

NO. 30653-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RUBY RAY CORDOVA

Appellant.

FILED
June 29, 2012
Court of Appeals
Division III
State of Washington

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

The Honorable Maryann C. Moreno, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Cordova of felony harassment without sufficient evidence that the alleged victim was placed in actual reasonable fear that the death threat would be carried out.

2. The trial court erred by denying Mr. Cordova's motion to dismiss the felony harassment charge for lack of evidence.

3. The trial court abused its discretion by admitting Officer McMurtrey's testimony that he was told by dispatch that Mr. Cordova was coded "officer caution" and was an "armed criminal."

Issues Pertaining to Assignments of Error

1. The felony harassment conviction is not supported by substantial evidence because there is insufficient evidence that Officer McMurtrey had an actual "reasonable fear" that the death threat would be carried out.

2. The trial court erred in permitting ER 404(b) character testimony by Officer McMurtrey that he was told by dispatch that Mr. Cordova was coded "officer caution" and was an "armed criminal."

B. STATEMENT OF THE CASE

In the early-morning hours of February 26, 2011, Rudy Cordova called 9-1-1 to report that his wife was hitting and kicking him. 2RP 194-5, 227, 243. A few minutes later, Mrs. Kelly Cordova also called emergency services, reporting that her husband was intoxicated and that he bit her thumb. 2RP 197, 245. Mr. Cordova then reported to the operator that Mrs. Cordova was continuing to assault him. 2RP 245.

Before arriving at the scene, dispatch relayed information to responding Officer Chris McMurtrey that Mr. Cordova was labeled “code 3” in the system, which the officer testified means “officer caution,” and was an “armed criminal.” 2RP 227-28. This testimony came in over defense objection. 2RP 227.

When the officers arrived, Mr. Cordova was waiting for them and let them into the house. 2RP 197. He appeared “very” intoxicated, but was cooperative. 2RP 199-200, 230, 248. He was not armed. 2RP 243. Both Cordovas had visible injuries—Mr. Cordova had cuts on his lip and cheek; Mrs. Cordova had a small bite mark on her thumb. 2RP 201, 233. Both denied assaulting the other. 2RP 232. After speaking with both parties, the officers decided to arrest only Mr. Cordova. 2RP 206, 234.

At first, Officer Holton Widhalm interviewed Mr. Cordova while his partner, Officer Chris McMurtrey, interviewed Mrs. Cordova in another room. 2RP 199. Officer Widhalm reported no problems with Mr. Cordova. When they switched, and Officer McMurtrey was alone in the room with Mr. Cordova, Mr. Cordova became agitated for the first time and Officer Widhalm heard yelling from the other room. 2RP 204.

Officer McMurtrey testified that Mr. Cordova became visibly upset and began yelling at him when it became clear that Officer McMurtrey thought Mrs. Cordova was the wronged party. 2RP 233, 234, 235. Mr. Cordova accused Officer McMurtrey of taking his wife's side because she was "blonde." 2RP 233. However, Mr. Cordova never became physically aggressive with the officers. 2RP 247, 253. The officers arrested and handcuffed Mr. Cordova without incident. 2RP 237, 253.

As he was being led in handcuffs by Officer McMurtrey to the patrol car, Mr. Cordova asked the officer's name, and then he said: "That's how people die right there," and, "That's how people die, by taking the wrong people to jail." 2RP 237, 238. Officer McMurtrey testified that Mr. Cordova followed this up by saying: "You don't

have sh-t on me. Don't worry, I'll get out of jail tomorrow and find out where you guys live. I've been to prison." 2RP 238.

Officer McMurtrey said he was "agast" and "concerned" by Mr. Cordova's statements. 2RP 238-39. Officer Widhalm, who also heard Mr. Cordova's statements, testified that the thought it was an attempt to change their minds about arresting him. 2RP 208, 223. He testified that this was the reason the officers believe the appropriate charge was intimidation of a public servant. 2RP 223.

Mr. Cordova was initially charged with intimidation of a public servant and fourth degree assault. CP 4. The charges were later amended to felony harassment and fourth degree assault. CP 8, 9.

Mr. Cordova's motion to dismiss the harassment charge for lack of evidence at the close of the State's case was denied. 2RP 290, 292-93.

Following jury trial, Mr. Cordova was acquitted of assault, but convicted of felony harassment. 3RP 351. He was sentenced in the standard range. 3RP 393. This appeal timely follows. CP 90.

C. ARGUMENT

1. THE FELONY HARASSMENT CONVICTION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT OFFICER MCMURTREY HAD AN ACTUAL "REASONABLE FEAR" THAT THE DEATH THREAT WOULD BE CARRIED OUT.

Under the state and federal constitutions, a criminal conviction must be reversed where no rational trier of fact could have found that the State proved all of the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). There is insufficient evidence to sustain the harassment verdict here because the State failed to prove that Officer McMurtrey had a subjective and reasonable fear that that the death threat would be carried out.

RCW 9A.46.020 provides in relevant part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;
 - . . . and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat would be carried out. . . .

(2) A person who harasses another . . . is guilty of a class C felony if . . . (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened. . . .

The State must prove that the victim was placed in reasonable fear that the threat made is the one that will be carried out—that is that the threat to kill will be carried out. State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003). The State must show that the person threatened subjectively felt the fear that the specific threat would be carried out and the jury must find that subjective fear was reasonable. State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002).

Officer McMurtrey did not testify to being afraid that the death threat would be carried out. Instead, he said he was only “agast” and “concerned.” 2RP 238-9. He testified that: “In this computer day and age, it’s so easy to find out where people live that it is concerning when people make that statement.” 2RP 239. That is not sufficient to establish that he had an actual *fear*, as opposed to merely a “concern,” that the death threat would be carried out. There is no evidence that he took any actions that would show his “concern” rose to the level of fear. To the contrary, following this incident, the officers made the decision to charge Mr.

Cordova with intimidating a public servant, rather than harassment, showing that they viewed this as an idle threat made in an attempt to change their minds about arresting him, rather than a real statement of intent. 2RP 208, 223, CP 4.

In State v. C.G., C.G. said to the victim, "I'll kill you Mr. Haney, I'll kill you." 150 Wn.2d 604, 607. Mr. Haney testified that C.G.'s threat caused him "concern" that C.G. "might try to harm him or someone else in the future." 150 Wn.2d at 607. In overturning C.G.'s conviction, the Supreme Court held that "there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him." 150 Wn.2d at 610.

As in C.G., testimony from Officer McMurtrey that he was "concerned" is insufficient evidence, without more, to show that he was actually placed in reasonable fear that Mr. Cordova would actually kill him. Therefore, the trial court erred by denying Mr. Cordova's half-time motion to dismiss and in convicting him of felony harassment.

2. THE TRIAL COURT ERRED IN PERMITTING ER 404(B) CHARACTER TESTIMONY BY OFFICER MCMURTREY THAT HE WAS TOLD BY DISPATCH THAT MR. CORDOVA WAS CODED “OFFICER CAUTION” AND WAS AN “ARMED CRIMINAL.”

- a. ER 404(b) Hearing

Prior to trial, the State moved to have Officer McMurtrey testify that he had been told by dispatch that Mr. Cordova had the notation “T3,” meaning “officer caution” and that the CAD report also showed he was an “armed career criminal.” 2RP 145-47. The State argued that this testimony would not be excluded under the general ban on character evidence in ER 404 because it would be offered as evidence relevant to whether Officer McMurtrey had a reasonable fear of the death threat. 2RP 145-47.

The defense disputed the accuracy of the designation of Mr. Cordova as an “officer caution” and “armed career criminal,” pointing out that Mr. Cordova’s criminal history did not substantiate either. 2RP 149-50. The defense argued that the lack of evidence of the truth of Mr. Cordova’s reputation, as reflected in the CAD report lowered its probative value. 2RP 150-51. The defense also argued that the prejudicial effect of this testimony exceeded its probative value. 2RP 149. The State argued the truth of the statements in the CAD report was not a relevant consideration for

the court if it was undisputed that the Officer heard these statements. 2RP 153.

The court ruled that the officer could testify that he was told that Mr. Cordova was classified as code "T3" and that this indicated he should "proceed with caution" and that the probative value of this testimony exceeded its prejudicial effect. 2RP 155. The court also ruled that the officer could testify that Mr. Cordova had been designated as an "armed criminal." 2RP 157-58.

The defense renewed its objection when Officer McMurtrey testified at trial. 2RP 227. Officer McMurtrey testified that on the way to the Cordova's house, he was told by dispatch that Mr. Cordova was "Code 3," meaning "officer caution," and that he was also an "armed criminal." 2RP 227-28. The jury was given a limiting instruction. CP 75.

- b. The trial court erred by admitting character evidence under ER 404 because the truth of the statements was disputed and the prejudicial effect outweighed its probative value.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404 prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. ER 404(a) addresses character evidence generally and ER 404(b) is specific to evidence of “other crimes, wrongs, or acts” brought in to show the character of a person.

The evidence rules forbid the use of character evidence to show a person’s propensity to commit a certain criminal act. Wade, 98 Wn. App. at 336. Such evidence is similarly inadmissible to show the defendant is a “criminal type” and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404 prohibits the admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Admission of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court

abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In this case, the trial court permitted Officer McMurtrey to testify, over defense objection, to what he had been told by dispatch about Mr. Cordova, specifically that he was an “armed criminal” and labeled an “officer caution” type. 2RP 155, 227-28. This evidence was evaluated and admitted by the court under ER 404(b).¹ 2RP 155-58.

- c. The trial court erred by failing to determine the accuracy/truth of the statements made on Mr. Cordova’s police record by a preponderance of the evidence.

The defense disputed the truth and accuracy of Mr. Cordova’s designations as “officer caution” and an “armed career criminal,” and pointed out to the court that none of Mr. Cordova’s prior convictions supported these statements. 2RP 155. Rather than offering any supporting evidence or foundation for these unattributed statements, the prosecutor argued that it did not matter

¹ Although this evidence is not “prior bad act” evidence per se, these unattributed statements about Mr. Cordova’s reputation with the police department imply prior bad acts have occurred to lead to these statements in his police record.

if the statements were true, so long they were in Officer McMurtrey's mind when he considered the threat. 2RP 153. The court never determined the truth or accuracy of the statements. See 2RP 155-58.

When the State seeks admission of evidence under ER 404(b) the trial court must "find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence." State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002), citing State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). While not every case requires a full evidentiary hearing, if the ruling is based on the State's offer of proof, that offer must be sufficient to make the determination by a preponderance. Kilgore, 147 Wn.2d 295.

In this case, the defense disputed the truth of the notations on his police record that he had committed acts warranting the code "officer caution," and that he was an "armed career criminal." 2RP 149-50. The only witness offered by the State was Officer McMurtrey, who said he had no knowledge of Mr. Cordova before this incident, and had no independent knowledge of the truth of these statements on the CAD report. 1RP 77. The State did not

offer any evidence, via offer of proof or even argument, that Mr. Cordova's prior acts established the truth of these statements.

Thus, the evidence before the trial court did not establish the truth of the statements offered by a preponderance of the evidence. The trial court failed to make the required determination that the statements were accurate or true by a preponderance.

While the State argued that it was irrelevant if the statements were true if they were told to Mr. Cordova, this argument should be rejected because it would contravene both caselaw and the purpose of the evidence rules. The requirement that the court determine the act occurred by a preponderance is a necessary step to establishing its admissibility. Kilgore, 147 Wn.2d at 292. A false statement that Mr. Cordova is violent is not relevant to determining if the person hearing it had a "reasonable fear," just as false evidence that the defendant had committed some prior bad act would be irrelevant. Especially because Mr. Cordova did not make the challenged statements and had no knowledge that they were in the Officer's mind. Nor could he know that, if there was no foundation for these statements.

Moreover, it is necessary that the trial court determine whether the statements have a basis in truth, rather than the jury.

The trial court can examine evidence that would not be otherwise admissible to determine if there is adequate truth in these statements. Without that determination by the trial court, the defense would have no way to adequately challenge the truth of the statements and argue to the jury that they were irrelevant because they were false.

The trial court failed to determine the truth of the statements made to Officer McMurtrey that Mr. Cordova warranted the code “officer caution” and that he was an “armed career criminal” and therefore it was error for the trial court to permit this testimony under ER 404(b).

- d. The trial court erred by admitting Officer McMurtrey’s testimony that he had been told that Mr. Cordova was code “officer caution” and a “career criminal” because the prejudicial effect of this character evidence exceeded its probative value.

Evidence of prior acts must be excluded unless the court first determines (1) that the act probably occurred by a preponderance of the evidence, (2) that the evidence is materially relevant to a permissible purpose, and (3) that the probative value of the evidence outweighs any unfair prejudicial effect the evidence may have upon the fact-finder. Pirtle, 127 Wn.2d at 649. The trial court

abused its discretion in granting the State's motion to admit Officer McMurtrey's testimony because the prejudicial effect exceeded the probative value of this evidence.

The State argued that Officer McMurtrey's testimony was relevant to proving his reasonable fear, and more probative than prejudicial, relying on State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), and State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999). 1RP 133. However, both of these cases are distinguishable from the facts of this case.

In Barragan, under ER 404(b), the court permitted the admission of statements made by Mr. Barragan to the victim in which Mr. Barragan bragged about earlier assaults against fellow inmates as evidence of the victim's reasonable fear that Mr. Barragan's threats against him would be carried out. 102 Wn. App. at 758. Likewise, in Ragin, the Court validated the admission of testimony that the defendant himself told the victim about his prior violent acts and convictions. 94 Wn. App. at 409. It is significant that in both Barragan and Ragin, it was the defendant himself who made the statements to the victim, deliberately instilling fear in the victim, which contributed to the probative value of the evidence.

The statements here are not as probative of “reasonable fear.” Mr. Cordova did not make the statements in question, did not deliberately instill fear in Officer McMurtrey through making such statements, and had no knowledge that Officer McMurtrey had been told he was “officer caution” and an “armed career criminal.” Moreover, the foundation for these statements was never established and was disputed. Although the existence of the assaults Mr. Barragan bragged about were also in dispute, since Mr. Barragan himself made the statements, this was not deemed by the Court as affecting the probative value of the statements in determining the victim’s reasonable fear.

The probative value of the testimony in this case is much lower than in Barragan because the truth of the statements was never proven by a preponderance and Mr. Cordova did not make the statements to Officer McMurtrey. The probative value of these statements on Mr. Cordova’s police file is reduced by the fact that we do not know who placed these codes in his file or that there is any substance or foundation for the labels. It is inherently unreasonable for a person to judge another based on inaccurate, biased, or fabricated judgments about them. And the false nature of the statements cannot be adequately challenged and cross-

examined before the jury because the defense would then have to put Mr. Cordova's criminal record before them to evaluate whether it provides a basis for the police department's coding. Without the trial court's determination that there is some foundation for the statements that Mr. Cordova should have been labeled an "armed criminal" and "officer caution," this evidence has very low probative value to the issue of "reasonable belief." Consequently, the evidence in this case is far less probative as to Officer McMurtrey's "reasonable fear" that the threat would be carried out.

Furthermore, the prejudicial effect of telling the jury, in essence, that Mr. Cordova had a reputation with the police department for being aggressive to the extent that they have given him the label "officer caution," and that he was an "armed criminal" was overly prejudicial. The evidence of Officer McMurtrey's actual belief that the death treat would be carried out was very weak, since he only testified that he was "concerned." In these circumstances, it is probable that the jury gave the ER 404(b) evidence far more weight than it deserved despite the limiting instruction. Telling the jury that Mr. Cordova is a violent "armed criminal," was likely to have an unfairly prejudicial impact on the trial.

In view of the limited probative value of the disputed police department coding of Mr. Cordova as “officer caution” and an “armed criminal,” the prejudicial effect of this evidence outweighed its probative value. Therefore, the trial court abused its discretion in permitting this evidence under ER 404(b).

e. The erroneous admission of the ER 404(b) evidence requires reversal.

Reversal is required where ER 404(b) evidence is erroneously admitted if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). The evidence of Officer Cordova’s actual and reasonable belief that the death threat would be carried out was already insufficient in this case. Consequently the improperly admitted evidence here likely had a significant impact on the jury’s determination that far outweighed the actual probative value. It is highly damaging to tell the jury in a case like this that the defendant has a reputation as an “armed criminal” and that the responding officer was advised specifically to use “caution,” especially where the truth of these statements has not been established by a preponderance. Consequently, it is more probable than not that

this improperly admitted testimony affected the outcome of the trial. Therefore, reversal of the felony harassment conviction is required.

D. CONCLUSION

The State failed to provide sufficient evidence that Officer McMurtrey had an actual and reasonable fear that the death threat would be carried out. Furthermore, the trial court abused its discretion in admitting ER 404(b) evidence without first determining by a preponderance of the evidence if the statements were true and where the limited probative value was outweighed by its prejudicial effect. Therefore, Mr. Cordova's felony harassment conviction must be reversed.

DATED: June 29, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



Rebecca Wold Bouchey
WSBA No. 26081
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Rudy Cordova

No. 30653-4-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29th day of June, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Mark Lindsey
Spokane County Prosecuting Attorney
mlindsey@spokanecounty.org
kowens@spokanecounty.org

Rudy Cordova
DOC #744495
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001

Signed in Seattle, Washington this 29th day of June, 2012.

X Patrick Mayovsky