

NO. 46580-9-II

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

STATE OF WASHINGTON, Respondent

v.

DANIEL MIKEL STIEF, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01029-0

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR IN ADMITTING PREJUDICIAL PRIOR ACT EVIDENCE UNDER ER 404(B).

II. THE TRIAL COURT DID NOT ERR BY FAILING TO BALANCE THE PROBATIVE VALUE OF THE DISPUTED EVIDENCE AGAINST THE PREJUDICIAL EFFECT.

III. THE TRIAL COURT DID FAIL TO ENSURE THE JUDGMENT AND SENTENCE REFLECTED THE SENTENCE IT IMPOSED.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Daniel Stief was charged by amended information with Robbery in the First Degree, Burglary in the First Degree, and Possession of a Controlled Substance - Methamphetamine for an incident that happened on or about May 22, 2014. CP 6-7. The case proceeded to trial before The Honorable John Nichols, which commenced on July 14, 2014, and concluded on July 15, 2014, with the jury's verdict. RP 21-238.

The jury found Mr. Stief guilty of the Robbery in the First Degree and Possession of a Controlled Substance – Methamphetamine, and guilty of the lesser included crime of Burglary in the Second Degree. CP 49-53; RP 237-38. The trial court sentenced him to a standard range sentence of

42 months, CP 57; RP 251. Mr. Stief filed a timely notice of appeal. CP 67.

II. STATEMENT OF FACTS

Ray Bettger works as a Corrections Deputy for the Clark County Sheriff's Office. RP 54, 82. His residence is located in what he termed a limited rural area, accessible by a single driveway, in which the house is about a football field and a half from the road. RP 56-57. The property is enclosed by a fence on which a private property sign and a no trespassing sign are posted. RP 57-58, 85-86, 109-110, 139.

On the afternoon of May 22, 2014, Mr. Bettger was at home sleeping. RP 56, 86. Out by his front door was an old water heater. RP 61-62, 89. On the front side of his shop sat three radiators. RP 73-74, 90. While the water heater and radiators were all likely destined to be recycled, Mr. Bettger had not placed any ads to sell them nor given anybody permission to take them. RP 62, 72, 89-91.

A ringing doorbell woke up Mr. Bettger. RP 56, 87. Mr. Bettger did not answer the door because he expected that the doorbell ringer was a delivery person leaving a package at his door. RP 56, 87. Eventually, Mr. Bettger got up and looked outside and, instead of seeing a package, he saw a car backed up to his garage. RP 58-60, 88. Finding those circumstances strange, Mr. Bettger retrieved his handgun and went outside. RP 60, 88.

Upon exiting his home, Mr. Bettger saw Mr. Stief between his (Mr. Bettger's) shop and pickup truck and made contact with him. RP 60.

Mr. Bettger asked Mr. Stief, "what he thought he was doing?" and "why he was there?". RP 60, 88. Mr. Stief told Mr. Bettger that he was there to pick up a water heater. RP 60-61, 89. Mr. Bettger replied by telling Mr. Stief that he was trespassing. RP 61, 89. Mr. Stief began to move very rapidly towards his car. RP 63, 89, 94. During this time, Mr. Bettger's firearm was concealed. RP 62.

Mr. Bettger followed Mr. Stief towards Mr. Stief's car when he noticed two of his radiators sitting on the floorboard of Mr. Stief's car. RP 64, 89-90. As Mr. Bettger made his way around to the driver's side of Mr. Stief's car, he noticed another one of his radiators in Mr. Stief's car. RP 64. At this point, Mr. Stief had entered his car and was sitting in the driver's seat, but the driver's side door was still open. RP 64-65.

Next, Mr. Bettger moved towards the open door when felt his leg being shut in the door between the door and the frame of car. RP 65-66, 94. According to Mr. Bettger, Mr. Stief was trying to close the car door on his leg. RP 66, 68-69. This occurred at least three times and caused injuries to Mr. Bettger's left leg, and in particular to the front shin area. RP 68-69, 76, 98.

During this encounter, Mr. Stief was attempting to start his car and drive away, and Mr. Bettger was attempting to reach into the car and grab the keys from ignition. RP 67-68, 95-96. When Mr. Bettger pulled out his handgun, Mr. Stief discontinued his attempt to escape and put his car in park while Mr. Bettger removed the keys from the ignition. RP 67, 95, 99-100. Mr. Bettger then had Mr. Stief get out of the car and sit on the grass while he went inside to grab a phone in order to call the police. RP 68, 70-72. While Mr. Stief was exiting the car, he made a statement along the lines of "You're right, I'm going to jail," or "I'll go to jail." RP 70, 102.

By the time Mr. Bettger returned outside, Mr. Stief had run away. RP 72-73. Mr. Bettger then called the police. RP 72-73. A deputy responded to his residence and took Mr. Bettger's statement before taking him to where Mr. Stief had been detained. RP 78-80, 134. Mr. Bettger identified Mr. Stief as the person who had been on his property and noted that Mr. Stief had removed the shirt and hat he was previously wearing. RP 80, 135-36.

Clark County deputies detained Mr. Stief down the road from Mr. Bettger's property. RP 79, 113, 154. They noticed he was not wearing a shirt and was all sweaty as if he had been running. RP 113, 128-29, 153-54. Mr. Stief quickly tried to explain that he had been at Mt. Bettger's property to pick up a water heater pursuant to an ad placed on Craigslist.

RP 114, 125. When asked by a deputy how he would be able to fit a water heater in a car, he just looked at the deputy and did not answer. RP 115. Mr. Stief then told the deputy that he did not see a water heater at the property, knocked on the front door, and then a man came out with a gun. RP 115.

Following a reading of his *Miranda* rights, Mr. Stief made additional statements to the deputies. RP 119, 129. He explained that the Craigslist ad for the water heater did not have a phone number and that it just had an address. RP 119. He reiterated that when he arrived at Mr. Bettger's property he knocked on the front door and that a man with a gun came out and chased him to his car. RP 119. Mr. Stief confirmed that Mr. Bettger reached into the car to get the keys and that he (Mr. Stief) ran away after he exited the car. RP 120. Additionally, Mr. Stief acknowledged that (1) he had seen the posted no trespassing signs; (2) he did not know the home owner; (3) no one had given him permission to enter the property; (4) no one had given him permission to take any property from the location; (5) when confronted by the home owner he refused to comply and tried to flee in his vehicle; and (6) when that did not work, he ran away on foot. RP 120, 137. During his contact with the deputies Mr. Stief was very excited, speaking very quickly, and "all over the place." RP 154-55.

Once Mr. Stief was searched, deputies discovered on his person a pocket knife and a glass pipe with methamphetamine residue inside. RP 117-19, 127-28, 140. The methamphetamine residue was sent to the laboratory for testing and tested positive for methamphetamine. RP 159-160, 162-63.

When the deputies executed a search warrant on Mr. Stief's car, they found Mr. Stief's driver's license, Mr. Bettger's radiators, and a flat screen television seat-belted into the backseat. RP 140-45. The television did not have the serial number sticker in the place where it would normally be located, but the serial number sticker was found in a toolbox on the floorboard. RP 145-46. They did not find any kind of ad or printout from Craigslist regarding a water heater. *See generally* RP.

C. **ARGUMENT**

I. **EVEN IF THE TRIAL COURT ERRED IN RULING THAT THE TELEVISION EVIDENCE WAS ADMISSIBLE THAT EVIDENCE DID NOT CHANGE THE OUTCOME OF THE TRIAL BECAUSE EVIDENCE OF MR. STIEF'S GUILT WAS OVERWHELMING.**

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281

P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court’s view.”) (citations omitted). Furthermore, a reviewing court “can affirm the trial court’s ruling on any grounds the record and law support.” *State v. Grier*, 168 Wn.App. 635, 644, 278 P.3d 225 (2012) (citing *State v. Costich*, 152 Wn.2d 463, 377, 98 P.3d 795 (2004)). When a trial court’s ER 404(b) ruling admitting evidence is in error, reversal will only be required if the error is prejudicial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Such an error “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (citation omitted); *Aguirre*, 168 Wn.2d at 361 (holding reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial”).

Pursuant to ER 404(b) evidence of other crimes or bad acts is inadmissible to show a defendant acted “in conformity therewith,” but may be “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Prior to the admission of ER 404(b) bad acts evidence, however, a court must (1) find by a preponderance of the evidence that the prior act occurred, (2) identify the purpose for which the

evidence is offered, (3) determine whether the evidence is relevant to prove an element of the charged offense, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Res gestae evidence, on the other hand, occupies an amorphous place in the law as it is sometimes characterized as an exception to ER 404(b)'s general prohibition on admitting bad acts and at other times as part of an ER 401 analysis. *State v. Grier*, 168 Wn.App. 635, 645-48, 278 P.3d 225 (2012). Regardless of the rule under which *res gestae* evidence is considered, *res gestae* evidence is admitted to complete “the story of the crime on trial by proving its immediate context of happenings near in time and place” and by depicting “a complete picture for the jury.” *Id.* at 647 (citing *State v. Acosta*, 123 Wn.App. 424, 442, 98 P.3d 503 (2004) (internal quotations omitted).

Here, the trial court allowed the State to introduce into evidence a purportedly stolen television that was found in Mr. Stief's car with the stolen radiators under the theories that it was *res gestae* evidence and admissible pursuant to ER 404(b)'s enumerated exceptions. RP 4-7. Essentially, the State asserted that television showed Mr. Stief's intent to steal. RP 5.

Assuming without conceding that the trial court erred in admitting the evidence, it is not “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Tharp*, 96 Wn.2d at 599. There is not a reasonable probability that the evidence would have changed the outcome of the trial because there was overwhelming evidence of Mr. Stief’s guilt and intent to steal Mr. Bettger’s radiators and only the most minimal discussion of the television. The State did not make a propensity argument or call Mr. Stief a thief. *See generally* RP. In fact, the State referenced the television just one time in its closing arguments:

[STATE]: I talked with you about the Defendant’s vehicle. (Prosecutor shows jury an exhibit.) That’s not a vehicle, ladies and gentlemen, that you’re going to drive away with a water heater in it. Okay? I’ll show you some more pictures of that. You can see the backseat of the car where those stolen radiators had been placed, where that t.v. without the serial number is strapped in next to it? That’s the backseat, rather cluttered backseat, of the Defendant’s vehicle.

RP 208.

Furthermore, while the fact that very little evidence was presented regarding the television¹ can be said to diminish the evidence’s relevancy

¹ “No evidence was presented regarding the television. Mr. Bettger did not identify it as his property and he made no claim that a television was taken from his property. There was no evidence presented on how Mr. Stief came to possess the television; no evidence of similar burglaries in the area, *no evidence that the television was even stolen and not Mr. Stief’s personal property.*” Brief of Appellant at 17 (emphasis added).

and probative value, the same can be said regarding the evidence's ability to prejudice the jury against Mr. Stief. The role of the television in the presentation of this case barely registered as an aside or footnote.

Moreover, Mr. Stief's trial strategy was not focused on casting doubt on his intent to steal the radiators; instead he sought to call into question whether, during the altercation at Mr. Stief's car giving rise to the Robbery in the First Degree and Burglary in the First Degree (as charged) offenses, he intentionally used force. RP 214-228, 245-248.² Essentially, there was no version of the events that took place in which Mr. Stief was permissibly on Mr. Bettger's property and lawfully took possession of Mr. Bettger's radiators. *See generally* RP. Consequently, if the trial court erred in admitting the evidence, Mr. Stief was not prejudiced.

II. MR. STIEF'S TRIAL JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR BECAUSE IT FAILS TO NOTE THAT COUNTS 1 AND 2 INVOLVED THE SAME CRIMINAL CONDUCT.

Mr. Stief is correct that while the trial court never explicitly stated that it was making a finding of same criminal conduct, the ultimate sentence, sentencing ranges, and offender score calculations are only compatible with such a finding. Br. of App. at 19 FN 3. Moreover, each is consistent with the State's concession that counts 1 and 2 involved the

² That this was Mr. Stief's trial strategy was confirmed in sentencing arguments to the trial court. RP 245-48.

CLARK COUNTY PROSECUTOR

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