

**FILED**

JUN 29, 2012

Court of Appeals  
Division III  
State of Washington

No. 30519-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DEAN BYRD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John Knodell

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APPELLANT'S REPLY BRIEF

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KRISTINA M. NICHOLS  
Nichols Law Firm, PLLC  
Attorney for Appellant  
P.O. Box 19203  
Spokane, WA 99219  
(509) 280-1207  
Wa.Appeals@gmail.com

## ARGUMENT ON REPLY

**Issue: Whether evidence of an arrest warrant is a “prior bad act” that triggers ER 404(b) analyses and limiting instructions.**

The State suggests that Mr. Byrd erred by characterizing evidence of his arrest warrant “as being evidence subject to ER 404(b)...”

(Respondent’s Brief, pg. 2) The State asserts it “did not introduce that testimony as anything other than res gestae evidence.” (*Id.*)

Evidence admitted for purposes of establishing “res gestae” has long been recognized as an exception to ER 404(b)’s general exclusion of prior bad acts evidence.<sup>1</sup> Furthermore, it is well settled that admission of “prior bad acts” evidence under the “res gestae” exception is indeed subject to an ER 404(b) analysis and limiting instructions as set forth in Appellant’s opening brief.<sup>2</sup>

Next, evidence of an arrest warrant would constitute an explicit or at least implicit “prior bad act” by the defendant. “Prior bad acts” are not limited to evidence of criminal convictions, but they instead include uncharged crimes, dishonorable acts or generally any evidence that would

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<sup>1</sup> See e.g., *State v. Sublett*, 156 Wn. App. 160, 194-98, 231 P.3d 231 (2010); *State v. Warren*, 134 Wn. App. 44, 62-64, 138 P.3d 1081, aff’d, 165 Wn.2d 17 (2006); *State v. Acosta*, 123 Wn. App. 424, 98 P.3d 503 (2004); *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989).

<sup>2</sup> See *id.*

portray the defendant as having the character to commit a crime.<sup>3</sup>

Evidence of Mr. Byrd's arrest warrant is precisely the type of evidence that ER 404(b) is intended to exclude, unless an exception exists.

The evidence of the arrest warrant created a prejudicial inference that the defendant had the type of character for committing crimes, had problems with the law, or at least had some issue that could taint his character. This is enough to trigger ER 404(b). Having an arrest warrant would certainly not create an impression that it was a result of some prior *good* act by the defendant. To reiterate, in order to constitute a "prior bad act," that act does not have to result in a conviction; an arrest or warrant as in this case would constitute a prior bad act and be subject to the required ER 404(b) analysis.

ER 404(b) was triggered in this case, and, as such, the court should have conducted the requisite analysis for admitting the evidence for "res gestae" purposes following defense counsel's objection. Likewise, this prior bad acts evidence that was apparently admitted as a "res gestae" exception to ER 404(b) required the corresponding limiting instruction. To the extent defense counsel failed to request the instruction, particularly where the prejudicial evidence was referenced numerous times throughout

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<sup>3</sup> See e.g., *State v. Ra*, 144 Wn. App. at 688, 701-02, 175 P.3d 609 (2008); *State v. Everybodytalksabout*, 145 Wn.2d 456, 468, 39 P.3d 294 (2002); Daniel Buzzetta, Article 6 Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b), *Fordham Urban Law Journal*, Vol. 21, Issue 2 (1993) (citing Fed. R. Evid. 404(b); *Huddleston v. United States*, 485 U.S. 681, 685 (1988)).

trial, counsel was ineffective. These ER 404(b) analyses and instructional issues have been more fully addressed in Mr. Byrd's opening brief and are now incorporated herein.

F. CONCLUSION

The State argued that Mr. Byrd erroneously assumed that evidence of arrest warrants constitutes a "prior bad act" or that "res gestae" evidence triggers an ER 404(b) analysis. As set forth above, evidence of an arrest warrant does constitute a prior bad act and, where it was admitted for "res gestae" purposes, an ER 404(b) analysis and corresponding limiting instruction were required. Appellant rests on his original briefing as to the remaining analysis on this and the other issues raised through this appeal.

Respectfully submitted this 28<sup>th</sup> day of June, 2012.

/s/ Kristina Nichols

Kristina M. Nichols, WSBA #35918

Attorney for Appellant

PROOF OF SERVICE:

I swear under penalty of perjury under the laws of the State of Washington that on June 28, 2012, I served a true and correct copy of the foregoing document by mail to Joseph Byrd via U.S. Postal Service, first-class and postage prepaid, at 9998 Maple Dr NE #84, Moses Lake, WA 98837. Also, having obtained prior permission from Grant County Prosecutor's Office, I served a true and correct copy of the same on D Angus Lee and Doug Mitchell by email at kburns@co.grant.wa.us, using the e-filing electronic e-mail service.

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Nichols Law Firm, PLLC  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 280-1207  
Fax: (509) 299-2701  
Wa.Appeals@gmail.com