

**NO. 43325-7-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RICHARD DONALD LLOYD JANSSEN,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ANSWER TO ASSIGNMENT OF ERROR**

**THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT JANSSEN KICKED AT THE ARRESTING OFFICERS.**

**B. STATEMENT OF THE CASE**

**1. Procedural History**

The State agrees with the recitation of the Procedural History provided by the appellant Richard Donald Lloyd Janssen.

**2. Substantive Facts**

For the purposes of the one assignment of error in this appeal, the State agrees with the recitation of the Substantive Facts provided by Janssen, with the following exceptions:

When police arrived on the scene immediately after the shooting and attempted to apprehend Janssen, Officers Terry Reece and Shawn Close saw Janssen run towards them between the house at 163 Oregon Way and the fence to the north. RP 160, 190. At gun point, Officer Close yelled at Janssen to “stop, freeze, police!” RP 161, 190. Janssen stopped and put his hands in the air, but he then turned and ran back behind the house. *Id.* Officer Close again commanded Janssen to stop at

gunpoint, and Janssen did then drop to the ground. RP 161-62, 191-92. Once two other officers arrived, Officer Reece was able to handcuff Janssen and place him under arrest. RP 162-63.

The two other officers took Janssen to a patrol car. RP 164-167, 193. Janssen then spit across the patrol car at Officer David Hawley. RP 222. At that point, Janssen began struggling with the officers. RP 164-167, 193. Janssen began kicking and bucking and rolled off the patrol car and onto Officer Chris Angel. RP 206. The struggle with the officers then took place much as Janssen describes. His threats to the arresting officers included, "I want to see your faces, I'm going to kill you and your family... I already shot at DOC." RP 169, 194, 201-02. Officer Close asked Janssen whether he was on drugs, and Janssen replied, "No, I'm not under the influence of any drugs, if I was I'd be way worse." RP 195.

### **C. ARGUMENT**

#### **THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF JANSSEN KICKING AT THE OFFICERS.**

- 1. The defendant failed to preserve the issue for appellate review based on ER 404(b).**

A party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. *State v. Gulloy*, 104 Wn.2d

412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Furthermore, an objection to the admission of evidence at trial based on relevance fails to preserve the issue for appellate review based on ER 404(b) grounds. *State v. Jordan*, 39 Wn.App. 530, 539, 694 P.2d 47 (1985), *cert. denied*, 479 U.S. 1039 (1987). During motions in limine, Janssen moved to exclude evidence of his kicking at the officers at the time of his arrest on the grounds of relevance:

DEFENSE COUNSEL: And finally, we move to exclude any testimony that of the officers, during the course of – subsequent to Mr. Janssen’s arrest or during the course of that, ended up suffering a broken ankle. That particular charge was originally filed, was not re-filed as part of the amended information. My understanding of the general allegations of that were that, when Mr. Janssen was being handcuffed and trying to be restrained and – I think he actually had to be handcuffed – the process of getting him into a vehicle, a law enforcement vehicle, that he kicked backwards at an officer and the officer fell and sustained a broken ankle.

JUDGE: Okay.

STATE: I have no objection to not eliciting the fact that that resulted in a broken ankle but we will be seeking to admit evidence of – of that struggle, that Mr. Janssen struggled and kicked at the officers.

JUDGE: Okay. So – so I’ll grant the motion in limine to exclude the fact that Officer Angel’s ankle was broken. Is that what you’re requesting?

DEFENSE COUNSEL: Yes, that – specifically that, but I guess we would also ask that – that the State be prohibited from introducing the evidence that he – he kicked an officer during the course of that struggle. I understand the State’s desire, but, this is after the shootings, and I do not see how it in any way could be argued that the fact that he kicked an officer while he was struggling, being arrested, is evidence of whether he intended to create substantial bodily harm or – anything like that – in the underlying charges.

....

[The State then makes an argument regarding relevance.]

....

JUDGE: Okay. Okay. Alright, so here the motion is basically to preclude or exclude testimony of the – the kicking of the officers during the – during their arrest process... The State counters that it’s – that goes to state of mind, to support intent to create bodily harm, great bodily harm. What’s the timing difference from the – when the shots are fired and the arrest occurs?

STATE: Oh, he ran through the neighborhood and was apprehended within ten minutes.

JUDGE: Okay. I’ll deny the – that portion of the motion. I’ll allow the – I’ll grant the motion, no mention of the broken ankle. And deny the lack – or the kicking of the officers. Because I think it does have some relevance.

RP 74-78.

On appeal, Janssen does not argue that the evidence was irrelevant but rather that it was unduly prejudicial and that the trial court failed to conduct a balancing test on the record as ER 404(b) requires. The trial court did not conduct a balancing test on the record because Janssen

objected to the evidence on relevance grounds, not ER 404(b) grounds. Therefore, the trial court did not err in not conducting a balancing test on the record.

**2. Even if the issue was properly preserved for review, the evidence of the kicking at the officers was properly admissible under ER 404(b).**

ER 404(b) reads as follows:

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 other acts is admissible if the acts are an inseparable part of the crime charged. Under this *res gestae* exception, the acts are admissible if they are so connected in time, place, circumstances or means employed that proof of such other acts is necessary for a complete description of the crime charged or constitutes proof of the history of the crime charged. *State v. Tharp*, 96 Wn.2d 591, 593-4, 637 P.2d 961 (1981).

Under this exception, evidence of other acts is admissible to complete the story of a crime or to provide the immediate context for

events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn.App. 422, 431-32, 93 P.3d 969 (2004). “Where another offense constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.” *State v. Hughes*, 118 Wn.App. 713, 724-25, 77 P.3d 681 (2003) (in prosecution for felony murder, court held admissible defendant’s illegal possession of a weapon and another uncharged offense in connection with the charged offense, rejecting defense argument that the uncharged offenses were not relevant to prove the charge offense). Evidence that Janssen struggled physically with the arresting officers and kicked at the officers before falling on Officer Angel is admissible as an inseparable part of the crimes charged.

Other acts are also admissible on the theory that they are so-called “admissions by conduct”. The evidence shows a defendant’s consciousness of his guilt. *See State v. McGhee*, 57 Wn.App. 457, 788 P.2d 603 (1990) (evidence of a threatening gesture toward a witness in the case admissible to show defendant’s consciousness of guilt in case); *State v. Hebert*, 33 Wn.App. 512, 515, 656 P.2d 1106 (1982) (flight from police admissible to show consciousness of guilt for burglary or was deliberate

effort to evade arrest and prosecution). In Janssen's case, the fact that he struggled with the officers and kicked at them in the immediate aftermath of the assault on the DOC officers shows that he was conscious of the fact that he assaulted the DOC officers.

Evidence that is otherwise admissible under ER 404(b) will be excluded under ER 403 if its probative value is outweighed by the danger of unfair prejudice. In its analysis, the court should consider how probative the evidence is, *i.e.*, how directly the act tends to prove the crime charged. If the act is highly probative, the balance may be tipped toward admissibility. However, if the act is only marginally relevant because of remoteness in time or other considerations, the balance may be tipped towards exclusion. *See State v. Boggs*, 80 Wn.2d 427, 495 P.2d 321 (1972). In assessing whether the evidence is unfairly prejudicial, the court should consider the probable effectiveness of a limiting instruction under ER 105.

The State agrees with the defense that the evidence was prejudicial. However, all of the evidence against Janssen was prejudicial. The question for the court is whether the evidence was unfairly prejudicial. In this case, it was not. The probative value of the evidence

that Janssen struggled with the arresting officers and kicked at them in the immediate aftermath of his assault on the DOC officers was extremely high and was therefore not unfairly prejudicial.

Janssen cites two cases in support of his argument that the evidence should not have been admitted under ER 404(b): *State v. Perrett*, 86 Wn.App. 312, 936 P.2d 426 (1997), and *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001). Neither case is analogous to the facts in Janssen's case.

In *Perrett*, the trial court incorrectly admitted evidence that when the police arrived at Perrett's house to arrest him for an assault with a firearm and asked Perrett to turn over the firearm, Perrett made a comment about not getting the firearm back for a long time the last time the police took his firearm. Unlike in Janssen's case, the evidence was not admitted as *res gestae*, evidence of the crime charged or evidence of a guilty conscience.

In *Pogue*, the trial court incorrectly admitted evidence in a drug case that the defendant had a previous drug conviction, on the basis that it negated the defense of unwitting possession. The reviewing court found that the only relevance was as propensity evidence. Unlike in *Pogue*, in

Janssen's case there are independent reasons to admit the evidence beyond showing propensity. If this court finds that Janssen preserved this claim for review, the evidence is still admissible under ER 404(b).

If this court finds that *Janssen* preserved this claim for review, the State agrees that the trial court erred in failing to conduct a balancing test on the record. However, the erroneous admission of ER 404(b) evidence is harmless absent a reasonable probability that the error materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Given the testimony from the other witnesses regarding the shooting and the immediate aftermath during which he was struggling with, spitting at and threatening the arresting officers, evidence of the kicking at the officers was of only minor significance. Janssen, therefore, fails to establish that the outcome of the trial would have been different had evidence of the kicking been excluded.

**D. CONCLUSION**

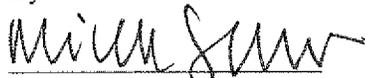
Janssen did not properly preserve the ER 404(b) issue for review. Even if he had, the evidence would have been properly admissible under ER 404(b). Any failure to conduct a balancing test was harmless.

For the reasons argued above, Janssen's convictions should be affirmed.

Respectfully submitted this 27<sup>th</sup> day of November, 2012.

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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on November <sup>27</sup>27, 2012.

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Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**November 27, 2012 - 2:42 PM**

## Transmittal Letter

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