

No. 42339-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donovan Bach,

Appellant.

Mason County Superior Court Cause No. 10-1-00386-0

The Honorable Judge Amber Finlay

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. Evidence that Mr. Bach was arrested on an outstanding warrant should have been excluded under ER 402, ER 403, and ER 404(b)..... 1

II. Mr. Bach’s convictions violated his Fourteenth Amendment right to due process because they were based in part on propensity evidence. 4

III. The erroneous definition of “substantial step” relieved the state of its burden to prove the elements of attempted burglary. 4

IV. The sentencing court’s finding regarding Mr. Bach’s present or future ability to pay his legal financial obligations is not supported by the record. 6

CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

State v. Acosta, 123 Wash. App. 424, 98 P.3d 503 (2004) 3

State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987)..... 3

State v. Brown, 147 Wash.2d 330, 58 P.3d 889 (2002) 6

State v. DeVincentis, 150 Wash. 2d 11, 74 P.3d 119 (2003) 1, 4

State v. Eplett, ___ Wash.App. ___, ___ P.3d ___ (2012) 5

State v. Hughes, 118 Wash. App. 713, 77 P.3d 681 (2003)..... 3

State v. Sublett, 156 Wash. App. 160, 231 P.3d 231, *review granted*, 170 Wash. 2d 1016, 245 P.3d 775 (2010) 2

State v. Workman, 90 Wash.2d 443, 584 P.2d 382 (1978) 4, 5, 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 4

WASHINGTON STATUTES

RCW 9A.28.020..... 4

OTHER AUTHORITIES

ER 103 3

ER 402 1, 2, 4

ER 403 1, 2, 4

ER 404 1, 2, 3, 4

RAP 2.5..... 4

ARGUMENT

I. EVIDENCE THAT MR. BACH WAS ARRESTED ON AN OUTSTANDING WARRANT SHOULD HAVE BEEN EXCLUDED UNDER ER 402, ER 403, AND ER 404(B).

Irrelevant evidence is inadmissible at a criminal trial. ER 402.

Relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403. Evidence of misconduct unrelated to the charged crime is inadmissible except in limited circumstances, and only after proper analysis on the record. ER 404(b); *State v. DeVincentis*, 150 Wash. 2d 11, 17-19, 74 P.3d 119 (2003).

Here, Mr. Bach objected to evidence that he had been arrested on an outstanding warrant; the court overruled the objection, and the jury heard the evidence without benefit of a limiting instruction. RP 7-10. This evidence should have been excluded because it was irrelevant and unfairly prejudicial. ER 402; ER 403; 404(b); *DeVincentis*, at 17-19. Respondent asserts that the evidence was admissible as part of the *res gestae*. Brief of Respondent, p. 8. This is incorrect.

Res gestae evidence is admissible as an exception to ER 404(b), to complete the story of the crime: “Unlike most ER 404(b) evidence, *res gestae* evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged.” *State v. Sublett*, 156 Wash. App. 160,

196, 231 P.3d 231, *review granted*, 170 Wash. 2d 1016, 245 P.3d 775 (2010). The exception is not available to complete the story of the investigation of the crime, which is how the prosecutor sought to use it in this case. *See* Brief of Respondent, pp. 8-9 (“the fact of the warrant is factually linked to Lord’s later identification of Bach after his arrest...”)

Nor is “*res gestae*” a magical phrase that permits admission of irrelevant evidence regardless of its prejudicial impact. Instead, facts that form part of the *res gestae* are subject to the same rules as any other evidence, including ER 402, 403, and 404(b). Here, there was no need to explain that Mr. Bach had an outstanding warrant. The jury did not need to know *why* Mr. Bach was in the police car when viewed by Lord.¹ Thus the evidence was irrelevant, and should have been excluded under ER 402 and ER 403.

Furthermore, even if *arrest* on the unrelated matter did qualify as *res gestae* evidence to complete the story of the burglary, the *arrest warrant* did not fit within the exception’s scope, because the prosecution failed to show that the warrant issued close in time and place to the events outlined at trial. *See, e.g., State v. Hughes*, 118 Wash. App. 713, 725, 77

¹ If an additional explanation truly was needed, the testimony should have been sanitized so that jurors would only know that he had been detained for unrelated reasons.

P.3d 681 (2003) (*res gestae* evidence “is admissible to complete the crime story by establishing the immediate time and place of its occurrence.”)

Finally, even if the evidence qualified as *res gestae* evidence, the trial judge failed to conduct an adequate analysis on the record, as required by ER 404(b). Respondent seeks to excuse the judge’s failure by faulting defense counsel for failing to specifically cite ER 404(b). While it would have been preferable for defense counsel to mention ER 404(b), an objection need not state specific grounds as long as grounds can be inferred from the context. *See* ER 103(a)(1); *State v. Black*, 109 Wash. 2d 336, 340, 745 P.2d 12 (1987). Both the prosecutor and the trial judge referenced *res gestae*.² RP (6/7/11) 7, 10. Accordingly, it is clear from the record that the prosecutor and the trial judge understood—from the context in which the objection was made—that the grounds for objection included ER 404(b).

Respondent is correct that counsel’s failure to propose a limiting instruction waives the issue on review. Brief of Respondent, pp. 9. However, the absence of a limiting instruction increases the likelihood that Mr. Bach was prejudiced by the error in admitting the evidence. Because of the judge’s erroneous decision, jurors learned that Mr. Bach was

² *Res gestae* is an exception to ER 404(b)’s general prohibition on evidence of prior misconduct. *State v. Acosta*, 123 Wash. App. 424, 442, 98 P.3d 503 (2004).

wanted by police, presumably for another crime. They could not have helped being prejudiced by the information, and must, inevitably, have used it as a lens through which to view the remainder of the evidence.

The erroneous admission of the evidence requires reversal of the convictions. The case must be remanded with instructions to exclude evidence of the outstanding arrest warrant. ER 402; ER 403; ER 404(b); *DeVincentis, supra*.

II. MR. BACH’S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THEY WERE BASED IN PART ON PROPENSITY EVIDENCE.

Mr. Bach rests on the argument set forth in his Opening Brief.³

III. THE ERRONEOUS DEFINITION OF “SUBSTANTIAL STEP” RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF ATTEMPTED BURGLARY.

To obtain a conviction for attempt, the prosecution must show that the accused person took a substantial step—defined as “conduct strongly corroborative of the actor’s criminal purpose”—toward the commission of that crime. RCW 9A.28.020; *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978). In this case, the court’s instructions differed from

³ Although this issue necessarily overlaps with the preceding issue, there are two important differences. First, the argument is constitutionally based and reviewable under RAP 2.5(a)(3). Second, the court applies a more stringent harmless error test when evaluating the effect of constitutional error.

the definition provided by the Supreme Court, and allowed conviction if Mr. Bach undertook conduct indicating any criminal purpose, even if the conduct did not corroborate his intent to commit burglary. Court's Instructions, CP 68-90.

Respondent erroneously suggests that this case is controlled by *State v. Eplett*, ___ Wash.App. ___, ___ P.3d ___ (2012). But in *Eplett*, the defendant invited any error by proposing the instruction at issue. Because of this, the court analyzed the instruction under the ineffective assistance of counsel framework, concluding that the appellant had not established deficient performance. *Eplett*, at ___,

Analysis of the instruction—as opposed to counsel's performance—yields a different result. According to the *Eplett* court, any problem posed by the instruction defining “substantial step” is solved by an instruction stating that includes language making clear that the jury must find the defendant, while acting ““with intent to commit [the charged] crime,”” did ““any act that is a substantial step *toward the commission of that crime.*”” *Eplett*, at ___ (quoting instruction). But these instructions, even in combination, do not address the standard set by the Supreme Court in *Workman*.

Specifically, the two instructions referred to by the *Eplett* court do not require jurors to find an act that “strongly corroborates” the actor's

specific intent to commit the crime attempted. *Workman*, at 451. Thus, for example, a person charged with attempted robbery cannot be convicted of that crime (under the *Workman* standard) if the conduct alleged to form a substantial step corroborates only the actor's intent to commit theft, even if the prosecution proves beyond a reasonable doubt that the conduct was undertaken with the intent to commit robbery.⁴

The court's instructions relieved the prosecution of its burden to prove a substantial step, as defined by the Supreme Court in *Workman*. Because of this, the conviction must be reversed and the case remanded for a new trial. *State v. Brown*, 147 Wash.2d 330, 58 P.3d 889 (2002).

IV. THE SENTENCING COURT'S FINDING REGARDING MR. BACH'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Respondent concedes that the trial court's finding is not supported by the record. Accordingly, that portion of the Judgment and Sentence must be vacated.

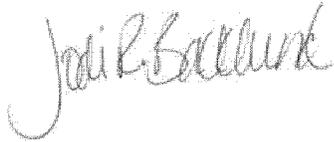
⁴ To make the example concrete: if A declares his intent to rob B using force, and is caught stealthily reaching to withdraw a wallet from B's jacket pocket, A should not be convicted of attempted robbery, but rather of attempted theft. This is so even if A confirms that the plan was to push B onto the ground once the wallet was in hand. The conduct (reaching into the pocket) strongly indicates a criminal purpose, but it does not strongly corroborate intent to commit the specific crime of robbery.

CONCLUSION

Mr. Bach's convictions must be reversed and the case remanded.

Respectfully submitted on April 30, 2012,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in cursive script.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Handwritten signature of Manek R. Mistry in cursive script.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Donovan Bach
31 East Fir Place
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timh@co.mason.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 30, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 30, 2012 - 11:16 AM

Transmittal Letter

Document Uploaded: 423391-Reply Brief.pdf

Case Name: State v. Donovan Bach

Court of Appeals Case Number: 42339-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**

A copy of this document has been emailed to the following addresses:
timw@co.mason.wa.us