

66327-5

66327-5

NO. 66327-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CURTISS WARE, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence of prior bad acts may be admitted under ER 404(b) to prove identity and state of mind. The trial court admitted testimony that Ware had attempted to punch a man minutes prior to killing Melvin Evans. The Court allowed the evidence to show Ware was present at the scene of the murder and that he was angry just before his prearranged meeting with Evans. Did the trial court abuse its discretion?

2. Where the trial court properly admitted prior bad acts evidence, was Appellant's counsel ineffective by failing to request a limiting instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Curtiss Ware, Jr., was charged with murder in the second degree with a deadly weapon.¹ CP 1-2. The State alleged that Ware shot and killed Melvin Evans on August 27, 2009.

¹ Jenita Freeman was also charged with rendering criminal assistance as a co-defendant; however, those charges were dismissed after the State rested. 12 RP 2-3.

CP 2-4. The State amended the information to charge Ware with a firearm enhancement on September 16, 2010. CP 89-90; 1 RP 4. The jury found Ware guilty as charged. CP 83-84. The court imposed a standard range sentence of 184 months of confinement. CP 93-103. The court sentenced Ware on December 2, 2010. Id.

2. SUBSTANTIVE FACTS

Melvin Evans was 32 years old and worked odd jobs in Seattle. 8 RP 143². He lived with his mother or at a shelter. 4 RP 54; 8 RP 143-44. On August 27, 2009, Evans was washing and detailing cars with his friend, Hal Goldsmith. 8 RP 143-45. Evans and Goldsmith had used cocaine together in the past. 8 RP 163-64. After work, Evans asked to borrow Goldsmith's cell phone so he could arrange to buy drugs. 8 RP 145. Evans told Goldsmith he was going to call "Curtiss." 8 RP 145. Soon after, Goldsmith saw Evans talking to Curtiss Ware, on the corner of Byron and

² The verbatim report of proceedings consists of thirty-eight volumes, which will be referred to in this brief as follows: 1 RP (5/14/10), 2 RP (9/16/10), 3 RP (9/20/10), 4 RP (9/22/10), 5 RP (9/23/10), 6 RP (9/27/10), 7 RP (9/28/10), 8 RP (9/29/10), 9 RP (9/30/10), 10 RP (10/4/10), 11 RP (10/5/10), 12 RP (12/6/10), 13 RP (12/2/10).

Rainier Avenue; the conversation became heated.³ 8 RP 146. According to Goldsmith, they were talking about money. 8 RP 156. Goldsmith heard Ware say "you work me for money," and Evans replied, "I ain't getting you for no money." 9 RP 10. Goldsmith saw Ware pull a gun from his waistband as Evans turned to run. 8 RP 146. Ware fired multiple shots at Evans. 8 RP 146. Ware got into the passenger side of a truck and drove away. 8 RP 161, 146. Goldsmith found Evans lying behind a store and called 911. 8 RP 171. Police recovered Goldsmith's phone and found a call to Ware's number. 11 RP 86, 89-90; 12 RP 35-36, 42-43, 72.

Richard Ramey had lived in the area of Rainier Avenue his entire life. 9 RP 161. He had known Evans for approximately seven years. 9 RP 169. He had seen Ware in the neighborhood a few times before. 9 RP 165. On the night of the shooting, Ramey encountered Ware on the corner of Byron. 9 RP 169. According to Ramey, Ware tried to punch him, but Ramey was able to block or catch the punch. 8 RP 169. Ware said "nice catch" and then told Ramey to "get off this block." 9 RP 169. As Ramey left he saw

³ Goldsmith identified Ware at trial and at a police line up. 8 RP 176. Goldsmith was also shown a photo montage by police, but identified an individual named Curtiss Dorrsett who looked like Ware. 9 RP 24-25.

Ware meet Evans. 9 RP 171. Ramey heard gunshots six or seven minutes later.⁴ 9 RP 171, 172.

Police responded to a call that shots had been fired at Byron and Rainier Avenue in Seattle at approximately 3:00 am. 5 RP 60; 6 RP 74. As officers approached, they were flagged down by witnesses. 5 RP 62; 6 RP 102. They found Melvin Evans lying in an alley with a gunshot wound to the back. 5 RP 63, 68; 6 RP 103. Paramedics responded and took Evans to Harborview Medical Center, but were unable to revive him. 6 RP 28. Evans died from a single gunshot wound to the back that went through his lung and lodged in his neck. 7 RP 114.

Officer Stephanie Marks found a bag of cocaine at Evans' feet. 5 RP 70-71; 8 RP 53. The bag was submitted to the Washington State Patrol Crime Lab for DNA testing. 9 RP 146. Megan Inslee swabbed the bag of cocaine and found a mixed DNA profile. 9 RP 148. Ware matched the major contributor to the DNA profile. 9 RP 150. Inslee testified that the statistical probability of a random person having that profile was 1: 2.3 quadrillion. 9 RP 151.

⁴ On cross examination, Ramey conceded that it may have been 20-40 minutes later. 10 RP 13. However, the surveillance video from witness John Rogers' house shows Ware's truck arriving at 2:42 and the shooting occurring at 3:04. 8 RP 67, 82. No more than 22 minutes could have passed.

Mark Hines lived in an apartment that overlooked the scene. 7 RP 28-30. Hines noted that the area is primarily a commercial neighborhood that is busy during the day, but not at night. 7 RP 30. At night the neighborhood is "scary," and there are drug users and dealers in the area. 7 RP 31. He was ill and trying to sleep at approximately 3:00 am on August 27, 2009. 7 RP 27-30, 36. Hines was startled to hear five gunshots close by. 7 RP 36-37. He looked out his window and saw an African American male in dark pants and a large white shirt shouting and waving a dark object in his hands. 7 RP 43-45. The man got into a white pickup truck that drove away slowly. 7 RP 43, 56. Hines described the truck as an older white Ford F-250 with a canopy. 7 RP 56.

John Rogers was also a resident of the neighborhood. 8 RP 8. The shooting occurred in front of his house. 8 RP 19. Unbeknownst to Ware, Rogers had several surveillance cameras around his house. 8 RP 14. His cameras recorded the shooting and he turned the video over to the police. 8 RP 20. The video showed that a white pickup truck arrived at the scene at 2:42 am

and a person in a white shirt got out.⁵ 8 RP 25. The man in the white shirt walked to the street corner and encountered another man in a black shirt.⁶ The man in black began to back away and the man in white raised a gun and shot. 8 RP 25.

Seattle police looked for the older white pickup truck with a canopy that fit the description in the area. 7 RP 130. Detective Randy Moore located the truck parked in the South Park area of Seattle. 7 RP 130. He observed Ware and Freeman get in the truck; he and other officers arrested them. 7 RP 131.

At trial, the State sought to admit evidence that Ware had encountered Richard Ramey and tried to punch him just before the murder occurred. 5 RP 20-21. The State had two bases to admit the evidence: first, to establish that Ware and Freeman were there at the scene; and second, to show state of mind, that Ware was angry just before the murder occurred. 5 RP 22-23. The first basis

⁵ Forensic video analyst Grant Fredericks compared the video to photos of the white pickup truck that Ware was arrested from. Fredericks looked at the characteristics of the make and model of the truck and found they matched. He also looked at numerous defects such as dents, damage and decals and found they also matched. 9 RP 91-94, 106-16.

⁶ Evans was wearing a black shirt when he was killed. 8 RP 79. Ware was seen wearing a white shirt that night. 8 RP 159.

was relevant to show identity and the second basis was relevant to show intent.

The trial court agreed and admitted the evidence to show both identity and state of mind. 5 RP 38-39. In a preliminary ruling on September 23, 2010, the court found, "I generally think that particularly the incidents of that day and particularly moments before are highly relevant. . . . It goes to knowledge of what was happening *to identity* and to motive." 5 RP 38-39 (emphasis added).⁷ The court repeated that the evidence was relevant to "*identity* and motive." 5 RP 39 (emphasis added). The trial court ruled:

I am allowing that entire incident in. It is soon enough to the event, whether it be five to twenty minutes. It is that day, right prior to the event; correct? *And the fact that he sees him at the scene is relevant.* The contact, I think his demeanor and anger shows his state of mind at the time. I think it is highly relevant, so I will let that entire incident in.

⁷ The trial court initially ruled that in addition to the encounter with Ramey moments before the shooting, other ER 404(b) evidence relating to Ware's drug dealing would be admissible. 5 RP 38-46. The court reconsidered her ruling on September 26, 2010, and limited the evidence to the incidents that occurred the day of the shooting. 6 RP 2-6.

5 RP 45 (emphasis added). The trial court readdressed the ER 404(b) evidence the next trial day and again noted the reasons the contact between Ramey and Ware was probative:

[Ramey] can 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 only problem is the question of why? And how do you answer that without getting into the prior drug transaction, which is the why?^[8] 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.

6 RP 4 (emphasis added). The trial court specifically allowed Ramey to testify about the attempt to punch him. 6 RP 5. The court noted, "I don't frankly think that the sucker punch itself is all that prejudicial." 6 RP 5. The prosecutor suggested that a limiting instruction could be given if the defense requested one and the trial court was willing to provide a limiting instruction. 6 RP 6. Ware did not request a limiting instruction. The jury convicted Ware of murder in the second degree. CP 82-83.

⁸ The prosecutor indicated that the reason Ware tried to "sucker punch" Ramey was because of a dispute over a prior drug transaction. The court did not allow Ramey to testify about the reason for the altercation. 6 RP 5-6.

C. ARGUMENT

1. THE COURT PROPERLY PERMITTED THE STATE TO ADMIT EVIDENCE THAT WARE ATTEMPTED TO PUNCH RAMEY.

Ware contends that the trial court erred by admitting evidence that he tried to punch Ramey before the shooting. Ware is incorrect. Ramey's encounter with Ware placed him at the scene of the murder moments before the shooting. The nature of the encounter explained why Ramey would recognize and remember Ware. The encounter was relevant to Ware's state of mind. The trial court did not abuse its discretion by admitting this evidence.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character and show action in conformity therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). Such evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If admitted for other purposes, a trial court must identify that purpose

and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Powell, 126 Wn.2d at 258-59. Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. Powell, 126 Wn.2d at 258; State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

a. The Evidence Was Properly Admitted
To Place Ware At The Scene And Prove
His State Of Mind.

The State offered the evidence to prove identity and state of mind. The prosecutor sought to show that Ware was in the area when the murder occurred, and that he was angry just before his prearranged meeting with Evans.

The evidence was highly probative of the identity of the killer. As previously noted, "[T]o admit prior misconduct evidence, it must be necessary to prove a material issue." Powell, 126 Wn.2d at 262. The identity of Ware as the killer was an essential element of the crime of murder. The fact that an eyewitness could place Ware at the murder scene minutes before the murder was highly relevant. The murder was committed in an industrial or commercial area at approximately 3:00 am. While the area was busy during business hours, that was not the case after dark. Placing Ware in that area five to twenty-five minutes before the shooting was highly probative.

In addition, Ware's attempt to punch Ramey made it much more likely that Ramey would recognize and remember Ware than if they had passed uneventfully on the street. The defense challenged Ramey's credibility extensively at trial. The defense attempted to impeach Ramey by pointing out that he had been drinking that night and using medication for a back condition. 10 RP 15. During that portion of cross examination the following exchange occurred:

Q: I'm just trying to find out what medications you took.

A: Okay

Q: What -- Did you take that medication that night?

A: Oh, my God.

Q: I mean--

A: I said I might have, I don't know. I know it didn't affect my judgment of remembering who walked up and tried to sock me in the face, sir.

10 RP 15. As Ramey pointed out, there was a valid reason that his encounter with Ware stood out in his mind.

Furthermore, Ware's attempt to punch Ramey was also relevant to show Ware's state of mind to prove his intent to kill. Evans prearranged the meeting with Ware. Evans had borrowed Goldsmith's phone to call "Curtiss" to buy drugs. Ramey encountered Ware on the corner of Byron just minutes before Ware was to meet Evans. During that encounter, Ware was angry and told Ramey to "get off this block." Ware also took a swing at Ramey, but failed to land the punch. Ramey then saw Evans approach Ware. This evidence made it likely that Ware was already angry prior to his meeting with Evans, and that Evans became a target of his anger. This evidence was probative of Ware's intent to kill Evans.

Ware argues that his attempt to punch Ramey is not sufficiently similar to the murder to be admissible under ER 404(b). Brief of Appellant at 14. Ware misconstrues the purpose of the evidence. The purpose was not to identify Ware by some modus

operandi. Rather, the evidence showed that Ware was already angry as he went to his prearranged meeting with Evans, and Ramey's testimony placed Ware with the victim at the scene of the murder.

Ware cites Wade to argue that "Geographic proximity of the acts does not itself establish the required relevancy." Brief of Appellant at 14. See State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999). In Wade, the State charged a juvenile with possession of cocaine with intent to deliver. Id. at 331. The State admitted prior drug transactions the defendant had made in Tacoma to prove intent. Id. at 332. However, those prior acts occurred months or years prior. Id. Wade is clearly distinguishable from the facts of Ware's case. In Wade, the prior bad acts merely occurred in the same city, and were years earlier. In contrast, Ware's encounter with Ramey was on the same street corner within minutes of the murder.

Ware cites to State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), to argue that the ER 404(b) evidence of intent was not necessary because intent was "implicit in the doing the act." Brief of Appellant at 13. Specifically, Ware argues that evidence that he attempted to punch Ramey was not necessary to prove his intent

because shooting Evans in the back itself established intent. Brief of Appellant at 13. However, as Powell notes:

We will uphold a trial court's decision to admit evidence of prior misconduct under ER 404(b) if one of its cited bases is justified. Here, the trial court correctly relied on the motive and res gestae exceptions as bases for admission.

Id. at 264. Even if this Court were to find Ware's confrontation with Ramey unnecessary to prove intent, Ware fails to address the trial court's reliance upon identity as a strong basis to admit the evidence.

The trial court clearly indentified two legitimate reasons to admit Ware's attempt to punch Ramey: to prove identity and to show Ware's state of mind. The court found the evidence probative and weighed the prejudicial impact, noting "I don't frankly think that the sucker punch itself is all that prejudicial." 6 RP 5. The trial court did not abuse its discretion by admitting Ramey's testimony about Ware attempting to hit him.

b. Any Error Was Harmless.

Any error in the admission of Ramey's testimony was harmless. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard.

State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).

Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

The trial court noted, "I don't frankly think that the sucker punch itself is all that prejudicial." 6 RP 5. The punch failed to land and did not harm Ramey. Ware's only response was to say "nice catch." This incident is relatively minor in comparison to the murder of Evans. The jury properly heard about more significant misconduct of the witnesses' involvement with drug dealing or use, including Ware, Evans, and Goldsmith. Viewed in the context of all the evidence, the fact that Ware took a swing at Ramey was not particularly prejudicial.

Furthermore, the evidence against Ware was overwhelming. Goldsmith saw Ware and Evans arguing, and then saw Ware draw a gun and shoot Evans. The shooting was captured on video, and Ware's truck was seen on the video. The video shows Ware shooting Evans as Evans turns to flee. Phone evidence established that Evans had called Ware to set up the meeting. Ware's DNA was on the drugs found at Evans' feet. There is no reasonable probability that the jury's verdict was unduly affected by

hearing that Ware tried to punch Ramey moments before the shooting.

The trial court properly admitted evidence that Ware attempted to punch Ramey just before the murder. The evidence was relevant to place Ware at the scene of the crime and to show he was angry prior to his prearranged meeting with Evans. Even if the trial court erred by allowing Ramey's testimony, any error was harmless and does not warrant a new trial.

2. THE RECORD DOES NOT ESTABLISH THAT WARE'S ATTORNEY WAS INEFFECTIVE NOR THAT WARE WAS PREJUDICED.

Ware argues that his counsel was ineffective by failing to request a limiting instruction for the evidence that he attempted to punch Ramey. Ware fails to demonstrate that his counsel's performance was deficient and fails to show prejudice. Ware's counsel would have had legitimate tactical reasons not to draw attention to evidence that established that he was at the scene of the murder and that he was angry just before the prearranged meeting with Evans. Furthermore, Ware cannot show a likelihood that the jury misused the evidence in a manner that affected the verdict given the minimal prejudice.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

Ware has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was

reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id.

In addition to overcoming the strong presumption of competence and showing deficient performance, Ware must affirmatively show prejudice. Id. at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. Instead, Ware must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

On direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. Id.

For Ware to prevail on his claim of ineffective assistance of counsel, the record must establish that his counsel's performance was deficient, and that there was a reasonable probability that the outcome would have been different had his attorney requested a limiting instruction. The record does not establish either.

First, Ware failed to show his counsel's performance was deficient. Clearly the court and defense counsel contemplated giving a limiting instruction. However, the record does not indicate the reasons why Ware's counsel did not request a limiting instruction. Ware has failed to meet his burden of showing deficient representation based on the record established in the proceedings below. McFarland, 127 Wn.2d at 335.

Furthermore, Ware has failed to overcome the strong presumption of competence afforded to trial counsel. Strickland, 466 U.S. at 689. Courts give great deference to the tactical decisions of trial counsel, and Ware's counsel had a legitimate reason not to request the instruction. Ware's counsel had argued there was not sufficient evidence to find Ware guilty, and would likely not want the court to highlight the evidence that showed Ware was at the scene moments before the murder. The defense argued that due to Ramey's health issues it was unlikely he could "catch" a

punch from Ware. Ware's counsel did not want the jury to consider the punch for the limited purpose of identity or state of mind; he wanted the jury to consider it as evidence that Ramey was not credible. 12 RP 33.

Ware has also failed to demonstrate prejudice. The trial court was correct when she noted that the "sucker punch" was not particularly prejudicial in the context of a murder over a drug deal that went wrong. 6 RP 5. As noted above, there was minimal prejudice from the evidence and overwhelming evidence that Ware committed the murder. Ware has failed to establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Ware has failed to establish a reasonable probability that the jury used the evidence for an improper purpose (for propensity rather than for identity and state of mind). Nor has Ware established a reasonable probability that this evidence affected the outcome in light of the eyewitness, video, cell phone and DNA evidence that established his guilt.

The record does not establish that Ware's counsel's performance was deficient, nor can Ware show prejudice from his attorney's decision not to seek a limiting instruction. Hence, his claim of ineffective assistance of counsel fails.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Ware's conviction for murder in the second degree with a firearm.

DATED this 19th day of September, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Motion for Brief of Respondent, in STATE V. CURTIS WARE JR., Cause No. 66327-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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