts. CP 57-58. The court imposed high-end standard range sentences, and McMillan filed this timely appeal. CP 67, 74.

2. Substantive Facts

a. Background facts

Shelly Crimmins's purse was stolen from her car at around 6:00 on January 29, 2007. Crimmins had just finished loading groceries into her car and was walking her cart to the cart return when she passed a white man in his early twenties wearing a white baseball cap, a white hooded sweatshirt, and a black jacket with fur around the hood. 2RP¹ 88-89, 93-95. Crimmins let go of the cart and turned around to see the man grab her purse out of the front seat of her car. 2RP 95. The man started running,

¹ The Verbatim Report of Proceedings is contained in four volumes designated as follows: 1RP—10/17, 29/08, 11/5/08, 12/3, 17, 23, 31/08, 1/6, 13/09; 2RP—1/14/09; 3RP—1/15/09 (Part A); 4RP—1/15/09 (Part B), 1/16/09, 2/4/09.

and Crimmins chased after him, grabbing the hood of his coat, which detached in her hands. 2RP 97.

The man got into an older white car and backed out of the parking space. 2RP 99-100. Crimmins noticed that the driver's window was open, so she reached in the car and grabbed him. 2RP 101-02. The man stepped on the gas, and the car took off with Crimmins still attached. She was knocked off when she bumped into a van which was parked next to the car. 2RP 103. A bystander assisted Crimmins in calling 911. 3RP 226-27. Crimmins was taken to the hospital in an ambulance, and she was diagnosed with acute cervical strain. 2RP 107;4RP 262. She was in pain for a couple of weeks, and she missed a few days of work due to her injury. 2RP 108.

At the time it was stolen, Crimmins's purse contained several pieces of identification, some expensive jewelry, bank cards, checks, and two cell phones. 2RP 96-97. Police recovered one of the phones the next day. Crimmins had called the phone from the hospital and told the man who answered that the phone was stolen. 2RP 109, 136. With the help of police, Crimmins arranged to meet the man to buy the phone back. 2RP 110, 136. A plain-clothes police officer stood in for Crimmins at the meeting, and Adam Pastorino was arrested when he arrived with the

phone. 3RP 158, 161. Crimmins was brought to the scene, but she failed to identify Pastorino as the man who robbed her. 2RP 111.

Following the robbery the police had collected the hood that detached from the perpetrator's jacket, and it was sent to the Washington State Patrol Crime Lab for analysis. 2RP 145; 3RP 176. In October 2008, police received a report from the lab indicating that Jesse McMillan was the source of one of the DNA profiles on the hood. 3RP 178; 3RP 240. McMillan was arrested at a traffic stop a week later, and he was charged with robbery and trafficking in stolen property. 3RP 178; CP 4-5.

b. Pretrial motion to exclude McMillan's statement

Prior to trial, the State indicated that it planned to present evidence of two traffic stops to show that McMillan was in possession of a vehicle the State contended was involved in the robbery. 2RP 51-52. The State noted that McMillan was arrested for other offenses following the traffic stops and acknowledged that that information would be unfairly prejudicial to the defense. 2RP 52. Defense counsel had no objection to the jury hearing that McMillan was stopped for traffic infractions, but he argued that the jury should not learn of the drug charges that came out of those stops. 2RP 52. The court ruled that any reference to drugs would be inadmissible under ER 404(b), but so long as the testimony was limited to the traffic violations, it would be permitted. 2RP 53.

At the pretrial Cr.R 3.5 hearing, Officer Brian Clark testified that on October 16, 2008, he stopped McMillan for failure to yield. 2RP 56. McMillan initially gave a false name, and he was arrested for obstructing and driving with a suspended license. 2RP 57-58, 61. Drugs were discovered in the trunk of the car in a search incident to the arrest. 2RP 61.

McMillan was transported to the police station. Police had just received the DNA report from the Crimmins robbery case the week before, and they wanted to interrogate McMillan. 2RP 63. After reading McMillan his rights, Detective Blain showed him the DNA report and questioned him about the robbery. 2RP 64, 66. Clark then drove McMillan to jail. On the way, McMillan told Clark he had given a false name during the traffic stop because he was “looking at a lot of time.” 2RP 60.

McMillan admitted giving a false name when he was stopped. 2RP 71. He testified that at the time of the stop, he had two other drug charges pending, and the officers found drugs when they searched his car. 2RP 72. His attorney had told him that his sentencing range would increase if he got any more offenses. 2RP 77. McMillan explained that when he told Clark he had given a false name because he was looking at a lot of time, he was referring to the pending drug charges as well as the

new drug charges that would result from the traffic stop. 2RP 73. He did not know he was a suspect in the robbery investigation at the time he gave the false name, and his statement to Clark had nothing to do with the robbery. 2RP 73.

The State moved to admit McMillan's statement that he gave the false name because he was looking at a lot of time. It argued that the statement was spontaneous and McMillan voluntarily waived his rights. 2RP 78. The prosecutor also argued that the statement showed guilty knowledge, and there was a reasonable inference he was referring to the robbery investigation because he made the statement after talking to the detective. 2RP 78-79.

Defense counsel moved to exclude the statement, arguing that it was irrelevant to the charges in this case and unfairly prejudicial. McMillan had given the false name before he knew he was a suspect in the robbery investigation, and there was no basis to infer that his statement explaining why he gave the false name was referring to that charge. McMillan's statement that he was looking at a lot of time referred to the drug charges that were pending at the time of his arrest, and admitting the statement would necessitate informing the jury of the pending charges, not just the fact of prior traffic stops as the court had earlier ruled. 2RP 79-81.

The court ruled that the statement was admissible under ER 404(b). It found that the false name, together with McMillan's statement explaining it, reflected a consciousness that was guilty of some crime that would generate a lot of time. 2RP 81-82. The court found that the only charge McMillan would be facing at the time of the traffic stop was DWLS, although it acknowledged that McMillan might have known about drugs in the trunk. 2RP 82. The court ruled the statement was not unfairly prejudicial, despite the fact that it would be necessary to explain the statement to the jury. 2RP 82.

c. Trial testimony

At trial, Crimmins testified about the robbery, giving descriptions of the perpetrator and his car. 2RP 88-114. The State also presented testimony about the subsequent investigation, the DNA analysis, and McMillan's arrest. 3RP 152-80, 223, 240-46. In addition, Officer Clark testified about McMillan giving a false name during the traffic stop and about his statement explaining why he did so. 3RP 221-23, 225.

In cross examining the State's witnesses, defense counsel brought out several inconsistencies in the State's evidence. For example, Pastorino testified that he obtained Crimmins's cell phone from James Repperger, and Repperger testified he bought the phone from McMillan. 2RP 128, 135. Defense counsel established, however, that while Repperger claimed

he bought the phone from McMillan around 7:00 or 7:30 on January 29, 2007, Pastorino had actually used the phone at 6:50. 2RP 130; 3RP 183-84, 197.

Detective Damon Blain testified that after McMillan's name had come up in the investigation, he went to McMillan's address and photographed one of the cars parked there, a white two-door Plymouth Colt GL with a rear spoiler. 3RP 173-75. Officers testified McMillan had been driving that car when stopped for traffic infractions on November 5, 2006, and January 10, 2007. 3RP 214-15, 219. Defense counsel established that the photographs of McMillan's car showed that the rear window was broken out. 3RP 193. Crimmins testified, however, that the car used in the robbery had a big back window. 2RP 100. Moreover, while McMillan's car had two doors, Crimmins had described the perpetrator's car as a four-door model in both the 911 call and in her written statement at the hospital. 2RP 120; 3RP 228. Only at trial did she say she could no longer remember whether the car had two or four doors. 2RP 100. In the 911 call Crimmins described the car as a "Corolla or something like that", in her written statement she compared it to a Celica, and at trial she said it was an older model sporty car similar to a Honda Prelude. 2RP 100, 122, 228. She did not know if the car had a spoiler, although she believed the back end was higher than the front. 2RP 101.

Finally, she testified that the door handles were black. 2RP 123-24. The photographs taken by the detective showed that McMillan's car did not have black handles. 3RP 193.

Detective Blain testified that he prepared three photo montages for Crimmins to view. 3RP 168. She did not identify anyone in the first montage. The second montage contained a photograph of McMillan, but Crimmins did not identify him as the perpetrator. 3RP 187. She pointed to two other photographs and said they shared some likenesses with the perpetrator. 3RP 187. In fact, she was 95% certain that one of those was the suspect. 3RP 190. She never picked McMillan's photograph as even bearing any resemblance to the perpetrator, however. 3RP 191.

Crimmins did not identify McMillan at trial, either. Although she had described the perpetrator to the 911 operator as a white male with dark hair, about 5'4" tall, at trial she testified that he was slightly taller than her 5'7". 2RP 105; 3RP 227. She maintained that the perpetrator had dark hair, however. 2RP 115. The evidence at trial was that McMillan is 6'1" tall and has light sandy blond hair. 3RP 189; 4RP 269.

Although the State presented evidence that McMillan was the major contributor of the DNA on the hood, there was more than one DNA profile present. 3RP 210, 235, 240. The forensic scientists who examined

the hood testified that it was impossible to tell when the DNA was deposited or which profile was more recent. 3RP 210, 252-53.

McMillan testified that he had a jacket with a hood similar to the one in evidence about two years earlier, but he did not remember the last time he wore it. 4RP 269. He knew Repperger, and he believed Repperger had been to his house when the jacket was there. 4RP 270. McMillan testified that he had never seen Crimmins before, and he did not steal her purse. 4RP 271, 276.

On cross examination, the prosecutor asked McMillan about his arrest. He admitted giving a false name and making the statement about why he had done so. 4RP 273. He did not explain why he was looking at a lot of time in jail.

The prosecutor relied on McMillan's statement in closing argument to show consciousness of guilt, saying McMillan told the officer he lied about his name because he was looking at a long time for a serious crime like robbery. The prosecutor commented that McMillan gave no explanation for his statement and argued that an innocent man would not act in that way. 4RP 295.

C. ARGUMENT

THE TRIAL COURT VIOLATED MCMILLAN'S DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE OF THE CIRCUMSTANCES FOLLOWING HIS ARREST ON UNRELATED CHARGES.

Both the state and federal constitutions guarantee criminal defendants a fair trial. U.S. Const. Amend V; U.S. Const. Amend XIV; Const. art. 1 § 3; see State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The rule does allow for the introduction of other acts evidence if it is relevant for some legitimate purpose, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b)². But such evidence is admissible only if

² ER 404(b) provides:

the trial court finds the substantial probative value of the evidence outweighs its prejudicial effect. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This cautious approach recognizes the inherent prejudice of evidence of other bad acts. State v. Sexsmith, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), review denied, 163 Wn.2d 1014 (2008).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible,” and the State must meet a substantial burden when attempting to bring in evidence under one of the exceptions to ER 404(b). DeVincentis, 150 Wn.2d at 17. A trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). “The abuse of discretion standard is not, of course, unbridled discretion.” In re Parentage of Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), affirmed, 149 Wn.2d 123 (2003). A court abuses its discretion if its decision is contrary to relevant law, based on untenable grounds, or supported by untenable reasons. Thang, 145 Wn.2d at 642; Jannot, 110 Wn. App. at 22.

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.

Evidence of flight, resisting arrest, use of a false name, and other related conduct may be admissible under ER 404(b) to prove the defendant's consciousness of guilt. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); see also State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965) (rationale underlying admissibility of evidence of flight following the commission of a crime is that flight is an instinctive reaction to consciousness of guilt or is an attempt to avoid arrest and prosecution). This evidence tends to be only marginally probative of guilt, however. Thus, to be admissible, "the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." Freeburg, 105 Wn. App. at 498. Evidence should only be admitted under this exception if it allows "a reasonable inference of consciousness of guilt of the charged crime." Freeburg, 105 Wn. App. at 498 (emphasis added).

In Freeburg, the trial court admitted evidence that the defendant was in possession of a weapon at the time of his arrest as evidence of flight. Freeburg, 105 Wn. App. at 496. But the arrest occurred more than two years after the charged crime, the defendant made no attempt to resist arrest, and the gun in his possession was not the gun used in the shooting with which he was charged. The Court of Appeals held that the State failed to prove the defendant's possession of the gun at the time of his

arrest was evidence of his consciousness of guilt in the charged offense. Freeburg, 105 Wn. App. at 500-01.

Applying the same analysis here, it is evident that the trial court abused its discretion in admitting McMillan's statement that he gave a false name during the traffic stop because he was looking at a lot of time. As the Freeburg Court recognized, flight and use of a false name fall within the same category—evidence used to demonstrate consciousness of guilt. Under the facts of that case, the defendant's possession of a weapon at the time of his arrest was too attenuated from the crime with which he was charged to be probative of his guilt on that offense. Although no gun was involved here, the same reasoning applies. As in Freeburg, the link between McMillan's statement and the robbery was too tenuous for the statement to be substantially probative of his guilt on that offense.

McMillan gave a false name at a traffic stop, and he was arrested for driving without a license and obstructing. 2RP 57-58. In a search incident to arrest, police found drugs in the trunk of his car. 2RP 61. McMillan also had two other pending drug charges at the time. 2RP 72. When he was being transported to jail, McMillan told the arresting officer that he had given a false name because he was looking at a lot of time. 2RP 60. Between the arrest and the statement, McMillan had been questioned about the robbery charged in this case, but there was no

evidence McMillan knew he was a suspect in the robbery, which occurred more than a year and a half earlier, at the time he gave the false name.

Nonetheless, the court admitted McMillan's statement, finding it was probative of his consciousness of guilt in the robbery. The court reasoned that because the only thing McMillan would be facing would be a DWLS charge, his statement indicated an awareness that there was some more serious crime out there. 2RP 82-83. This reasoning is untenable. McMillan's statement is relevant to the robbery charge only if one disregards, as the court did, the undisputed evidence that drugs were found in the trunk, that McMillan had two pending drug charges at the time, and that he knew any additional charges would increase his standard range.

Given the circumstances, this Court can have little confidence that McMillan's explanation for giving a false name signified he was trying to evade detection for the robbery. The statement was not substantially probative of McMillan's consciousness of guilt on the robbery charge, and it should have been excluded. See Freeburg, 105 Wn. App. at 500-01.

Moreover, any marginal relevance the statement may have had to the charges in this case was outweighed by the danger of unfair prejudice. The trial court had already ruled that evidence of McMillan's pending charges was unfairly prejudicial and inadmissible. 2RP 53. As the court acknowledged, McMillan could not fairly rebut the inference of guilt

urged by the State without also informing the jury of this highly prejudicial explanation for the false name. 2RP 82-83. “Where admission of evidence is unduly prejudicial, the minute peg of relevance is said to be obscured by the dirty linen hung upon it.” State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324, review denied, 95 Wn.2d 1030 (1981).

The trial court’s error in admitting this unfairly prejudicial evidence was not harmless. An evidentiary error is harmless only if it is reasonably probable the error did not materially affect the jury’s verdict. State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006). The State’s case against McMillan was far from overwhelming. Crimmins did not identify McMillan at trial or in a montage containing his photograph. 3RP 187, 191. In fact, she selected a photograph of someone else and said she was 95% certain that man was the perpetrator. 3RP 190. In the 911 call Crimmins made immediately after the robbery, she described the suspect as 5’4” tall with dark hair, while the undisputed evidence at trial established that McMillan is 6’1” tall and has light sandy blond hair. 3RP 189, 227; 4RP 269. Although McMillan’s DNA profile was found on the hood, his was not the only DNA present, and the State did not prove that McMillan was the last person wearing the hood. 3RP 210. Moreover, Crimmins did not identify McMillan’s car as the one used in the robbery, and none of the various descriptions she gave of that car was consistent

with the photograph of McMillan's car. 2RP 100, 120, 122-24; 3RP 173-75, 193, 228.

Because of the court's error, the jury heard McMillan's statement that he gave a false name because he was looking at a lot of time. The State suggested in closing argument that McMillan admitted on the stand that he knew he was "looking at a long time for a serious charge like robbery." 4RP 295. The jurors could either draw the unreasonable inference suggested by the State, that McMillan was admitting guilt in the robbery, or they could speculate that he had committed other offenses about which they had not been told. The latter consideration, while being true, has no legitimate role in the jury's deliberations. It tends to shift the jury's attention to the defendant's criminal propensity, "the forbidden inference." State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987) (overruled on other grounds); see also Freeburg, 105 Wn. App. at 502. Given the powerful nature of this evidence, its lack of relevance, and the weakness of the State's case, the court's error cannot be considered harmless. Admission of the statement denied McMillan a fair trial, and his convictions must be reversed.

D. CONCLUSION

The trial court's improper admission of irrelevant and unfairly prejudicial evidence of McMillan's statement relating to his arrest on an

unrelated charge denied McMillan a fair trial, and his convictions must be reversed.

DATED this 30th day of July, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jesse Ryan McMillan*, Cause No. 38821-9-II, directed to:

Susan Irene Baur
Cowlitz Co. Prosecutor's Office
312 SW First Ave.
Kelso, WA 98626-1799

Jesse Ryan McMillan, DOC# 304037
Unit E, Tier West, Cell 218
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

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



Catherine E. Glinski
Done in Port Orchard, WA
July 30, 2009

BY _____
DEPUTY
STATE OF WASHINGTON
09 JUL 31 PM 2:50
COURT OF APPEALS
PORT ORCHARD, WA