

1 COURT OF APPEALS DIVISION
2 TWO OF THE STATE OF WASHINGTON

3
4 STATE OF
5 WASHINGTON
6 RESPONDENT
7 V.
8 TIMOTHY J ROHN
9 APPELLANT

NO. 45654-1-II
STATEMENT OF
ADDITIONAL
GROUNDS
REVIEW BY
STATE SUPREME
COURT

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 16 PM 2:59
STATE OF WASHINGTON
DEPUTY

11
12 I TIMOTHY J ROHN HAVE RECEIVED
13 AND REVIEWED THE OPENING BRIEF
14 PREPARED BY MY ATTORNEY. SUMMARIZED
15 BELOW ARE THE ADDITIONAL GROUNDS
16 FOR REVIEW.

17
18 ADDITIONAL GROUND I
19 THE JUDGE ERRED WHEN HE
20 PERMITTED THE PROSECUTING
21 ATTORNEY TO REMOVE AN EXHIBIT
22 FROM THE COURT ROOM AFTER IT
23 WAS MARKED AND ADMITTED INTO
24 EVIDENCE. PLEASE NOTE PAGE 40-43
25 OF MOTION IN LIMINE (INCLOSED)

1 THE COURT: I don't think Mr. Lane is
2 suggesting that he would intend to argue to the jury that
3 it is the crime of attempted escape or anything along those
4 lines. Am I correct, Mr. Lane?

5 MR. LANE: Correct.

6 MS. CHABOT: I'm not -- you have already ruled
7 that everything he said comes in. I'm not sure what it is
8 he wants to do with it now. I don't understand.

9 MR. LANE: We only dealt with Criminal Rule 3.5
10 yesterday. We did not deal with admissibility under
11 404(b).

12 MS. CHABOT: I don't see why it would be
13 admissible under 404(b).

14 THE COURT: Because there are alternative
15 interpretations or inferences?

16 MS. CHABOT: Yeah. He didn't -- yeah, he is
17 hacking at the ceiling. He obviously didn't get very far.
18 He -- he's got all these things that are -- chemicals are
19 on the floor, and they are at the door. He is like -- I'm
20 not too sure, Your Honor, but I just don't see how that's a
21 404(b) issue. I think if we want to go with 404(b), then I
22 say it's not admissible because I don't think that it is
23 another crime. I don't think it's an intent to commit a
24 crime. And I don't think it's a wrong doing saying that.

25 THE COURT: The State's position is that it is

1 direct evidence, the damage to the ceiling which apparently
2 they have some evidence of, is direct evidence of malicious
3 mischief. So the defendant's words, I gather, would be
4 relevant to show that he intended to get through the
5 ceiling and is further evidence that he caused the damage
6 to the ceiling, hence the malicious mischief. And it would
7 tend to show a motive for why he wants to damage the
8 ceiling and get through the ceiling so he can escape.

9 Whether or not that constitutes a separate crime under
10 404(b), I think that's why the State is bringing this up at
11 this time. But I do think it's relevant to show the
12 defendant's intentions and as corroborative evidence of the
13 charged malicious mischief. So the Court will permit it.

14 MR. LANE: Your Honor, the only other matter
15 pertains to the video. And perhaps defense counsel and I
16 can take care of this outside of court. I expect -- I plan
17 to use the video with witnesses this afternoon. From an
18 admissibility standpoint, none of them have seen this
19 particular disc that we have, that we have brought into
20 court.

21 I do have a witness, Daniel Gapsch, G-A-P-S-C-H, who
22 is the security director at the hospital that I was going
23 to have come in tomorrow -- because we are off tomorrow, I
24 was going to ask that he come in tomorrow so I can sit down
25 with him with the video that is going to be marked as an

1 exhibit and we can view the video here just so he can look
2 at the video and say, yes, that is in fact a true and
3 accurate copy of the video that we put together that we saw
4 at the hospital, and then to have him mark that exhibit
5 with his initials. So that we are not in the situation of
6 having to present the video on the stand and have the
7 witness view the entire videos with the jury sitting here
8 waiting without being able to see it. I am just trying
9 to --

10 THE COURT: Have the parties considered a
11 stipulation as to the authenticity of the video?

12 MS. CHABOT: Your Honor, I don't believe I am
13 in a position to stipulate to anything. I think Mr. Lane
14 is going to have to show the authenticity. Given my
15 client, given the situation, I don't think I can do that.

16 THE COURT: What you seem to be asking me,
17 Mr. Lane, is to permit witnesses to testify about the
18 video, show the jury the video, and then tie the
19 authenticity later on. Is that what you are saying?

20 MR. LANE: My plan -- Mr. Gapsch, the security
21 director -- my plan was to show the video as sparingly as
22 possible. I didn't want to go through all of the videos
23 with every single witness that could testify about the
24 videos. From an admissibility standpoint --

25 THE COURT: You need your foundation before

1 it's admitted.

2 MR. LANE: Right.

3 THE COURT: Of course. Once it's admitted, if
4 you wanted to fast forward through it or what have you to
5 try to be more efficient, that does not strike me as
6 objectionable, but -- because the defense could turn around
7 and show it more slowly if they wanted -- if they wanted
8 the jury to see it all in realtime.

9 MR. LANE: In light of the lack of a
10 stipulation from the defense, I think I am in the position
11 of having to show the video to the witness -- perhaps the
12 jury can take a recess -- and show the witness the video so
13 he can identify it.

14 THE COURT: Well, the witness could during a
15 break view the disc.

16 MR. LANE: That's what I mean.

17 THE COURT: Yeah. At some point when we are
18 like at a noontime or after normal hours or what have you
19 rather than having the jury sit in the jury room for all
20 that time. I would sure appreciate that because we are
21 trying to be mindful of the jury's time. And it's 10:15
22 already, but you see what I am driving at. And then the
23 witness could testify that they viewed the -- this disc
24 outside of court, and it is authentic, so on and so forth.
25 Those are my initials. It seems to me that might be a way

1 you can consider handling it.

2 MR. LANE: Okay. Then I will ask the -- I just
3 wanted to put the Court and everyone on notice that it
4 looks like there is going to be some down time where we are
5 trying to accomplish that if defense is not stipulating.

6 THE COURT: I sure want the down time to be
7 other than usual court hours. I want witnesses to come in
8 here and --

9 MR. LANE: The problem is --

10 THE COURT: -- testify while the jury is here.

11 MR. LANE: The problem is it's an exhibit
12 that's going to be marked as soon as one witness looks at
13 it. Every witness after that is -- I obviously can't take
14 the disc out of the courtroom.

15 THE COURT: I will let you do that --

16 MR. LANE: Okay.

17 THE COURT: -- Mr. Lane rather than having the
18 jury sit around for 45 minutes while a witness views it on
19 a laptop. I will permit you to remove it. You are an
20 officer of the court. You are not going to discard it or
21 tamper with it.

22 MR. LANE: Thank you, Your Honor.

23 THE COURT: All right. Well, let's have a
24 recess while the jury is working their way up here. And we
25 will hopefully reconvene about 10:30, and we will resume

1 jury selection.

2 MR. LANE: Thank you.

3 (Court at recess.)

4 (Whereupon jury selection continued. A panel
5 was selected, impaneled, and sworn.)

6 THE COURT: You can pull the door shut behind
7 you, please.

8 Ms. Chabot, have you decided whether you want to make
9 an opening statement right after the State or not?

10 MS. CHABOT: I believe I will.

11 THE COURT: Can you give us a time estimate,
12 Mr. Lane, for your opening statement, roughly?

13 MR. LANE: I would estimate about 15 minutes,
14 20 minutes.

15 THE COURT: All right. Ms. Chabot, similar or
16 less?

17 MS. CHABOT: Heavens no. Probably more like
18 five-minutes, if it's that long, Your Honor. I would think
19 we would be -- do you have witnesses standing by still?

20 MR. LANE: Too many. I do have witnesses.

21 THE COURT: Good. We will hear from at least
22 one, maybe two depending how things go. But we have to
23 stop at 4:00 or just before perhaps. So we will take about
24 a 15-minute recess and Ms. Prichard can orient the jury.

25 (Court at recess.)

1 THE COURT: All right. Is the State ready to
2 handle a 3.5 hearing right now, or what do you want to do
3 in that regard?

4 MR. LANE: The State is ready to proceed. All
5 the witnesses are here for that. I would note there are
6 numerous other fairly short motions that I think are going
7 to be brought up before the Court, but I would ask if we
8 can address the 3.5 hearing since the witnesses are here
9 now.

10 MS. CHABOT: Your Honor, I think this
11 particular motion probably would come before the 3.5, and
12 that's a motion to dismiss for a speedy trial violation. I
13 wanted to preserve that motion for Mr. Rohn on appeal. He
14 did not agree to either of the two continuances that were
15 made on his trial. He did not sign for them, and he
16 objects to them. And he would like this case dismissed on
17 the basis of that. And in any case, I want to make sure
18 that motion is preserved for appeal.

19 THE COURT: Understood. It is of record at
20 this point. Mr. Rohn made his objections here, and now you
21 are making them on his behalf. The record will speak for
22 itself with respect to those continuances and the order for
23 continuance.

24 Mr. Lane, anything you want to add for the record on
25 that issue?

1 Prosecuting Attorney Terry Lane having legal authority to
2 sign for the prosecuting attorney.

3 All right. Mr. Rohn, I have read these charges to
4 you. Your attorney has a copy of them.

5 Ms. Chabot, what's your client's pleas?

6 MS. CHABOT: Well, I would assume they are not
7 guilty to all six charges, Your Honor; is that correct?

8 THE DEFENDANT: My not guilty plea from the
9 start still stands, Your Honor.

10 THE COURT: You are required by law to enter
11 pleas to these amended charges. I have accepted -- or am
12 accepting the Amended Information for filing in this case.
13 It is timely. There is no unfair prejudice to the
14 defendant in his ability to defend himself in this case due
15 to the timing of it, so now I need to accept your pleas.
16 Your attorney is saying you are pleading not guilty to
17 these six counts; is that correct?

18 THE DEFENDANT: (Defendant nods head.)

19 THE COURT: You are nodding affirmatively. You
20 have to say out loud.

21 THE DEFENDANT: Yes, Your Honor, I plead not
22 guilty.

23 THE COURT: Very good. The Court will accept
24 not guilty pleas on your behalf.

25 MR. LANE: Thank you, Your Honor.

1 apologize for using that word, but this is a word that he
2 used. And he told them: I have demands. I don't want to
3 be at Western State Hospital. We found that out
4 ultimately. He did not want to be there.

5 The officers all kept their distance. They put on gas
6 masks. Why did they keep away from him? They kept away
7 because they fully believed him capable of doing whatever
8 it was he was saying he was going to do. And they were
9 advised -- and Officer Brown testified that he was aware of
10 the defendant's classification as a violent offender.
11 Additionally, they also believed him capable of doing it
12 because they were aware that this defendant was apparently
13 very intelligent. And we heard from many of the Western
14 State Hospital employees that the defendant is a very
15 intelligent individual. And if he says he can do something
16 like this, he probably can. And this also entered into
17 their belief.

18 They also smelled the chemicals which supported the
19 fact that they believed that he was capable of doing this.
20 They heard that he was armed with a weapon. And sure
21 enough, he is armed with a weapon. And this further adds
22 to their concern. They were aware of the fire that had
23 been set the night before. And remember, the residents
24 there do not have access to matches. They do not have
25 access to lighters. The defendant did not need a lighter

1 or a match to start a fire. So these officers are fully
2 justified in believing that he is capable of doing the same
3 thing here in this instance.

4 Ultimately, I believe it was Sergeant Mark Eakes, the
5 negotiator, eventually talked the defendant into coming
6 out. He gave him a time limit. It was five minutes or
7 something. And eventually the defendant did in fact come
8 out. The police went in there. They found the key card
9 that had been stolen from Joshua Mounts and returned that.

10 Based on these facts, the defendant is charged with
11 six crimes. He is charged with arson in the first-degree.
12 He is charged with malicious mischief in the first-degree.
13 He is charged with harassment. And I should point out that
14 the arson in the first-degree in Count I and the malicious
15 mischief in the first-degree, Count II, those both relate
16 to the July 1st incident in F8 surrounding the arson
17 incident -- I should say the fire incident. The remaining
18 counts all deal with July 2nd, the stand off and the
19 barricade. Those counts are harassment, also intimidation
20 of a public servant for his efforts to intimidate the
21 police. He is also charged with malicious mischief in the
22 first-degree for the damage that was caused in that
23 particular wing. Additionally, he is charged with theft in
24 the third degree for stealing Joshua Mounts' access card,
25 his key card.

1 with as vague a reference as we are talking about that the
2 person has a classification that may indicate that he might
3 be violent. That -- I don't think it conveys what the
4 officers were basing their beliefs on. We have a very
5 credible -- to the officers a credible source that says
6 this guy is a danger. This guy is violent.

7 And, you know, I understand why it would be important
8 to keep it out in other cases where that's not an element
9 that we have to prove, the officer's reasonableness. But
10 this is a case where I have to show beyond a reasonable
11 doubt to all 12 jurors that the officer's belief was
12 reasonable. And any information that's out there that
13 shows the reasonableness of that, the jury is entitled to
14 hear. And the State should be entitled to present. I
15 understand that it's hurtful to the defendant's case, but
16 that's not the issue here.

17 MS. CHABOT: Well, you know --

18 THE COURT: I don't need to hear anymore
19 argument about it. As I have said, I am trying to balance
20 the risk of unfair prejudice against the probative value
21 here. And although I am not going to exclude it entirely
22 as the defense asks, this particular phrase, "high violent
23 offender" classification decided by someone at Western
24 State Hospital who's not going to testify or explain that
25 to the jury, I think it should be softened as I have

1 described. And Officer Brown can say he had information
2 that the defendant was classified as potentially violent or
3 might be violent or he -- Officer Brown had concerns about
4 potential violence from the defendant because of his
5 classification, that he came to learn about, words to that
6 effect. But I just don't want this particular phrase,
7 "high violent offender."

8 MR. LANE: How about violent offender? My
9 concern is we are talking about an objective standard here.

10 THE COURT: I understand, Mr. Lane. It's a
11 difficult thing for me to be trying to dictate and direct
12 the State as to how a witness should say something. I
13 mean, this is a challenging thing to balance here. You
14 know, the words "violent offender" are acceptable. I will
15 go with that. Delete the word, "high."

16 MR. LANE: I will instruct all the officers and
17 also inquire as to which other officers, if any, had that
18 same information.

19 MS. CHABOT: I have one more problem with it,
20 and it's hearsay. And we don't know where it came from.

21 THE COURT: It wouldn't be offered for a
22 hearsay purpose. It would be offered to show that the
23 officer heard it and that it effected his point of view.

24 MS. CHABOT: For the truth of the matter
25 asserted though.

1 THE COURT: It wouldn't be offered for the --

2 MS. CHABOT: Well, it would be.

3 THE COURT: It would be offered to show that
4 was a classification, but --

5 MR. LANE: It's offered to show the
6 reasonableness of the officer's belief.

7 THE COURT: Right. So, Ms. Chabot, I don't
8 agree that it would be offered for a hearsay purpose.

9 MS. CHABOT: Okay.

10 THE COURT: So a motion to deny -- a motion to
11 exclude it for that basis is denied.

12 MR. LANE: The next matter, the defendant made
13 statements shortly after the fire that indicated his intent
14 to incite a riot. He is not charged with attempt to incite
15 a riot. I didn't feel that the elements -- or that the
16 facts rose to the defendant being charged with the crime of
17 riot. However, it does provide the motivation for the
18 defendant's actions in this case. And this is under
19 Evidence Rule 404(b). The State is not using -- is not
20 attempting to use that information to show that the
21 defendant acted in conformity, but just to show motive in
22 this case.

23 THE COURT: What did he supposedly say and to
24 whom?

25 MR. LANE: The defendant stated, quote, now is

1 your chance to attack the police since they are here.

2 MS. CHABOT: What page is that in discovery?

3 MR. LANE: Page -- looks like 37.

4 MS. CHABOT: Thank you.

5 MR. LANE: And, in fact, that's -- well...

6 THE COURT: "Now is your chance to attack the
7 police..." what else was there?

8 MR. LANE: "Now is your chance to attack the
9 police since they are here" --

10 THE COURT: Who did he supposedly --

11 MR. LANE: -- end quote.

12 THE COURT: -- say this to?

13 MR. LANE: The defendant said this in the
14 presence of numerous other staff people -- numerous staff
15 people.

16 MS. CHABOT: Were there any patients present?

17 MR. LANE: Yes. There were approximately 30
18 patients that were being lined up in order to evacuate
19 because of all the smoke.

20 THE COURT: Is it the State's theory that the
21 fire was set in order to create a trap for law enforcement
22 so that they might be attacked.

23 MR. LANE: It may not -- well, I think that's
24 certainly a legitimate theory of the case in this instance.
25 He is the one who allegedly set the fire. Shortly after