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OCT 19 2011

King County Prosecutor  
Appellate Unit

66327-5 HK

NO. 66327-5-1

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

FILED & DIV 1  
COURT OF APPEALS  
STATE OF WASHINGTON  
2011 OCT 19 PM 4:03

STATE OF WASHINGTON,

Respondent,

v.

CURTISS WARE, JR.,

Appellant.

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

The Honorable Regina Cahan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE COURT ERRED BY ADMITTING EVIDENCE OF WARE'S ENCOUNTER WITH RAMEY UNDER ER 404(b).

1. Evidence of Ware's Attempt to Punch Ramey was Not Relevant to Intent.

The trial court erred under ER 404(b) by admitting evidence that Ware attempted to punch Ramey before the shooting. The alleged encounter was not relevant to a material issue or sufficiently similar to the charged offense to constitute evidence of Ware's "state of mind." Brief of Appellant (BOA) at 8-18.

Though not disputing intent was implicit in the act of shooting Evans, the State claims the evidence was relevant because it shows "Ware was already angry prior to his meeting with Evans, and that Evans became a target of his anger." Brief of Respondent (BOR) at 12. But "the test for logical relevance is whether the evidence is necessary to prove an essential element of the crime charged." State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000). Premeditation is not an element of second degree murder. See RCW 9A.32.050(1)(a) and (b). Thus, the State was not required to prove that Ware was angry before meeting Evans or that he acted on his alleged anger with premeditated intent.

Furthermore, as discussed in the BOA, even if the evidence was relevant to prove Ware's intent, evidence of ill will or abuse toward one person to show intent to harm a different person lacks logical relevance. BOA at 14-15.

2. The Danger of Unfair Prejudice from Evidence of Ware's Attempted Punch Outweighed Any Probative Value.

The State also claims that if "unnecessary to prove intent," the alleged encounter was relevant to establish Ware's identity. BOR at 11-14. Even if relevant, however, prior acts evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987).

The prejudice from evidence of Ware's attempted punch outweighed any probative value. While the State could have relied on other evidence to establish identity,<sup>1</sup> Ware had no recourse for the propensity evidence that portrayed him as a violent person. The jury was more inclined to believe Ware shot Evans after hearing evidence he also attempted to assault Ramey shortly before the shooting. Indeed, juries are naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror's

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<sup>1</sup> BOR at 15.

natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.”), rev. denied, 116 Wn.2d 1020 (1991).

The risk of unfair prejudice could have been reduced by sanitizing evidence of the encounter to remove any mention of the attempted punch. In other words, Ramey could have testified he encountered Ware near the scene shortly before the shooting. The attempted punch evidence added nothing to the probative value of this identity evidence, if in fact the state truly sought its admission to prove identity. Instead, the punch evidence was likely to provoke an emotional response rather than a rational decision among jurors. It thus should have been excluded. See 5 Karl B. Tegland, Washington Practice: Evidence § 403.3, at 442 (5th ed. 2007) (if evidence is likely to arouse an emotional response rather than a rational decision among the jurors, and other less inflammatory evidence is available to make the same point, the balance is tipped towards exclusion.)

The trial court recognized this risk by suggesting a safer way to establish Ware's presence at the scene before the shooting:

[Ramey] [c]an testify that a few minutes before Richard Ramey had contact with Defendant Ware – I think what he can testify to is they came up and had some sort of interaction. I don't have a huge issue with the sucker punch. My problem is the question will be why?...So I think you are better off to say, because the whole point is

ID, a few minutes before the shooting they had contact, and leave it at that.

6RP 4.

The State unfortunately declined to follow the court's suggestion, instead arguing the attempted punch made the alleged encounter memorable. BOR at 11-12. This argument is unavailing; Ramey testified he knew Ware and remembered seeing him urinate in the area beforehand. 9RP 164-66; 10RP 4-5. As the State notes, the alleged shooting also occurred at approximately 3 a.m. in an industrial area largely deserted after dark. BOR at 11; 7RP 27-31. It is just as likely any of these facts made the alleged encounter memorable to Ramey.

3. The Erroneous Admission of Ware's Prior Misconduct was Not Harmless.

The State claims evidence of Ware's attempt to punch Ramey was not "particularly prejudicial" because Ramey was not injured and because the jury was told of other prior misconduct involving Ware's drug dealing and use. BOR at 15. This argument is without merit.

Evidence of the attempted punch is prejudicial regardless of injury, because it portrays Ware as having a violent predisposition. Though evidence of Ware's involvement with drugs was also prejudicial, its damaging effect pales in comparison to prior misconduct involving the same type of violent behavior at issue in the charged offense.

If anything, evidence of Ware's involvement with drugs was prejudicial because it allowed the jury to infer that he was not only violent, but also a "criminal type." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987) (Evidence of other misconduct is prejudicial because it "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away."), overruled on other grounds by, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

As addressed in the Opening Brief of Appellant, this prejudicial effect was compounded by the lack of a limiting instruction. BOA at 16-22. Without a limiting instruction, the jury was free to consider Ware's attempted assault on Ramey as evidence of his propensity for violence and criminality.

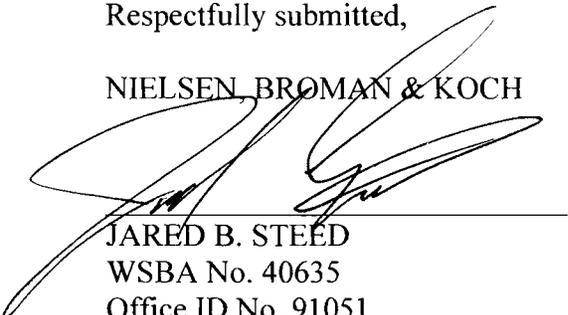
B. CONCLUSION

For the reasons discussed above and in the opening brief, Ware's conviction should be reversed and the case remanded for a new trial.

DATED this 19<sup>th</sup> day of October, 2011.

Respectfully submitted,

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	COA NO. 66327-5-1
	)	
CURTISS WARE, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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 19<sup>TH</sup> DAY OF OCTOBER, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     CURTISS WARE, JR.  
          DOC NO. 346157  
          CLALLAM BAY CORRECTIONS CENTER  
          1830 EAGLE CREST WAY  
          CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*