

NO. 41364-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS MICHAEL QUACKENBUSH,

Appellant.

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

The Honorable Stephanie Arend

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	6
THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE CHARACTER EVIDENCE BASED ON AN ERRONEOUS VIEW OF THE LAW WHICH PREJUDICED QUACKENBUSH AND DENIED HIM A FAIR TRIAL .....	6
D. <u>CONCLUSION</u> .....	12

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Allen</u> , 57 Wn. App. 134, 787 P.2d 566 (1990) . . . . .	7
<u>State v. Chase</u> , 59 Wn. App. 501, 799 P.2d 272 (1990) . . . . .	7
<u>State v. Fire</u> , 145 Wn.2d 152, 34 P.3d 1218 (2001) . . . . .	12
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001) . . . . .	7
<u>State v. Herbert</u> , 33 Wn. App. 512, 656 P.2d 1106 (1982) . . . . .	7
<u>State v. McGhee</u> , 57 Wn. App. 457, 788 P.2d 603 (1990) . . . . .	7
<u>State v. McSorley</u> , 128 Wn. App. 598, 116 P.3d 431 (2005) . . . . .	10
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008) . . . . .	6
 <u>RULES, STATUTES, OTHER</u>	
ER 404(a) . . . . .	10
U.S. Const. amendment VI . . . . .	12
Wash. Const. article I, section 7 . . . . .	12

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in allowing inadmissible character evidence which prejudiced appellant and denied him a fair trial.

2. The trial court erred in entering the conclusion that the questions asked by Deputy Dosremedios were for assessment of the defendant's medical needs and therefore the statements made by the defendant to Deputy Dosremedios while in his vehicle are admissible. CP 60-65.

Issue Pertaining to Assignments of Error

Is reversal required where the trial court abused its discretion because it allowed inadmissible character evidence based on an erroneous view of the law which consequently prejudiced appellant and denied him his constitutional right to a fair trial?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts.

On June 8, 2010, the State charged appellant, Thomas Michael Quackenbush, with one count of attempting to elude a pursuing police vehicle while endangering one or more persons other than the defendant or pursuing law enforcement officer and one count of driving while license

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<sup>1</sup> The verbatim report of proceedings are referred to as 1RP for 10/06/10, 10/07/10 a.m., 10/08/10; 2RP for 10/07/10 p.m.; and 3RP for sentencing on 10/22/10.

suspended in the third degree. CP 1-2. On October 6, 2010, the State orally dismissed count two, driving while license suspended in the third degree, and filed an amended information on October 22, 2010 1RP 4; CP 66.

Prior to trial before the Honorable Stephanie Arend, the court held a 3.5 hearing on October 6, 2010 and admitted statements made by Quackenbush. 1RP 13-43. A jury found Quackenbush guilty as charged on October 8, 2010. 1RP 75-77; CP 54-55. The court sentenced Quackenbush to 34 months and a day in confinement. 3RP 7; CP 73. Quackenbush filed a timely notice of appeal. CP 80.

2. Substantive Facts

On May 29, 2010, Sergeant John Lizama was supervising a “nighttime seatbelt emphasis.” 2RP 9. Lizama testified that he stood outside his patrol car on the corner of State Route 7 and 112<sup>th</sup> Street, watching cars to see if the occupants were wearing seatbelts. 2RP 9-10. If he observed an occupant not wearing a seatbelt, he would direct a trooper by radio to stop the car and issue a citation. 2RP 10.

At around 4 p.m., Lizama heard Trooper Havenner reporting by radio that a “vehicle was failing to yield.” 2RP 9, 12. He drove to State Route 512 where he caught up with Havenner who was pursuing a car with Trooper Anderson following him. Lizama got behind Anderson and

the pursuit continued with lights and sirens activated. 2RP 13-14. The car was weaving in and out of traffic and ran a red light. 2RP 14-15. Lizama saw other motorists stop or pull off to the shoulder to avoid a collision. 2RP 15. When the car accelerated to a “speed in excess of probably 75 miles a hour” through a “somewhat quasi residential area,” Lizama directed his troopers to terminate the pursuit for public safety concerns. 2RP 16-17. He never saw the driver of the car. 2RP 18-19.

Trooper Albert Havenner testified that while “working a seatbelt emphasis, he was traveling north on State Route 7 when he saw a blue Chevy Monte Carlo coming southbound, “I observed a white male probably in his mid-20s, dark hair, short hair, kind of a goatee. As he came close, I observed his seatbelt hang above his shoulder.” 2RP 21-25, 27. Havenner watched the driver for “two to three seconds” and “made eye contact” with him as he went by. 2RP 25. He made a U-turn and caught up to the car and wrote down the license plate number. 2RP 25-27. As Havenner began following the car, it accelerated up to 80 miles an hour, driving in and out of traffic, and running through red lights. 2RP 28-34. He turned on his emergency overhead lights and pursued the car until the chase had to be terminated “to try to avoid any kind of further accidents or anything else happening.” 2RP 29, 34-35.

The next day, Havenner learned that the Pierce County Sheriff's Department arrested "an individual that was driving the same car" and after viewing a Department of Licensing photograph of Quackenbush, Havenner identified him as the driver of the Chevy that he chased on May 29, 2010. 2RP 36-38. Under cross-examination, Havenner acknowledged that in the photograph, Quackenbush had a goatee and a tattoo on the right side of his neck but he had not noted in his police report that the driver had a goatee and tattoo. 2RP 41-44. He did not consider anyone else as a suspect and did not conduct any further investigation. 2RP 45-46.

While working patrol on May 30, 2010, Deputy Chad Dickerson noticed a light blue Chevy Monte Carlo turn into Parkwood Apartments, located close to State Route 7. 2RP 49-50, 53-54. Dickerson testified that the car caught his attention because a car matching that description had been involved in a pursuit with the Washington State Patrol. He passed by the apartment complex and recognized the license plate so he turned around, pulled into the parking lot behind the car, and activated his overhead lights. 2RP 50. Dickerson approached the lone driver and asked for his driver's license and registration. He obtained a Washington State I.D. card that identified the driver as "Thomas Michael Quackenbush." 2RP 50-52. He asked Quackenbush if "he had any warrants" and he said,

“No.” 2RP 51. Dickerson ran a check and discovered that “he had a possible felony warrant.” 2RP 51-52.

While Dickerson was running a check for warrants, Quackenbush fled on foot and Dickerson apprehended him after a short pursuit. 2RP 56-57. Dickerson deployed his taser because Quackenbush did not immediately comply with his commands to get on the ground. 2RP 57. After placing Quackenbush in handcuffs and advising him of his constitutional rights, Dickerson asked him if he ran because he “had warrants” and he said, “Yes.” 2RP 57. Dickerson asked Quackenbush if “that’s why he had run from state patrol the day before” and he said, “I didn’t run from the state patrol.” 2RP 58. Before he turned Quackenbush over to Deputy Dosremedios, he asked him who owned the car and Quackenbush said it belonged to his girlfriend. 2RP 58. During cross-examination, Quackenbush stated it was his belief that Quackenbush was not the registered owner of the car but he never followed up with the registered owner. 2RP 60-61.

Deputy Patrick Dosremedios placed Quackenbush in the back of his patrol car to take him to the Fife Jail. 2RP 64-65. On the way to the jail, Quackenbush told him that he was not feeling well. When he kept complaining, Dosremedios thought “it’s a medical condition. I need to know what is going on.” 2RP 66. Dosremedios asked Quackenbush if he

was “on any drugs.” 2RP 66. Over defense counsel’s objection, the court allowed him to state that Quackenbush told him “no.” When Quackenbush started throwing up in the patrol car, Dosremedios called for the Tacoma Fire Department to meet him at the Fife Jail. Before arriving at the jail, Dosremedios asked Quackenbush how he was feeling and he said “he had used drugs prior to my contact with him.” 2RP 66-67. The court overruled defense counsel’s objection and motion to strike the statement. 2RP 67. At the jail, the fire department evaluated Quackenbush and transported him to the hospital. 2RP 67.

Quackenbush did not testify. 2RP 68.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE CHARACTER EVIDENCE BASED ON AN ERRONEOUS VIEW OF THE LAW WHICH PREJUDICED QUACKENBUSH AND DENIED HIM A FAIR TRIAL.

Reversal is required where the trial court abused its discretion because it allowed inadmissible character evidence based on an erroneous view of the law which consequently prejudiced Quackenbush and denied him his constitutional right to a fair trial.

A trial court necessarily abuses its discretion if it is based its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Washington courts have found several forms of conduct to be relevant and admissible because they allow a reasonable inference of consciousness of guilt on the part of the defendant. Examples include State v. Chase, 59 Wn. App. 501, 507-08, 799 P.2d 272 (1990)(citing State v. Allen, 57 Wn. App. 134, 143-44, 787 P.2d 566 (1990)(a defendant giving false name to the police); State v. McGhee, 57 Wn. App. 457, 460-01, 788 P.2d 603 (1990)(a defendant making threatening gestures toward a witness); State v. Herbert, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982)(a defendant's flight from the crime scene). “[E]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime.” State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001).

In Chase, he argued on appeal that the trial court erred by admitting evidence that he gave a false name to the police. 59 Wn. App. at 506. This Court determined that the evidence had a tendency to connect Chase to the scene of the crime, tended to show consciousness of guilt of the crime, and had a tendency to show that Chase being one who would lie was a person of bad character. Id. at 507. This Court concluded that although the third purpose was improper, the evidence was admissible

because the probative value of the first two purposes outweighed the unfair prejudice resulting from the third. Id. at 507-08.

In Freeburg, he was convicted of shooting and killing a man in Seattle. 105 Wn. App. at 495-96. On appeal, Freeburg argued that the trial court erred in admitting evidence that he possessed a loaded gun when he was arrested in Canada three years later. Id. at 497-98. Division One of this Court concluded that the State failed to show that the fact that Freeburg carried a loaded gun in Canada was evidence of consciousness of guilt in the Seattle shooting. Id. at 501. The Court reversed, holding that admission of the evidence was not harmless because the evidence tended to show that Freeburg was a “bad man,” it was irrelevant, and evidence of guns is highly prejudicial. Id. at 502.

Here, the State moved to admit evidence that while Deputy Dosremedios was transporting Quackenbush to jail, he said he was not feeling well and complained of a rapid heart rate and difficulty breathing so Dosremedios asked him if he had taken any drugs. The State argued that evidence that Quackenbush initially denied consuming drugs but later admitted he had consumed drugs was admissible as consciousness of guilt, citing State v. Chase where the defendant had initially given a false name to police. 1RP 34-35, 41-42. The State asserted that the evidence was relevant “in terms of the defendant’s statements in assessing what

statements to believe the defendant is telling the truth and which statements he is not.” 1RP 42.

Defense counsel objected to admitting evidence of drug use because it was more prejudicial than probative and argued that the State would use such evidence for an improper purpose:

I anticipate that the State will use it for purposes of credibility, and I appreciate the opportunity to use a limiting instruction; however, I think it could potentially start going into because he lied -- he said, No, I didn't use drugs; and then, Yes, I used drugs an hour ago -- that can then be used to imply he must be lying about the fact that, No, I didn't drive; I wasn't involved in the Washington State Patrol chase yesterday.

1RP 40-42.

The trial court recognized that “[i]t’s not relevant to this trial whether or not he had consumed any meth or any other drugs for that matter and suggested that it could give a “limiting instruction that it’s being offered solely for the purpose of assessing the credibility of the defendant” and not for substantive reasons. 1RP 40. The court admitted the evidence agreeing with the State that the evidence was “relevant to his credibility, and indicia of guilt, I would agree with that.” 1RP 42-43.

The trial court’s conclusion that Quackenbush’s conflicting statements were admissible for assessing credibility and to show consciousness of guilt falls contrary to this Court’s decision in Chase. In

Chase, this Court concluded that evidence of Chase giving the police a false name tended to show that he, “being one who would lie, was of bad character and thus more likely to have committed the crime charged.” 59 Wn. App. at 507. This Court concluded that admitting such evidence “was improper due to ER 404(a).”<sup>2</sup> Id. Similarly, admission of evidence that Quackenbush gave police contradictory statements was improper and prejudicial. To Quackenbush’s detriment, the State highlighted this improper evidence during closing argument to bolster its case:

They transported the defendant to the Fife Jail when he says that he is starting to feel ill. In order to assess his medical condition, the deputy asked him, “Well, do you have drugs in your system?” What does the defendant say? “No.” He starts to throw up. It is clear that something is going on. The defendant then says, “Well, yeah, I did. I had drugs in my system.”

So when you look at, no warrant, yeah, I have a warrant; no drugs, yes, I did. I used -- I have drugs in my system, then you get to determine is the defendant credible when he says, I’m not the guy that ran from WSP the day before.

2RP 81-82.

The State’s argument clearly implied that because Quackenbush lied about using drugs he must have lied about eluding the police, in violation of ER 404(a). State v. McSorley, 128 Wn. App. 598, 611, 116

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<sup>2</sup> Under Evidence Rule 404(a), “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving actions in conformity therewith on a particular occasion.”

P.3d 431 (2005)(ER 404(a) bars evidence that uses a person's propensities to show how the person acted on a particular occasion).

Furthermore, contrary to the prosecutor's argument, unlike in Chase, the evidence did not show consciousness of guilt of the charged crime. 59 Wn. App. at 507. As in Freeburg, where the Court concluded that evidence that Freeburg carried a loaded gun when arrested in Canada did not show consciousness of guilt of the Seattle shooting three years earlier, evidence that Quackenbush gave conflicting statements of drug use did not show consciousness of guilt that he eluded police the day before. 105 Wn. App. at 501. Importantly, just as evidence of weapons was highly prejudicial in Freeburg, evidence of drug use was highly prejudicial here. Consequently, the trial court abused its discretion in admitting the evidence because its ruling was based on an erroneous view of the law. Quismundo, 164 Wn.2d at 504.

The record substantiates that admission of the evidence was not harmless in light of the fact that the State's case was not overwhelming given that Trooper Havenner only saw the driver for two to three seconds, the description in his report did not note that the driver had a goatee, Quackenbush was not the registered owner of the car, and the police conducted no further investigation. 2RP 21-25, 41-46, 60-61. Reversal is

required because the highly prejudicial evidence denied Quackenbush his right to a fair trial. Freeburg, 105 Wn. App. at 502.

D. CONCLUSION

The Sixth Amendment and article I, section 7 of the Washington Constitution ensures and protects a defendant's right to a fair trial. State v. Fire, 145 Wn.2d 152, 167, 34 P.3d 1218 (2001). For the reasons stated, this Court should reverse Mr. Quackenbush's conviction and remand for a new and fair trial.

DATED this 20<sup>th</sup> day of May, 2011.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Thomas Michael Quackenbush

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Thomas Michael Quackenbush, DOC # 839192, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326-0769.

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

DATED this 20<sup>th</sup> day of May 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

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