

No. 43816-0-II

Pierce County No. 11-1-05032-9

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

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FILED
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DAMON CLARK McGRAW,

Appellant.

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

The Honorable Bryan Chushcoff and Katherine M. Stolz (motions) and
the Honorable Beverly G. Grant (trial)

APPELLANT'S OPENING BRIEF

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 AND HIS RIGHTS UNDER CrR 3.5 WERE VIOLATED BY
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A. ASSIGNMENTS OF ERROR

1. Appellant Damon McGraw was deprived of his state and federal due process rights to a fair trial by improper admission of irrelevant, highly prejudicial ER 404(b) evidence.

2. The trial court abused its discretion in admitting ER 404(b) evidence of McGraw having made racist comments and declaring that all police should be killed without weighing the probative value of that evidence against the unfair prejudice it would cause to the jury's ability to fairly and impartially decide guilt for the actual charges.

3. The trial court erred and McGraw's CrR 3.5 rights were violated when the court allowed the prosecutor to elicit testimony about statements McGraw was alleged to have made to police after his arrest when the prosecution failed to first establish that McGraw had been read and waived his rights or that those rights did not apply.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

McGraw was alleged to have committed intimidation and harassment of a police officer who was about to testify in a case.

Over defense objection, the prosecutor was allowed to elicit testimony from two officers who later arrested McGraw about his "demeanor" when arrested, his lack of cooperation with police and comments he made about police in general which were described as "racist" and which included saying that all officers should be killed.

1. Before admitting the evidence, the trial court did not find it relevant to any material issue, did not examine other evidence available and did not weigh the probative value of the evidence against the unfair

prejudice this highly prejudicial evidence was likely to engender against McGraw's ability to receive a fair trial. Did the court abuse its discretion in failing to follow the requirements of ER 404(b) and in admitting the evidence?

2. Prior to trial, the prosecutor specifically told the court and counsel that he would not be seeking to introduce any of the defendant's custodial statements and that no CrR 3.5 hearing was therefore required.

3RP 4. As a result, the prosecutor never had to meet the requirements of CrR 3.5 and prove that either the defendant was read his rights and gave a knowing, voluntary and intelligent waiver of those rights or that those rights, for some reason, did not apply. The prosecutor nevertheless called witnesses for the purpose of having them testify about the defendant's post-arrest statements and conduct.

Did the trial court further abuse its discretion in allowing the prosecutor to admit post-arrest statements of a defendant without making any effort to comply with the requirements of CrR 3.5 and in allowing such admission even though the prosecutor had represented that no custodial statements would be used?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Damon C. McGraw was charged by information with one count of intimidating a witness and one count of felony harassment, with the intimidation charge also being alleged with the aggravating factor that the offense was committed against a law enforcement officer who was performing his or her duties at the time of the offense. CP 1-2; RCW

9A.46.020(1); RCW 9A.46.020(2)(b); RCW 9A.72.110(1)(a); RCW 9.94A.535(3)(v).

After motions before the Honorable Judge Katherine M. Stolz on January 30, March 22, April 26, May 16, June 11 and June 12, 2012, and the Honorable Judge Bryan Chushcoff on May 10, 2012, trial was held before the Honorable Judge Beverly Grant on June 7, 13, 14, 18 and 19, after which McGraw was found guilty as charged. CP 71-72.¹

On July 27, 2012, Judge Grant imposed a standard-range sentence of a total of 61 months in custody. 3RP 143; CP 77-89. Mr. McGraw appealed, and this pleading follows. See CP 90.

2. Testimony at trial

On December 15, 2011, Seth Huber, a deputy at the Pierce County Sheriff's Department, went to the Pierce County superior court in response to a subpoena. 3RP 9-10, 69. Huber arrived before the hearing, taking a seat in the front pew after speaking to the prosecutor who had issued the subpoena. 3RP 9-10, 69. Damon McGraw walked through the doors at some point while Huber was either speaking to the prosecutor or done doing so, just about when Huber was sitting down. 3RP 11. According to Huber, McGraw mumbled something as he went by Huber, but Huber could not really hear what it was. 3RP 12. Even so, Huber, speculated, it did not seem like "general conversation" but rather

¹There are three volumes of the verbatim report of proceedings, each separately chronologically paginated, which will be referred to as follows:
the volume containing the proceedings of January 30, March 22, April 26, May 16, June 11 and June 12, 2012, as "1RP;"
the volume containing the proceedings of May 10, 2012, as "2RP;"
the volume containing the proceedings of June 7, 13, 14, 18 and 19 and July 27, 2012, as "3RP."

“something of anger.” 3RP 12.

The officer admitted that McGraw did not look at him when he mumbled the unintelligible words. 3RP 12.

Huber testified that McGraw walked over to “the Defendant’s table,” sat down “at the Defendant’s chair” in the courtroom and then turned his chair around, facing towards Huber. 3RP 12. According to the officer, McGraw then “began to stare directly” at Huber. 3RP 12.

A videotape from the courtroom showed that, in fact, McGraw had come into the room, sat down, looked at the judge and looked forward for “some time” before he turned to look at the officer. 3RP 59. The judge was asking McGraw questions about where his attorney was, because she was late. 3RP 61.

Huber described the look as a “long stare,” but ultimately admitted that it was no longer than a minute and a half at most. 3RP 12-35. Huber conceded that he gets similar attention in the field with people saying “they hate your guts simply because you’re doing your job,” but said he always takes such attitude seriously. 3RP 24-25. Huber then speculated that McGraw had the ability to “do” something at that point, because he “wasn’t restrained.” 3RP 25.

Huber admitted, however, that Huber had a weapon and could have pulled the gun out and shot McGraw if it had actually been that kind of situation. 3RP 25. Huber also conceded that he was trained to deal with volatile situations and had worked with a “focus on gangs,” who were a “tough bunch.” 3RP 20. Huber had training in how to “subdue and individual who may be resisting arrest” or attacking. 3RP 23.

After the “stare,” McGraw got up and walked back out of the courtroom. 3RP 12-13. Huber, who had sort of gone into “high alert” said that, as McGraw passed him, McGraw again mumbled something. 3RP 14, 37. This time, Huber said, he could hear part of it, which included the words “fuck you.” 3RP 14, 37. Huber also said that, just before walking out, McGraw turned and made a gesture which Huber described as “a configuration with his hand of a gun pointed at” Huber and a “shooting motion.” 3RP 13.

Huber conceded that McGraw never came towards him in “an offensive, hostile manner.” 3RP 32-33. Huber also agreed that McGraw had to walk by him just to walk out the door. 3RP 33-34.

The judge, prosecutor and judicial assistant who were in the courtroom that day did not hear anything being said nor see any gestures at that point. 3RP 43, 82-84, 89-91. Judge Ronald Culpepper, who was presiding over the hearing that day, explained that counsel was “a bit late” so that everyone was waiting for her to arrive. 3RP 84. The judge saw McGraw walk out while they were waiting for counsel, but the judge saw nothing unusual occur. 3RP 84. The judge also felt he would have heard or seen anything if it had happened and was clear he heard no threats of any kind and saw nothing that seemed like it was threatening. 3RP 85-86.

Angela Edwards, the judicial assistant working that day, was in the courtroom the entire time that McGraw was there. 3RP 89. She remembered McGraw coming in and walking out. 3RP 89. Although she noticed him coming into the room, she did not hear him say anything. 3RP 89. She was also clear that there was nothing “unusual” that

happened from the time when McGraw walked in until he walked out while they were waiting for counsel. 3RP 90.

Huber said that, after McGraw left the room, he then peered through a window in the door to the courtroom and configured his hand to make a “knifing motion to his throat” while looking directly at Huber. 3RP 14. According to Huber, he could hear McGraw saying, “[y]ou are a fucking dead man.” 3RP 15. Huber also thought McGraw made some threatening remarks towards Huber’s wife and kids, “saying that he was going to kill them as well.” 3RP 15.

The prosecutor who was there that day, Marc Sanchez, was clear that he could see “very clearly” through the window from where Sanchez was standing in the courtroom. 3RP 63. Despite this, Sanchez did not see any gestures or “cutthroat mark[s]” by McGraw at all. 3RP 63-64.

Although Sanchez had seen what he thought was McGraw staring at Huber in the courtroom a few moments before, the prosecutor admitted he could not really tell whether McGraw was looking at Huber or the door through which McGraw’s late attorney was going to arrive at the time. 3RP 62-63.

Sanchez testified that, after he spoke with Huber, Sanchez looked at the courtroom exit and thought he saw McGraw standing outside the courtroom, his face close to the glass. 3RP 44. Sanchez said he then heard McGraw say, “[y]ou’re dead. You’re dead.” 3RP 44.

Sanchez later admitted that a video of the events shows what appeared to be McGraw outside the courtroom “pacing” rather than standing next to the window. 3RP 63. Sanchez conceded that “there were

points where obviously he was at one window and maybe at the other,” but maintained there was “one point where he was standing outside the window,” at least for “a couple of seconds.” 3RP 63.

Sanchez could not, however, point to the moment in the video where he thought he had heard the comment. 3RP 63.

From where she sat, Edwards could see if someone was at the window on the door or even close to it. 3RP 90-91. Edwards did not see McGraw doing anything at the window after he walked out and thought whatever happened in the hall would have to be “pretty loud” for someone to hear it inside the courtroom. 3RP 90-91.

Huber decided he did not want to “get directly involved” and should contact other deputies to handle the issue. 3RP 15. The court security deputies he called came into the courtroom before McGraw returned, so he gave them a “quick briefing” on what he thought had occurred. 3RP 18-19.

Huber admitted that McGraw’s alleged comments and acts had no effect on Huber’s ability to testify, nor did they change how he had testified. 3RP 19-20. Huber nevertheless maintained that McGraw’s comments made Huber fear he was “unpredictable” and that Huber “did not know what Mr. McGraw would do.” 3RP 20.

Vera Jean, counsel for Mr. McGraw for the hearing on the day of the incident, testified that, when she arrived, she noticed McGraw in front of the courtroom, talking on his cell phone. 3RP 103. She said he had his “usual demeanor” and seemed “animated,” apparently speaking as he normally did. 3RP 103-104. Jean had heard him on the phone before,

usually talking to his dad, and said McGraw “talks in an excited manner when he is on the phone.” 3RP 104. Jean was not aware of anything having allegedly occurred. 3RP 104. She never heard anything like a threat or anything of the kind. 3RP 104-105.

Huber admitted that, when McGraw returned to the courtroom, he made no comments or gestures of any kind. 3RP 18-19.

PCSD Deputy Sheriff Ronald Carter was one of the security officers who responded to Huber’s call. 3RP 68. At the time Carter came in, McGraw was sitting on the right-hand side of the courtroom and the prosecutor and Huber were talking. 3RP 70. The hearing had not yet started. 3RP 70. After the hearing was over, about an hour later, Carter arrested McGraw based on what Huber said had occurred. 3RP 70.

Over defense objection, the prosecutor was allowed to elicit testimony from Carter about what McGraw said and did after his arrest. Carter testified that McGraw made “disparaging comments” about and to police, including that he called them “pigs” and “white devils.” 3RP 71-72. The officer was also allowed to declare that McGraw had made “threats towards law enforcement in general” and had said that they “should all be killed.” 3RP 75-76. Another deputy who was there, Jesus Villahermosa, testified that McGraw was making “[r]acial comments” and accusing the officers of being “racist.” 3RP 76-78. Villahermosa also reported “something about we should all be dead..” 3RP 79. Villahermosa declared that “[m]ost of the comments were racial in nature,” and that “probably 95 percent of the comments were just attacks on our professionalism or what he felt was just a racist situation and racist

culture.” 3RP 79.

D. ARGUMENT

McGRAW’S DUE PROCESS RIGHTS TO A FAIR TRIAL AND HIS RIGHTS UNDER CrR 3.5 WERE VIOLATED BY IMPROPER ADMISSION AND USE OF IRRELEVANT, HIGHLY PREJUDICIAL STATEMENTS EVEN THOUGH THE PROSECUTION FAILED TO SATISFY THE REQUIREMENTS PRIOR TO ADMITTING SUCH STATEMENTS AND AFFIRMATIVELY DECLARED IT WOULD NOT BE SEEKING TO ADMIT ANY SUCH STATEMENTS

Defendants are not guaranteed a “perfect trial,” but the state and federal due process guarantees mandate that, at a minimum, any trial in a criminal case must comport with basic norms of fairness. See State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). In this case, the trial fell far short of those standards, because the prosecutor was allowed to admit and exploit irrelevant, highly prejudicial ER 404(b) evidence. Further, the prosecutor never made any attempt to establish the requirements of CrR 3.5 before seeking to use McGraw’s statements, made after his arrest, against him at trial. And the prosecutor relieved himself of that burden by telling the court and counsel, at the start of trial, that no such statements would be introduced.

a. Relevant facts

Just before trial was scheduled to start, the prosecutor told the court that no CrR 3.5 hearing was needed and that “[t]here are no custodial statements the State is seeking to admit.” 3RP 4. In fact, the prosecutor declared, “the only motion in limine would be to exclude witnesses.” 3RP 4.

Before Officer Carter took the stand, counsel moved to exclude his

testimony. 1RP 65-66. Counsel pointed out that Carter had arrived after the incident and had been involved in the arrest and subsequent transport of McGraw to jail after the hearing at which Huber testified had been held. 1RP 65-66. Counsel argued that Carter was going to testify about what McGraw said and did after his arrest and that this evidence would be “highly prejudicial.” 1RP 65-66. Counsel also argued that admitting the evidence would be “almost like saying because he behaved this way an hour afterwards he must have been doing what we say he was doing at the time of this particular incident.” 3RP 66.

In response, the prosecutor argued that the evidence was admissible both to show McGraw’s “anger and animosity towards law enforcement” and to give “credibility” to the prosecution’s claim that McGraw “was making the threats before.” 1RP 66.

Counsel then noted that, if the prosecution had thought that the evidence was relevant, “it’s something that should have been briefed,” but “[t]hat wasn’t done.” 3RP 66-67. He again argued that the evidence was not relevant and stated that, in addition, it was so prejudicial that the prejudice outweighed the probative value. 3RP 67.

In ruling that the evidence was admissible, Judge Grant did not address the specifics of the evidence or weigh the probative value against the prejudice the evidence would cause. 3RP 67. Instead, she just said that the evidence was “relevant” because it involved something that happened at “close proximity in time.” 3RP 67.

At trial, Carter was then allowed to testify that, after his arrest, McGraw “kept using disparaging comments towards” Carter and his

partners. 3RP 67-70. When the prosecutor asked Carter, “[w]hat type of disparaging comments?” counsel objected not only on hearsay grounds but also “there has been no foundation laid with respect to whether or not this was before he was advised of his rights.” 3RP 70.

In ruling on the objection, Judge Grant first said, “those are the questions that would be brought up in cross.” 3RP 70-71. The judge then asked the officer, “these are observations you observed, you heard?” 3RP 70-71. When Carter said, “[y]es,” the court overruled the objection, and Carter went on to say McGraw called the officers “pigs” and “white devils,” and that McGraw “never did” become cooperative during the whole arrest process. 3RP 70-72.

On redirect examination, the following exchange occurred:

Q: Did the Defendant ever make threats towards law enforcement in general?

A: Yes, he did. He told us we should all be killed as we walking over to the jail.

3RP 75. After initially sustaining a defense objection, the judge the asked the officer, “is this something you heard?” 3RP 75. The officer said, “[y]es, Your Honor. I documented this in my report.” 3RP 75. The judge then said, “[h]e heard it. It’s overruled.” 3RP 75. At that point, Officer Carter declared that McGraw had “made several disparaging comments towards my partners” and that three officers were “all walking Mr. McGraw to jail based on the altercation and the demeanor of which he was acting while we were in court or while were walking to the jail.” 3RP 75. The officer also told the jury that McGraw “said that we should all be

killed.” 3RP 76.

Deputy Jesus Villahermosa similarly testified about McGraw’s “demeanor,” saying:

At the time that we went to place him into handcuffs he immediately started getting belligerent, I guess is a good word. **Racial comments then followed, that we were racist for arresting him, that this had to do with him being African American.** Once he was placed into cuffs on the way to transport to the jail, and this was because of the nature of his - - he seemed to keep escalating, and I made a decision as supervisor and there was two other officers present at the time . . . I made a decision that I would escort the officers to the jail with him because I felt he was getting more volatile.

3RP 79 (emphasis added). The following exchange then occurred:

Q: Did he ever make any threats, general threats, toward[s] law enforcement?

A: Um, I think he - - I remember him saying something about we should all be dead. Most of the comments were racists in nature, going back to actually calling us landowners, slave owners. So I would say probably 95 percent of the comments were just attacks on our professionalism or what he felt was just a racist situation and racist culture.

Q: But did he express that he thought that all the officers should be dead?

A: Yes.

Q: Thank you, Officer.

3RP 79.

In closing argument, the prosecutor relied on the testimony about McGraw’s behavior, telling jurors that the “State doesn’t have to prove motive” or a “reason” for the offenses, although admitting that McGraw “had to want to attempt to influence the testimony of someone.” 3RP 112. The prosecutor then said McGraw had “wanted Deputy Huber to know

that he didn't like him, he wanted to kill him, **and, in fact, later he wants to see all law enforcement dead.**" 3RP 112-13 (emphasis added).

Later, in rebuttal closing argument, the prosecutor again raised the specter of the post-arrest comments, speculating that, if McGraw thought he was not doing anything wrong when he said whatever he said in the courtroom and "all he is doing is venting some of his personal opinions about law enforcement, why be so quiet about it?" 3RP 125. The prosecutor went on:

If it's okay, I mean, **he had no problem insulting the officers that came after the hearing; "pigs, white devils" [and] all of these insulting words.** If he just wanted to insult Deputy Huber he knew how to do it because he did it less than an hour later.

3RP 125 (emphasis added). The prosecutor again brought up the "you're a white devil, you're a pig" statement, noting that what was alleged to have been said in the courtroom was instead, "[y]ou're dead." 3RP 125.

- b. The post-arrest statements were irrelevant, highly prejudicial ER 404(b) evidence for which the prosecution utterly failed to establish foundation

Admission of the testimony of both Carter and Villahermosa regarding the statements McGraw supposedly made after he was arrested compels reversal in this case. Not only were the statements irrelevant, they were highly prejudicial, inadmissible ER 404(b) evidence. Further, the prosecution made absolutely no effort to satisfy the requirements of CrR 3.5, prior to using McGraw's post-arrest statements against him at trial. Indeed, the prosecutor effectively relieved himself of that responsibility by telling the court and counsel that no CrR 3.5 hearing was required and no custodial statements would be used while at the same

time apparently planning to call witnesses for the purpose of having them testify about McGraw's post arrest statements and conduct.

Evidence is only relevant if it has a tendency to make a fact which is of consequence either more or less likely. ER 401, 402; see State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Further, even relevant evidence is inadmissible if it is more prejudicial than probative. ER 403.

In addition, evidence of other "wrongs" or acts is inadmissible to prove the defendant's "character" or "propensity." ER 404(b). Such evidence is prohibited because it is so likely to cause the jury to "prejudge" the defendant and "deny him a fair opportunity to defend" himself against the state's case. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948).

Put simply, a defendant is entitled to be tried based on the evidence rather than being convicted because the jury believes he is a bad person who "is by propensity a probable perpetrator of the crime." Id.; see also, State v. Perrett, 86 Wn. App. 312, 319-20, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). Said another way, ER 404(b) evidence is likely to cause the jury to try a defendant not for what he is accused of doing but rather for who they think he *is*. See State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

That is exactly the undue prejudice caused here by admission of the officers' testimony about McGraw's post-arrest comments and behavior. As a threshold matter, the requirements of ER 404(b) apply not only to "bad acts," crimes and "unpopular behavior." State v. Foxhaven,

161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). Instead, the rule applies to *any* evidence offered to “show the character of a person to prove the person acted in conformity” with that character at the time of the crime. Id. The purpose of the rule is thus not to exclude only a certain type of evidence (i.e. crimes) for use to prove “character and conformity therewith” but instead to prevent conviction based upon “character and conformity therewith” - rather than evidence - at all.

For these reasons, a court admitting ER 404(b) evidence is required to take careful steps to ensure that it is only admitted when the prosecution can show it is material and necessary for a legitimate purpose, such as proving motive or opportunity. See Kelly, 102 Wn.2d at 199-200. The court must first “identify the purpose for which the evidence will be admitted,” second “find the evidence materially relevant to that purpose,” and third, “balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.” State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

In conducting the balancing test, there are additional maxims which apply. The trial court should consider the availability of any other means of proving the same point. See State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Further, if there are any doubts as to the admissibility of the character evidence, the trial court must resolve the issue in favor of exclusion. See State v. Thang, 145 Wn.2d 630, 641, 41 P.3d 1159 (2002).

Indeed, because of its inherent prejudice, ER 404(b) evidence is only admissible if it has “substantial probative value” to a necessary part

of the state's case, not simply if it meets the minimum standard of "relevance." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). The evidence must "be necessary to prove a material issue" at trial. Powell, 126 Wn.2d at 262. A court deciding whether to admit such evidence must examine the other available evidence and admit only the quantum of ER 404(b) evidence required. State v. White, 43 Wn. App. 580, 587-88, 718 P.3d 841 (1986).

Here, the trial court failed to engage in any of this analysis. In ruling, the judge simply declared the evidence "relevant" because of timing. 3RP 67, 70-71. She did not identify any legitimate purpose for which the evidence was being admitted. 3RP 67. She did not make a finding that the evidence was "materially relevant" for such a purpose. 3RP 67. She did not examine the other available evidence and limit the testimony to only what was required to prove whatever material fact the evidence was supposed to prove. 3RP 67. Nor did she engage in any balancing of the probative value of the evidence against the risk of unfair prejudice. 3RP 67.

As this Court has recently noted, however, evidence of other "crimes, wrongs or acts" under ER 404(b), is "presumptively inadmissible." State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012), review denied, ___ Wn.2d ___ (February 2013). Further, a trial court abuses its discretion if it fails to abide by the requirements of the rule. See State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Not only that, "a trial judge errs when she does not enunciate the reasons for her decision" under the three-part analysis on the record. See State v.

Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984).

Indeed, the U.S. Supreme Court has expressed “concern that unduly prejudicial evidence” can be admitted under the federal equivalent of ER 404(b), but that “the protection against such unfair prejudice” is the requirements that the evidence “be offered for a proper purpose,” that the evidence must be relevant, and that the trial court has to go through the required assessment “to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice.” Huddleston v. U.S., 485 U.S. 681, 691, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

Thus, it is the conduct of the required analysis that ensures ER 404(b) evidence is admitted only for the very limited purposes for which it is allowed. By failing to do that analysis or follow the requirements of the rule before admitting the testimony, the trial judge abused her discretion and effectively ensured that improper, prejudicial evidence was admitted against Mr. McGraw.

Had she conducted the proper analysis, the trial judge would have then erred had she failed to exclude the evidence, because there was no legitimate purpose for which the evidence of Mr. McGraw’s post-arrest conduct and statements were somehow “material” and necessary. To prove McGraw guilty of intimidating a witness as charged, the prosecution had to prove that he made a threat to the officer in an attempt to influence his testimony or prevent him from testifying. See, e.g., State v. Fuentes, 150 Wn. App. 444, 451, 208 P.3d 1196 (2009), review denied, 170 Wn.2d 1005 (2010). To prove felony harassment as alleged, the

prosecution had to prove that McGraw made a threat to kill the officer and the officer reasonably feared that threat would be carried out. See id.

Neither of these crimes, however, required the prosecution to prove McGraw's conduct an hour or more after the alleged threats were made. Whether McGraw made racist comments, called police "pigs" and "white devils" or said all police officers should be killed in general, those facts did not prove that, an hour or more before, he had threatened Huber for the purposes of trying to make him change his testimony.

Further, evidence of McGraw's lack of cooperation with police and all of the comments he made was only relevant to whether McGraw threatened Huber if used improperly, i.e., to argue that McGraw's later statements and conduct proved he was *likely* guilty because he was a dangerous, police-hating, violent man.

Nothing required the prosecution to prove that McGraw made racist comments, or that he called police "pigs" and "white devils," or that he disliked police in general, or that he thought all police should be killed. Nor was the prosecution required to prove that McGraw "never" cooperated with police after his arrest, disparaged the officers who were transporting him and had very negative feelings about officers in general.

Indeed, the trial prosecutor admitted that there was no need to prove *why* McGraw made the comments he was alleged to have made to Huber, because "motive" was not at issue. 3RP 112.

Here, the statements both Carter and Villahermosa said McGraw made were clearly evidence of other "wrongs" or acts being used by the prosecution to prove McGraw's "character" rather than legitimate

evidence used to prove an actual fact at issue in the trial. The arguments of the prosecutor below prove this point. In arguing for admission of the evidence, the prosecutor identified two reasons he claimed the evidence was admissible: 1) to show McGraw's "anger and animosity towards law enforcement" in general and 2) to give "credibility" to the prosecution's claim that McGraw "was making the threats before," i.e., at the time of the alleged crimes. IRP 66.

But both of these reasons were simply another way of saying that, because McGraw was hostile to police and said inappropriate, racist and nasty things about police *in general* after his arrest he was by propensity more likely to be guilty of having made threats to Officer Huber in the courtroom and through the window on the courtroom door earlier in the day. Relying on other bad acts as evidence that the defendant acted "consistent" with those acts at the time of the alleged crimes amounts to using the other bad acts to prove "propensity." See, Fisher, 165 Wn.2d at 748. McGraw's general "anger and animosity towards law enforcement" and his expressions of that anger and animosity after his arrest does not prove that he had made specific comments or gestures towards Huber at the relevant time. Instead, the ER 404(b) evidence of his apparent racism, anger, and animosity towards officers after his arrest was only admissible to show his character as a guy who was hostile to police and thus by propensity likely to have made the threats as charged.

Had the court conducted the required analysis, it would have concluded that the evidence of what McGraw said and did after the alleged crimes and after his arrest was irrelevant to the crimes charged. In

addition, the court would have realized that any minimal relevance which might have existed was outweighed by the risk that the evidence would lead the jury to convict based upon “propensity” or “character” alone.

The

danger of unfair prejudice “exists when evidence is likely to stimulate an emotional rather than a rational” decision by the jury. McCreven, 170 Wn. App. at 455.

It is difficult to conceive how anyone could argue that there was not a danger of unfair prejudice in this case. The evidence of McGraw’s post-arrest statements and conduct was extremely likely to inflame the emotions of the jury against Mr. McGraw and to risk them deciding the case based on character and propensity. With the testimony, the jury was told not just that McGraw was disrespectful towards police (whom most citizens see as protectors and hold in high regard) and not just that he failed to cooperate with the arrest - but that he held the extreme view that all officers should be **killed**. See, e.g., State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (testimony from officers “often carries a special aura of reliability” for jurors). It cannot be questioned that such violent opinions or views can have an extremely strong impact on jurors and a likelihood of leading them to decide a case on improper grounds. See, e.g., McCreven, 170 Wn. App. at 455 (reversing because, *inter alia*, the trial court failed to conduct the required ER 404(b) analysis on the record for evidence of association with an outlaw motorcycle gang and the state failed to prove that evidence admissible for any proper purpose).

In addition to being highly prejudicial, there is another serious

problem with admission of McGraw's statements in this case. The statements were made **post-arrest**. Under the Fifth Amendment, a defendant's statement made while in custody cannot be used against him unless the prosecution proves either 1) that Miranda warnings were given and there was a knowing, voluntary and intelligent waiver of those rights or 2) that some exception to the Miranda requirements applies. See, e.g., State v. Holland, 98 Wn.2d 507, 519, 656 P.2d 1056 (1983). Further, CrR 3.5 mandates that, before "a statement of the accused is . . . offered into evidence," the court must hold a hearing to determine if the statement is admissible. CrR 3.5.

The requirements of holding a CrR 3.5 hearing are mandatory, "whether requested or not." See State v. Tim S., 41 Wn. App. 60, 701 P.2d 1120 (1985). The purpose of the hearing is to ensure not only the protection of constitutional rights but also to give the trial court has a chance to rule on admissibility of evidence prior to its admission. See id.

Here, however, the judge was given no such opportunity and the prosecution avoided making any record to support admission of the statements **because the prosecutor specifically told the court and counsel that none of the post-arrest statements were going to be offered.** 3RP 4. Indeed, the prosecutor said that no CrR 3.5 hearing was needed regarding the constitutional validity of admitting any statements because, "[t]here are no custodial statements the State is seeking to admit." 3RP 4. Yet the prosecutor clearly intended to elicit testimony about Mr. McGraw's post-arrest statements at trial, because there was no other purpose for calling Carter and Villahermosa, who were not present

until after the crimes were alleged to have occurred.

It is extremely troubling that the prosecutor would tell the court and counsel that he had no intention of using McGraw's statements against him, thus ensuring no CrR 3.5 hearing would occur, while at the same time the prosecutor was planning to call witnesses to testify about such statements. The result was that the prosecution was effectively relieved of its burden of proving that Miranda warnings were properly given and properly waived or that some other exception applied. Neither Carter nor Villahermosa testified about giving such warnings, or about any "waiver" of McGraw's rights. Nor did they testify about the circumstances of the comments, i.e., whether they were in response to comments by police which could be deemed "interrogation" or were spontaneous and thus admissible as such.

The evidence of McGraw's post-arrest statements and failure to cooperate with police was highly prejudicial, improper character evidence which was irrelevant to any legitimate purpose. The only reason to admit the evidence was to sway the jury into believing McGraw was a dangerous man whose hatred of police and racism made him much more likely to be guilty of the harassment and intimidation of Officer Huber as alleged. The trial court abused its discretion in failing to conduct the required analysis and in admitting the evidence over defense objection. Further, the evidence should have been excluded because the prosecution failed to even attempt to establish that the statements were admissible as required under CrR 3.5 - and indeed, the prosecutor effectively relieved himself of his duties under the rule by declaring that he would not be using any

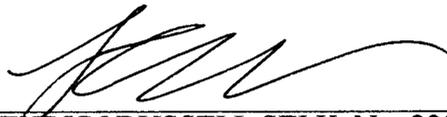
custodial statements at all. There is more than a reasonable probability that the admission of the highly improper, irrelevant and extremely prejudicial character evidence, used by the prosecutor in closing to argue guilt, affected the outcome of the trial. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 11th day of February, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Damon McGraw, DOC 823202, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 11th day of February, 2013.



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