

FILED

MAY 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29234-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANITA S. WOLF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 09-1-00099-1

BRIEF OF RESPONDENT

LORI LYNN HOCTOR
Prosecuting Attorney

KATHARINE W. MATHEWS
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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Evidence of prior acts of a defendant is not barred by ER 404(b) unless the acts tend to show qualities of character and are used to show criminal propensity. Evidence of misconduct may be admitted to prove motive, intent, or absence of mistake or accident. The defendant claimed that shooting and killing her fiancé was an accident and that she had no motive to kill him. Testimony that the defendant intentionally hit her fiancé with a truck several months before shooting him was used to show a history of hostility and assaultive conduct toward the victim to rebut the defendant's claims of accident and lack of motive. Did the defendant fail to preserve any error regarding admission of the ER 404(b) evidence by failing to object on that basis in the trial court? Did the trial court properly exercise its discretion in admitting the evidence? Was any evidentiary error harmless where the forensic and other evidence overwhelmingly contradicted the defendant's two conflicting version of events? (Assignment of Error No. 1)

2. The jury was erroneously instructed that a "no" answer to the special verdict question concerning whether the defendant was armed with a firearm at the time of the commission of the crime had to be unanimous. Was it harmless error to give the unanimity instruction when the jury unanimously found the defendant guilty of murder in the second degree and it was uncontested both that the victim died of a gunshot wound and that the defendant fired the gun that killed him? (Assignment of Error No. 2).

3. Under the Judgment and Sentence, a term of community custody was erroneously imposed pursuant to an inapplicable statute. Is remand appropriate to correct the statutory citation and term of community custody? (Assignment of Error No. 3)

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 1, 2010 the defendant, Anita Wolf ("Wolf"), was charged by amended information filed in Klickitat County Cause No. 09-1-00099-

1 with one count of Murder in the Second Degree – Domestic Violence in violation of RCW 9A.32.050, 10.99.20 and 9.94A.125 and eight counts of Unlawful Possession of a Firearm in the Second Degree in violation of RCW 9.41.040. CP 24 – 29.

On June 17, 2010 the trial court granted Wolf's motion to sever the charges of Unlawful Possession of a Firearm in the Second Degree from the murder charge. The trial court found that evidence of conviction for the prior misdemeanor domestic violence assault on a different victim would be highly prejudicial when dealing with another domestic violence charge, prejudice a limiting instruction would not cure. RP 104.

On June 22, 2010 the trial court granted the State's motion to admit evidence of Wolf's prior uncharged domestic violence assault upon her fiancé, Michael White ("White") which occurred several months prior to the shooting. RP 113 – 14. Wolf objected that the incident was not relevant to the circumstances of the shooting. RP 113. The court stated that while the incident was a "bad act" it went to motive. RP 113. Wolf did not argue prejudice or request a limiting instruction.

Following a jury trial before the Honorable E. Thompson Reynolds, Wolf was convicted of Murder in the Second Degree. CP 136. The jury answered "yes" to the question on the Special Verdict Form concerning whether Wolf was armed with a firearm at the time the crime

was committed. CP 137. The jury had been instructed that it must reach a unanimous “no” decision to answer “no” on the Special Verdict Form. RP 757, CP 132.

2. SUBSTANTIVE FACTS

The State adopts the Appellant’s statement of facts and supplements those facts as follows:

Wolf shot White on June 23, 2009 around 9:00 a.m. RP 251. The next afternoon, June 24, 2009, Wolf called her cousin Steven Smith (“Smith”) and asked him to come to her house due to a family emergency. RP 335 – 36. Upon entering Wolf’s house, Smith encountered White’s partially-covered body and Wolf, who was holding a pistol. RP 350. Wolf told Smith that she shot White when the gun accidentally went off. RP 350. She told Smith that she and White had been fighting a little bit, that White had left, and that the door jammed as White was re-entering the house. RP 351. She said that when White came through the door there had been a struggle, or maybe just some sideways movement, and the gun went off. RP 352. Smith testified that “she made it sound like it was * * * definitely not a purposeful thing.” RP 353.

On the afternoon of June 25, 2009, Wolf drove to the house of Charlotte Dehne (“Dehne”). RP 152, 264. She encountered Jeff Roza

(“Roza”) in Dehne’s driveway. Wolf’s first words to Roza were “I’m sorry. I’m sorry. I didn’t mean to.” RP 146. Wolf told Roza that she was outside at the front of her house as White was exiting, that White got in the way when she was going after her dog, that she turned when he was closing the door and she accidentally touched the window pane with the gun. RP 170. She said that the gun muzzle hitting the window pane made the gun go off. RP 171. The outside door Wolf referred to enters into a storage or mud room and a door from that room opens into the living area. RP 506 – 07. The interior door has a window in it. RP 377.

Wolf told Dehne that her dog had gotten loose, that White had handed her a gun and gone inside the house. RP 268. She said that she started to go back inside as White was coming out and the gun went off. RP 268. She told Dehne that White had been dead four days and that she had not called 9-1-1. RP 268. Wolf told Dehne that she had not reported White’s death because she had been unable to get cell phone reception. RP 269. She also told Dehne that she loved White and that he was the only man she ever trusted. RP 287.

Wolf, Dehne and Roza viewed White’s body at Wolf’s house, after which they returned to the Dehne residence. RP 172, 318. Wolf made a private call from Dehne’s home telephone that lasted five or ten minutes. RP 317 – 18. During that call, she falsely reported that law enforcement

had been called. RP 288 – 89. Dehne insisted that Wolf call 9-1-1. RP 289. Wolf needed someone else to dial 9-1-1 from Dehne's home telephone because she was apparently incapable of dialing by herself. RP 318.

Washington State Patrol forensic scientist Stephanie Winter-Sermeno testified that the DNA on the weapon that killed White matched the Wolf's profile. RP 628. Washington State Patrol forensic scientist Johan Schoeman testified that the only way the weapon could have fired was if the trigger had been pulled. RP 663 – 64. The gun would not have fired without someone pulling the trigger if it had been cocked and hit something or had been dropped while cocked. RP 663.

White's body was found lying face upwards inside the house at an angle to the interior door, the lower half of his body blocking the door and a quilted screen partially blocking the view from the mud room. RP 378 – 79. There was no blood on the door, nor was there any bullet mark, graze or hole on the door or its glass window. RP 586.

Clark County Medical Examiner Dr. Dennis Wickham testified that Michael White died of a gunshot wound to the chest. RP 720. The bullet almost completely severed his aorta, passed through his left atrium, went through the upper lobe of his left lung, and fractured a rib before exiting the body. RP 718 – 19. Blood loss from the damage to his heart

would have caused White to lose consciousness within twenty seconds.

RP 720.

Washington State Patrol forensic scientist Kari O'Neill testified that there was no blood in the living room area except in the saturation area immediately under and next to the body. RP 582. There was blood on White's shirt, undershirt and overalls, but not on his shoes and socks. RP 585. Most of the blood was around his upper torso. RP 586.

On June 25, 2009, shortly before she appeared in Dehne's driveway, distraught and disheveled (RP 145), Wolf encountered her neighbor, James Gerulf ("Gerulf") while driving her car near his home. RP 322. She did not get out of her car as she gave Gerulf a key to a neighborhood association post office box and said "I have a body in my house." RP 324. Gerulf asked if it was White and she responded "yes" before going on to tell him where in her house he could find items belonging to the association. RP 326. Wolf also told Gerulf that White had been the only guy that really treated her right. RP 326. Wolf was not crying or shaking or hysterical; her voice was no louder, softer, or faster than usual. RP 327 – 28. The conversation about the association key and other association items seemed normal to Gerulf and lasted only a few minutes. RP 328.

White's sister Elizabeth Porritt ("Porritt") testified that several months before the shooting, she witnessed Wolf and White arguing as White was jumping out of a pickup driven by Wolf. RP 634 – 35. Wolf stopped the truck as White jumped out. RP 635. Porritt testified that as White walked in front of the truck "he turned towards the front of the truck and was yelling at her that she's gonna shut her mouth bitch and so she hit the gas" striking White. RP 636. Wolf then said to White, who was apparently unhurt, "you're not gonna come screaming at me and tell me to shut up bitch." RP 637. Porritt reported that Wolf's tone was very firm and matter of fact as she spoke to White. RP 638.

In closing argument, defense counsel focused on lack of motive, stating "this is the man she's loved, she was going to marry, the only man that ever treated her nice." RP 771. Counsel argued that there was "no real evidence of – of such hard feelings between these people that she would take the gun, intentionally point it at him, kill him and decide it's time to end his life." RP 771 – 72. Nothing, he urged, could be more traumatic than to accidentally kill the person you love. RP 774. Counsel explained that Wolf's conflicting accounts of the shooting were due to "the stress of the situation and the grief and the anguish[.]" *Id.* Counsel argued that the fact that she only shot once was evidence of accident (RP 778 – 79), as was the fact that White died from a shot to the body, not to

the head. RP 779. Recounting what Wolf told Dehne and Roza, counsel argued “it was truly an accident and the dog got in the way.” RP 780. He told the jury “if you think long and hard you can come up with all kinds of scenarios that are just as likely to be accidental as intentional.” RP 781.

The jury convicted Wolf of murder in the second degree. CP 136, 137. At the July 10, 2010 sentencing, Judge Reynolds imposed a 232 month sentence followed by community custody under RCW 9.94A.742 “for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.” CP 145 - 147.

C. ARGUMENT

Evidence of prior acts of a defendant is not barred by ER 404(b) unless the acts tend to show qualities of character and are used to show criminal propensity. Evidence of misconduct may be admitted to prove motive, intent, or absence of mistake or accident. The defendant claimed that shooting and killing her fiancé was an accident and that she had no motive to kill him. Testimony that the defendant intentionally hit her fiancé with a truck several months before shooting him was used to show a history of hostility and assaultive conduct toward victim.

1. EVIDENCE THAT WOLF ASSAULTED WHITE WITH A PICKUP TRUCK SEVERAL MONTHS BEFORE SHOOTING HIM WAS NOT OBJECTED TO ON 404(B) GROUNDS, ITS ADMISSION WAS NOT AN ABUSE OF DISCRETION, AND ANY EVIDENTIARY ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE CONTRADICTING WOLF'S OWN CONFLICTING VERSIONS OF EVENTS.

- a. Wolf failed to preserve any error regarding admission of ER 404(b) evidence by failing to object on that basis in the trial court.**

Erroneous admission of ER 404(b) evidence is not error of constitutional magnitude and may not be raised for the first time on appeal under RAP 2.5(a). *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Wolf challenges admission of the prior truck assault as constituting improper ER 404(b) evidence. Brief of Appellant at p. 8. Wolf did not make an objection on this basis in the trial court and did not preserve this issue for appellate review. RP 113. Wolf's stated basis for the objection was "it's simply not relevant to the circumstances surrounding this shooting[.]" RP 113. Nothing in Wolf's argument articulates an objection on the grounds that the State is offering evidence of "bad acts" or that the prejudicial value of the evidence exceeds its

probative worth. RP 113. A relevancy objection does not preserve an ER 404(b) issue for appellate review. See, *State v. Kendrick*, 47 Wn. App. 620, 634, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987).

b. Evidence of the ER 404(b) truck assault was properly admitted to rebut Wolf's defense of accident and to show motive and intent.

“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.” ER 404(b). The exclusion provision of ER 404(b) does not apply if such evidence is offered for a legitimate purpose. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). Evidence of prior misconduct is admissible if it is logically relevant to a material issue before the jury and its probative value outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence of prior criminal or other bad acts “must be relevant to prove some ‘essential ingredient’ of the crime charged or otherwise probative of an issue in the case.” *Roth*, 75 Wn. App. App. 808, 818, 881 P.2d 268, 275 (1994) (citing *State v. Fernandez*, 28 Wn. App. 944, 628 P.2d 818 (1980)).

Wolf argues that the trial court was mistaken concerning the general admissibility of domestic violence evidence. The trial court was not mistaken. “[E]vidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, and [] such evidence tends to show the relationship of the parties and their feelings one toward the other and often bears directly upon the state of mind of the accused with the consequent bearing upon the question of malice or premeditation.” *Stenson*, 132 Wn.2d at 702 (citing *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995)). The trial court was correct when it found that evidence of prior domestic violence between the defendant and the deceased is relevant to show motive. Evidence of quarrels and prior threats is admissible to show motive or malice if the evidence is of consequence to the action. *Id.*

Evidence of a prior assault also may be admissible to show absence of mistake or accident. ER 404(b). Whether Wolf shot White intentionally or by accident was the overriding issue at trial. “[A] material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim’s injuries

occurred by happenstance or misfortune.” *Id.* at 819. “Use of other crimes and acts to rebut a claim of accident or to rebut ‘any material assertion by a party’ is a well-established exception to ER 404(b).” *Id.* (citing 5 Karl B. Tegland, *Washington Prac. Evidence* § 114, at 391, § 117, at 411 (3rd Ed. 1989)). See, e.g. *State v. Gogolin*, 45 Wn. App. 640, 646, 727 P.2d 683 (1986)(evidence of prior assault demonstrated history of hostility and abusive conduct toward victim, tending to rebut defense of accident); *Fernandez*, 28 Wn. App. at 950 (evidence that defendant twice before assaulted victims then fraudulently obtained their property relevant to rebut defense of accidental death of defendant’s wife under similar circumstances); *State v. Bell*, 10 Wn. App. 957, 961, 521 P.2d 70, *review denied*, 84 Wash.2d 1006 (1974) (evidence of prior assault of child properly admitted in prosecution for second degree murder of child where defendant claimed accidental injury from a fall from crib).

Wolf did not testify at trial, but people with whom she spoke shortly after the shooting testified that she claimed the shooting was accidental. Wolf also told Dehne right after the shooting that she loved White, that he was the only man she ever trusted. RP 287. Wolf told Gerulf that White had been the only guy that really treated her right. RP

326. In closing, defense counsel argued accident and lack of motive, stating “this is the man she’s loved, she was going to marry, the only man that ever treated her nice.” RP 771. The trial court properly admitted evidence that a few months before shooting White, Wolf intentionally hit him with a pickup truck, then firmly and matter-of-factly told him “you’re not gonna come screaming at me and tell me shut up bitch.” The evidence was relevant to show that Wolf and White had a history of physical conflict, rebutting the impression developed by Wolf after the shooting that she and the victim had a harmonious, peaceful relationship. It went directly to motive, intent, and absence of accident.

Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000)(citing *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995)). A trial court does not abuse its discretion unless its discretionary action is manifestly unreasonable or is based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. Evidentiary rulings will be sustained on any proper basis. *Id.* at 264. Here, the trial court properly concluded that the truck assault evidence was relevant to motive and admitted it on that basis. RP 113. There was no abuse of discretion.

- c. **If the truck assault evidence was improper under ER 404(b), the error was harmless because the remaining evidence overwhelmingly contradicted the defendant's conflicting versions of events.**

Even if ER 404(b) had precluded the truck assault evidence “[e]videntiary errors under ER 404 are not of constitutional magnitude.” *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such error is prejudicial only if, “within reasonable probabilities,[] the outcome of the trial would have been different if the error not occurred.” *Id.* (citing *State v. Robtoy*, 98 Wash.2d 30, 653 P.2d 284 (1982)).

It is not reasonably probable that the outcome of the trial would have differed had the truck assault evidence been excluded. There was only one issue for the jury: whether Wolf acted intentionally when she shot Michael White. Wolf argues that the truck assault “is perhaps the only evidence of intent that the state presented to the jury.” Brief of Appellant at p. 11. Wolf ignores the overwhelming evidence contradicting the conflicting versions of events she recounted to friends and family in the days immediately following the shooting. To Smith she said that she was inside the house and accidentally shot White as he was coming in through the utility room door. A day or so later she told Roza and Dehne that she was outside the house and shot White as he closed the door coming outside after she accidentally bumped the gun into the door.

Forensic evidence incontrovertibly proved neither version could be true. The body was in the wrong position. Under Wolf's versions, White would have had to move or been moved after he was shot in order to have ended up where his body was found. The forensic evidence proved White could not have moved by himself, nor was he moved. Damage to his heart was so severe that he lost consciousness and fell to the floor within twenty seconds of being shot. Bloodstains on his clothing were concentrated at his upper torso around the bullet entry and exit holes. His shoes and socks had no blood on them, indicating he did not stand long enough for blood to flow that far downwards. All the bloodstains in the room where he was found were directly underneath and around the upper portion of his body. There was no blood anywhere else in the room – not on the door he was supposed to have been entering or exiting and not dripped or smeared on along the floor. Neither were there any marks, scrapes, or bullet grazes on the door from the utility room to the living area.

The blood evidence alone is sufficient for the jury to conclude Wolf had lied to her friends about the circumstances of White's death. When combined with the myriad of other evidence – the four-day reporting delay during which Wolf made other cell phone calls but claimed she could not dial 9-1-1, her access to a vehicle, her call to her cousin claiming a family emergency, her calm assertion that there was a

body at her house during a conversation about neighborhood association matters, her subsequent inability to dial 9-1-1 from Dehne's telephone immediately after using the same phone to make a private call – make it highly improbable that the jury's guilty verdict turned on evidence of the truck assault. Any evidentiary error concerning the truck assault was harmless.

2. THE ERRONEOUS UNANIMITY INSTRUCTION WAS HARMLESS ERROR WHEN IT WAS UNCONTESTED THAT WHITE DIED OF A GUNSHOT WOUND AND THAT WOLF FIRED THE GUN THAT KILLED HIM.

The Special Verdict Form asked “was the defendant, Anita Sue Wolf, armed with a firearm at the time of the commission of the crime?” CP 137. The jury answered “yes.” CP 137. The jury was instructed that it was the “state’s burden to prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.” CP 133. The jury was also instructed not to use the special verdict form unless it found the defendant guilty. CP 132. The erroneous special verdict unanimity instruction complained of in this case comported with 11A Washington Practice: Washington Pattern Jury Instructions Criminal 160.00, at 630 (3d ed.2008).

Wolf challenges the special verdict unanimity instruction for the first time on appeal, arguing that giving the instruction was a manifest

error affecting a constitutional right under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), and *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d d1083 (2003). This Court rejected that interpretation of *Bashaw* in *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), holding that the instruction requiring a jury to deliberate to unanimity in order to acquit a defendant of an aggravating factor does not constitute manifest constitutional error reviewable for the first time on appeal under RAP 2.5(a)(3). *Nunez*, 160 Wn. App. at 164–65.

Regardless of whether the error is of constitutional magnitude, Wolf's argument fails because giving the instruction in this case was harmless error. Errors of constitutional magnitude are harmless when proven to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The erroneous instruction here could not have affected the jury's deliberative process in any way. The jurors unanimously found Wolf guilty of Murder in the Second Degree. It is uncontested that White died because a bullet ripped through his heart. It is uncontested that Wolf fired the gun that killed him. The jurors were compelled to find that Wolf was armed with a firearm during the commission of the crime. They could not have found otherwise.

The harmless error did not violate Wolf's constitutionally guaranteed right to a jury trial. The resulting firearm enhancement should be affirmed.

3. REMAND IS REQUIRED TO CORRECT THE COMMUNITY CUSTODY PROVISION OF THE JUDGMENT AND SENTENCE.

The State agrees that the community custody provision of the Judgment and Sentence cites an inapplicable statute, resulting in imposition of an inappropriate term of community custody. Serious violent offenders are subject to three years of community custody under RCW 9.94A.701(1)(b). Remand is required to correct the citation in the Judgment and Sentence and to impose the correct term of community custody.

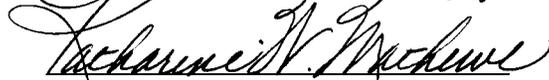
E. CONCLUSION

For the reasons stated above, this Court should find that evidence of the prior assault was properly admitted and find that the giving the erroneous unanimity instruction was harmless error and affirm Wolf's conviction and the special verdict for the firearm enhancement.

In addition, this Court should vacate the community custody provision of the judgment and sentence and remand the case for sentencing under RCW 9.9A.701(1)(b).

Dated this 24th day of May, 2011.

Respectfully submitted,
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