

NO. 73955-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRANT, JR.,

Appellant.

FILED

May 24, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald Eaton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to conduct the requisite analysis on the record before admitting evidence of past misconduct under ER 404(b).

2. Prosecutorial misconduct violated appellant's right to a fair trial.

3. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Before admitting evidence of other misconduct under ER 404(b), the court must weigh the danger of unfair prejudice against any probative value. This analysis must be conducted on the record. Did the court commit reversible error in admitting evidence of two prior contentious incidents between appellant and his wife without expressly considering the danger of unfair prejudice?

2. Prosecutors must not disparage defense counsel's constitutionally mandated role. Here, the prosecutor argued defense counsel's argument regarding the complaining witness's credibility was "offensive." Did the prosecutor commit misconduct that requires reversal of appellant's convictions?

3. Did the cumulative effect of the above-described errors deny appellant a fair trial and require reversal?

B. STATEMENT OF THE CASE

1. Procedural Facts

The San Juan County prosecutor charged appellant James Brant, Jr. with one count of residential burglary, one count of fourth-degree assault, and one count of interfering with the reporting of domestic violence. CP 1-2. The jury found him guilty of residential burglary and assault, but not guilty of interfering with domestic violence reporting. CP 34-36. The jury also found the offenses were committed against a family or household member. CP 37. The court imposed a suspended sentence for the misdemeanor assault and three months confinement for residential burglary. CP 41; Supp. CP ___ (Sub no. 53, Judgment and Sentence, filed Aug. 12, 2015).¹ Notice of appeal was timely filed. CP 48.

2. Substantive Facts

In September 2014, Brant's wife of 23 years told him she wanted a divorce. RP 98. He hoped the relationship could be saved, but his wife Deanna² was convinced it could not. RP 98-99. He was very hurt. RP 224. Many arguments ensued, but overall, the couple initially maintained a civil relationship and the ability to discuss issues such as their children and the business that they owned. RP 225.

¹ A supplemental designation of clerk's papers was filed on May 13, 2016.

² Because Brant and his wife share the same last name, Deanna Brant is referred to by her first name for clarity. No disrespect is intended.

The couple continued living together until January 2015, when Brant moved into a shop building the couple owned. RP 99. Deanna remained in the residence they had most recently shared with their two sons, ages 14 and 20. RP 97, 99. Deanna testified that, from that moment on, her husband was no longer permitted to enter their residence without her permission. RP 99-100.

On April 22, 2015, roughly four months after Brant had moved out, he called Deanna to ask if she needed anything from the store. RP 109. She told him she did not. RP 109. Nevertheless, when a store error led to Brant receiving an extra gallon of milk, he decided to drop it by the house for Deanna and the kids. RP 235.

Deanna testified she heard a knock at the door, looked outside, saw Brant walking back to his truck and the milk on the doorstep. RP 110. She put it in the refrigerator and went back outside to thank him. RP 111. At that point, Brant brought up what had been a sore subject for him for a while now. RP 235. He wanted to know why Deanna had not yet filed for divorce. RP 235. She told him she had no money for a lawyer and, as Brant described it, the standard argument ensued. RP 235.

When Deanna turned to go back inside, Brant asked to use the bathroom. RP 112. She refused to let him in and told him to go outside. RP 112. According to Deanna, Brant then pushed his way past her, walked

down the hall to the bedroom, went into her closet, and came out with his shotgun that she had stored there. RP 112.

Deanna had Brant's shotgun in her closet because of an incident that had occurred approximately a month earlier. On that day, she entered Brant's residence while he was away. RP 102. She claimed this was pre-arranged so she could pick up the Direct TV box they were sharing. RP 102. Brant denied there was any such arrangement and testified she had no permission to be in his home or take the Direct TV box, since he was paying for the service. RP 229-31.

The previous evening, Brant had been feeling suicidal. RP 233. He went so far as to write what was essentially a suicide note. RP 231-32, 256-57. It had Deanna's name and the words "last will and testament" at the top. RP 103, RP 256-57. He set it out, along with a shotgun and some shells before he left for work in the morning. RP 232. Photos of the couple's wedding were on the bed, beside the bed, and on the wall. RP 257. For fear that he would do himself harm, Deanna took the shotgun and the shells and put them in her closet. RP 104. When she called him upset later that morning, he did not know what she was talking about until she explained she had gone into the shop without his permission. RP 233-34. The court admitted evidence of this incident as *res gestae* for the charged events a month later. RP 22.

After taking back his shotgun, Brant headed for the door. RP 113. He took off a sticky note Deanna had affixed to the shotgun and flicked it at her as he went by. RP 239-40. She claimed he tried to affix it to her chest. RP 113. The note said, "If you take this, I will report it stolen. You don't need it. Stay the fuck out of my house." RP 115. Brant went outside and put the shotgun in his truck, all the while yelling that he wanted his pistol as well. RP 115.

According to Brant, the two simply went back into the house together while continuing to argue. RP 247. Deanna claimed she had told him to get out but he pushed his way through the door as she tried to shut it. RP 113, 115. Brant explained that as he came through the door, she turned and approached rapidly as if attacking him. RP 248. He restrained her so that she would calm down and he would not get hit. RP 248-49. She testified her elbow was injured when he pushed her up against the refrigerator, screaming that he wanted the pistol. RP 116-17. She conceded he released her after only a few seconds. RP 117-18.

Brant admitted that he smashed a coffee cup – his coffee cup – on the floor out of anger. RP 249. But he explained he merely dropped Deanna's phone so that his hands would be free when she came at him. RP 248. He was holding it because she threw it at him, and he caught it. RP 248. The couple continued arguing, going from room to room in the house. RP 249.

In the living room, he grabbed the phone to try to call 911, but dropped it when she came at him again. RP 250. Seeing a half-full water bottle, he threw it at her as she approached. RP 251. Finally he grabbed the family cell phone that the couple paid for jointly. RP 156, 252. He told her she could have it back when she returned his pistol. RP 241, 252.

Brant then got in his truck and left, while Deanna called 911. RP 123. The jury also heard the recording of the 911 call. RP 137. Deanna told the dispatcher she was not hurt; Brant had merely pushed her and thrown things at her. Ex. 25.³

In addition to the March incident with the suicide note, the court also admitted an incident from February, approximately two months earlier. In that instance, Deanna claimed she called 911 because Brant brought something by the house and then refused to leave. RP 100-01. Brant explained he was in the process of leaving when she called the police. RP 228. Thereafter, he only stayed because he knew the police would want to speak with him. RP 228. The court deemed this incident relevant to show that Deanna was afraid and to illustrate the *res gestae* of the entire incident. RP 22. Additional facts will be discussed in the argument sections to which they pertain below.

³ Exhibit 22 is the recording of the 911 call. This brief refers to exhibit 25, the transcript, for ease of reference.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING EVIDENCE OF PRIOR BAD ACTS WITHOUT WEIGHING THE DANGER OF UNFAIR PREJUDICE.

The court erred in admitting evidence of Deanna's February 911 call and the March incident with the suicide note without conducting a balancing analysis on the record considering whether any probative value was outweighed by the danger of unfair prejudice. On appeal, a trial court's decision whether to admit evidence of other misconduct is generally reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). But a trial court necessarily abuses its discretion when it fails to abide by the requirements of ER 404(b). Id. That is what occurred here. The court admitted evidence of two prior incidents without performing the four-part analysis required by ER 404(b) on the record.

a. The Court Failed to Properly Determine Admissibility Under ER 404.

Under ER 404, evidence of other wrongs is presumptively inadmissible to prove character or show action in conformity with the other acts. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). It may be admissible for other purposes such as to show motive, intent, or a common scheme or plan. ER 404(b). Before admitting evidence of other wrong acts, the court must engage in a four-step process. Fisher, 165 Wn.2d at 745. First, the court must find by a preponderance of the evidence that the

conduct occurred. Id. Second, the court must identify a proper purpose for which the evidence may be admissible. Id. Third, the court must determine the relevance of the evidence to an element of the crime. Id. Finally, the court must engage in a balancing analysis under ER 403 to determine whether any probative value is significant enough to outweigh the danger of unfair prejudice to the defendant. Id. “In doubtful cases, the evidence should be excluded.” State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

This analysis must be conducted on the record. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). With regard to this balancing test, the Washington Supreme Court has stated, “We cannot overemphasize the importance of making such a record.” State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). “The process of articulating the prejudice, and comparing it to probative value, ensures a ‘thoughtful consideration’ of their relative weight.” State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (quoting Jackson, 102 Wn.2d at 694). Thus, the trial court errs when it does not conduct this balancing and weighing of prejudice on the record. Id. at 685-86; see also Fisher, 165 Wn.2d at 745 (“A trial court abuses its discretion where it fails to abide by the rule’s requirements.”).

Here, the court ignored the rule's requirement that it carefully analyze the prejudice, on the record. Carleton, 82 Wn. App. at 685-86. Because the court did not articulate any prejudice, this Court cannot be certain that the court even recognized it, let alone made a careful balancing of that prejudice against the probative value. The court was also required to exclude the evidence if the balance is even close. Thang, 145 Wn.2d at 642. But again, because the court failed to articulate or weigh the prejudice on the record, it appears the court failed to give the defendant the benefit of the doubt on this issue, as it was required to do.

Because the trial court failed to follow the dictates of ER 404(b) before admitting this evidence, it necessarily abused its discretion in admitting the evidence. Fisher, 165 Wn.2d at 745. But even if this Court should perform its own analysis based on the record, the conclusion is the same: the evidence fails to meet the requirements for admissibility under ER 404(b).

b. The Danger of Unfair Prejudice from the Prior 911 Call and Brant's Suicide Display Far Outweighs Any Minimal Probative Value.

“Prior misconduct evidence is inherently prejudicial.” Carleton, 82 Wn. App. at 686. “There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.” State v. Smith, 103

Wash. 267, 268, 174 P. 9 (1918). Substantial probative value is needed to outweigh the prejudice of such evidence. State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003). When the evidence involves uncharged misconduct attributed to the defendant, courts should err on the side of exclusion. Thang, 145 Wn.2d at 642. Here, the evidence of the February and March incidents should be excluded because it is pure propensity evidence as to the residential burglary and of only minimal probative value on the fourth-degree assault charge.

Neither prior incident is relevant to the residential burglary charge in this case. That offense requires proof that the accused person entered or remained unlawfully in a dwelling with the intent to commit a crime against person or property therein. RCW 9A.52.020. The February incident, at most shows that, on one prior occasion, Brant remained unlawfully after being asked to leave. Thus, with respect to the residential burglary, this was pure propensity evidence. It invited the jury to infer that, since he had refused to leave when asked in the past, he likely did so in this case.

The March incident has no bearing on the residential burglary at all. Writing a suicide note addressed to one's wife does not indicate a motive or intent to burglarize her home. The court believed it was *res gestae*, but any relevance is tangential. The fact that Deanna Brant was in

possession of her husband's shotgun was certainly relevant to his motive to enter her home to repossess it. The fact that she took it from his residence while he was not there may also be probative on that issue. But the fact that, when she took it, there were wedding photos and a suicide note does not bear on unlawful entry or the intent to commit a crime in the instant case.

Regarding the fourth-degree assault charge, the court concluded the February incident was relevant to Deanna Brant's fear, an element of one possible definition of assault in the fourth degree. In Washington there are three forms of assault: (1) actual harmful or offensive contact, (2) attempt to inflict injury with the apparent ability to do so, and (3) placing a person in reasonable apprehension of bodily harm. State v. Hall, 104 Wn. App. 56, 62-64, 14 P.3d 884 (2000). The State presented evidence showed that, on this occasion, Brant shoved his wife against a refrigerator, poked her in the chest to press a sticky note onto her person, and threw a bottle of water at her. RP 113, 116, 120. Each of those instances, if believed, constitutes an actual battery, and in which Deanna's fear is not relevant. In the midst of the above offenses, Deanna claimed, and Brant agreed, he smashed a coffee cup. RP 118. Deanna's 911 call in February and Brant's suicidal display in March do not make it

significantly more or less likely that she feared bodily injury when he smashed the coffee cup in April.

The danger of unfair prejudice to Brant from admitting these instances was far more significant. In domestic violence cases, the danger of unfair prejudice from past acts is extremely acute. State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). As mentioned, the February incident of the 911 call is pure inadmissible propensity evidence with regards to the residential burglary, a far more serious charge than misdemeanor assault in the fourth degree. The March incident with the suicide note served only to portray Brant as mentally unstable.

Normally, this Court would defer to the trial court's discretion in balancing the State's need for the evidence against the danger of unfair prejudice to the defense. But here, there is no exercise of discretion to defer to. The past acts evidence was at most minimally relevant to the issues and was extremely prejudicial. The February and March incidents should have been excluded due to the unfair prejudice caused by the inference of mental instability and propensity for domestic violence.

Improper admission of this evidence is likely to have affected the jury's verdict. Both parties agreed on much of what happened, and the jury was left to decide between competing interpretations by Brant and his wife. Evidence tending to show criminal propensity and mental instability

was likely to affect the jury's assessment and requires reversal of Brant's convictions.

2. THE PROSECUTOR COMMITTED MISCONDUCT BY DISPARAGING DEFENSE COUNSEL'S ARGUMENT AS "OFFENSIVE."

A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Fisher, 165 Wn.2d at 746; State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A fair trial is one in which the accused person benefits from the effective assistance of counsel for his or her defense. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Therefore, prosecutors must refrain from attacking defense counsel's vital and constitutionally mandated role. Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983).

A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Id. at 703-04.

Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)). “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Here, the prosecutor’s closing rebuttal argument referred to defense counsel’s argument as “offensive.” RP 325. Presumably attempting to make a valid argument about Deanna’s credibility, he instead disparaged defense counsel, arguing, “It’s offensive to consider, I’m sorry, that she was up here faking being upset. You don’t have to cower in a corner to be the victim of a crime.” RP 325-26. The second sentence was valid argument. The first was not. This improper argument undermined Brant’s right to counsel for his defense and requires reversal of his convictions.

Maligning counsel is prosecutorial misconduct. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Comments by the prosecutor that invite the jury to nurture suspicions about defense counsel’s integrity violate the rights to a fair trial and to effective assistance of counsel.

Bruno, 721 F.2d at 1195; State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988). It is therefore blatant misconduct for the prosecutor to disparage defense counsel or defense counsel's role. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Bruno, 721 F.2d at 1195. Such improper argument severely damages the defendant's opportunity to present his case before the jury. Bruno, 721 F.2d at 1195.

The prosecutor's comment referring to defense counsel as offensive damaged Brant's ability to present his case. This case largely amounted to a credibility contest between Brant and his wife. In that context, the prosecutor's accusation that defense counsel was being offensive with regards to Deanna was likely to unfairly influence the jury in a way that could not be cured by instruction. It was likely to bolster the jury's view of Deanna as the victim and of Brant, and his attorney, as the aggressor. The prosecutor's misconduct rendered the trial unfair and Brant's convictions should be reversed.

3. CUMULATIVE ERROR DENIED BRANT A FAIR TRIAL.

Even if this Court concludes the above errors do not individually require reversal, their combined effect does. Every accused person has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may violate this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668

(1984). Even unpreserved errors can contribute to a finding that cumulative error denied the appellant a fair trial. State v. Alexander, 64 Wn. App. 147, 150, 822 P.2d 1250 (1992). Brant’s trial was rendered unfair when the court admitted unfairly prejudicial evidence of past incidents between him and his wife. The scales were further unbalanced by prosecutorial argument that denigrated defense counsel’s constitutionally mandated role and bolstered the jury’s view of Brant’s wife as a victim. Cumulative error requires reversal of Brant’s convictions.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Brant indigent and entitled to appointment of appellate counsel at public expense. CP 66. If Brant does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order

appropriate to the individual defendant's circumstances." Id. Accordingly, Brant's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. CP 40. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2 (f).

Without a basis to determine that Brant has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

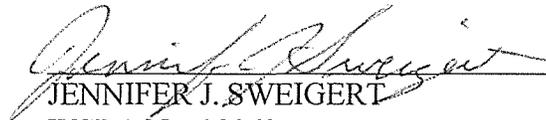
D. CONCLUSION

For the foregoing reasons, Brant requests this Court reverse his convictions.

DATED this 24th day of May, 2016.

Respectfully submitted,

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