SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN BRESLIN, III,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 57544-2-II
Pierce County No. 21-1-03545-9

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JOHN BRESLIN, III, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Breslin seeks review of the June 25, 2024, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUE PRESENTED FOR REVIEW

Over defense objection, the court admitted testimony detailing a threat assessment which resulted in use of a SWAT team to execute a search warrant, as well as extensive testimony regarding tactical maneuvers during the operation. Where this evidence had no relevance to the charged crimes and served only to suggest Breslin was guilty due to his criminal propensity, must his convictions be reversed?

D. STATEMENT OF THE CASE

In October 2021, the Pierce County Sheriff's Department received information from KL that her ex-boyfriend John Breslin had been living on her property, despite a domestic violence no contact order. CP 73. KL reported that Breslin had access to guns on the property and that he always carried a gun with him. CP 73. Law enforcement gathered information from KL about the layout of the property and a description and location of any guns she had seen. CP 75. Detective Brian Peterson, a Pierce County Sheriff's deputy in the domestic violence unit, obtained a warrant to search the property for Breslin and guns based on information from KL. 3RP 233, 241.

Following execution of the warrant on November 10, 2021, Breslin was charged with three counts of domestic violence court order violation, fourth degree assault, first degree assault, two counts of unlawful possession of a firearm in the second degree, one count of theft of a firearm, and obstructing a law enforcement officer. CP 1-9. Twelve charges of domestic violence court order violation were later added based on letters

Breslin mailed from the jail to a post office box, and the first degree assault charge was amended to second degree assault. CP 129-50.

Prior to trial, the defense moved to exclude cumulative evidence pursuant to ER 403. Counsel argued that the State had a large number of law enforcement officers on its witness list, most of whom were members of the SWAT team that arrested Breslin. Counsel argued that testimony substantially similar to testimony from other witnesses on the scene should be excluded as unfairly prejudicial and a waste of time. CP 106. The court reserved ruling on the motion regarding cumulative evidence. 1RP[12] 85.

In opening statement, the prosecutor told the jury that the State would present evidence that on November 10, 2021, Pierce

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[1]

[2] The Verbatim Report of Proceedings is contained in eleven volumes, designated as follows: 1RP—9/28/22; 2RP—9/29/22 (AM); 3RP—10/3/22; 4RP—10/4/22; 5RP—10/5/22; 6RP—10/6/22; 7RP—10/7/22; 8RP—10/10/22; 9RP—9/29/22 (PM); 10RP—6/9/22; 11RP—11/4/22; and 12RP—9/29/22 (opening statements).

County Sheriff Deputies, assisted by members of the SWAT team, responded to KL's property. 12RP 7. The prosecutor told the jury the State would call numerous law enforcement witnesses to talk about how they responded to KL's property and what they found on the scene. 12RP 8.

Defense counsel noted in his opening statement that the State had already told the jury that law enforcement went to the property with a SWAT team. He elaborated that they came out wearing body armor, helmets, combat boots, and fatigues, they were carrying assault rifles and they arrived in an armored car with snipers. They came for Breslin with overwhelming force based on an assumption that he had done something wrong. 12RP 10-11.

Peterson testified at trial that after he obtained the warrant, he did a threat assessment to identify potential safety concerns in executing the warrant. 4RP 279-80. Defense counsel objected on the bases of relevance and ER 404(b). 4RP 280. The State responded that the testimony would lay the foundation for how

law enforcement proceeded when they arrested Breslin. Defense counsel argued that why law enforcement chose to take the actions they did, or how those decisions came about, was not relevant, and it was prejudicial for the jury to hear the exact details. The court overruled the objection. 4RP 280.

Peterson then testified that a threat assessment involves review of prior law enforcement contacts of anyone on the property, as well as an evaluation of the property itself. It looks for things like aggressive dogs, surveillance, and fortifications. With regard to prior law enforcement contacts, it considers what sort of contacts they were, the criminal history of those involved, and any weapons involvement. 4RP 280-81. Peterson explained that the assessment involves scoring each of these factors, with the total score determining SWAT involvement. At a certain score, a SWAT consult is discretionary. The next level is a mandatory SWAT consult, and the highest level is a mandatory SWAT response. 4RP 281.

Peterson testified that SWAT is a team of people in the sheriff's department that have specialized training in the use of certain tactics and weapons that the average patrol deputies would not have. The SWAT team is used in situations where their expertise can assure safety to the maximum extent possible. 4RP 282.

After doing the threat assessment with regard to Breslin, Peterson had a SWAT consultation. It was determined that the appropriate course of action was to have SWAT participate in the service of the search warrant, and it would be done at a time when Breslin was the only person on the property. 4RP 282-83.

On the morning the warrant was to be executed, Peterson had a briefing with the deputies on his search team and members of the SWAT team. Once they determined that Breslin was the only person present, about 20 SWAT team members proceeded toward the property. 4RP 286. Peterson testified that SWAT team members wear military-style camouflage uniforms with helmets and drive a large, armored van. 4RP 286-87. Once in

place, the SWAT team called Breslin out of the house using a loudspeaker on the armored vehicle. 4RP 293. Breslin exited the house and headed into the woods. He was followed and arrested. 4RP 288.

Patrick dos Remedios, a SWAT team sniper, testified that SWAT is primarily used to handle situations that go beyond what patrol officers can handle, such as high-risk warrant services. When a person of interest is identified, they do a threat assessment, assigning a point value to various things in the person's history. That assessment determines whether SWAT is needed to serve the warrant or be part of the apprehension. 4RP 366. When asked what factors are considered in determining whether a SWAT response is needed, dos Remedios answered that first they look at the type of crime being investigated; then they consider the person's past involvement with weapons and criminal history. 4RP 367.

He testified that the SWAT team has 24 members, including four snipers. Typically the snipers get into position

prior to the entry team, to keep the team as safe as possible. Their job is to observe and report their observations, and in the worst case scenario provide some type of cover with firearms. 4RP 367-68.

Dos Remedios testified that in this case, the domestic violence unit had probable cause to arrest Breslin, so they did a consult with the SWAT team. Based on the information they gathered, including Breslin's history, they determined that the SWAT team would be used to serve the warrant. 4RP 369. When the State asked why a SWAT response was needed for this specific warrant, defense counsel objected. The court warned that the question was getting close to calling for ER 404(b) information, and the State should frame its questions to avoid putting such information before the jury. 4RP 370-71. The State changed its focus to what dos Remedios was tasked with during the operation. 4RP 371.

Dos Remedios testified that his mission was to deploy prior to the rest of the team, walk through the woods, and get

behind the house to provide containment. 4RP 371. From his position he heard announcements over the loudspeaker and saw someone run across the yard to the trees. He relayed that information to the rest of the team. 4RP 372.

Nathan Coggin, another SWAT sniper testified that he provided overwatch while the search warrant was served. 5RP 448-49. He testified that he and dos Remedios arrived 10 to 15 minutes before the rest of the SWAT element. He found a densely vegetated area from which he could watch the property to see if anybody tried to flee. 5RP 449. It was his job to stay out of sight and be the eyes and ears for the rest of the team, for security reasons. 5RP 450.

While in position Coggin saw a man walk toward the garage. 5RP 453. After the rest of the team arrived and announced they were police, Coggin heard something running through the woods toward his location. 5RP 454. After that, he heard the team initiate a K-9 track. 5RP 455. A SWAT team K-

9 handler described his role in searching for Breslin as well. 5RP 458, 466-72.

After these witnesses testified, defense counsel renewed the motion to exclude cumulative testimony, which the court had previously reserved. 6RP 540. Specifically, counsel pointed out that the State was planning to call two additional members of the SWAT team as witnesses. Counsel argued that they had no new information to present and any further testimony regarding tactical decisions would be unduly prejudicial. 6RP 542. The court ruled that it would allow no more testimony regarding tactical reasons for the SWAT response, commenting that the trial had been lengthened significantly by the repetitive testimony on that subject. 6RP 543, 545.

The State argued that these witnesses would be able to identify the person seen on the property as Breslin. 6RP 541. The court ruled that to the extent either of these witnesses could testify that they personally saw the man on the property that

morning and that it was Breslin, that testimony would be allowed. 6RP 543.

Following the court's ruling, the State called SWAT team leader Derek Nielsen. Nielsen testified that there was a team briefing, after which the overwatch team was inserted. The rest of the team arrived, Breslin fled the property, and they searched for him until they contacted him. 6RP 552. Nielsen testified that as tactical team leader, he was in charge of the tactical events throughout the operation. 6RP 552-53. Nielsen also testified he recognized Breslin from a previous law enforcement contact. 6RP 554. Tyler Seavey, a member of the SWAT entry team, also testified that the pre-deployed snipers had seen Breslin move from the rear of the property through the woods. 6RP 570. Seavey testified that he did not personally see Breslin. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The extent to which admission of highly prejudicial evidence is permissible to rebut trial counsel's opening statement is an issue of substantial public importance.

Every person accused of a crime is entitled to a fair trial by an impartial jury. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21, 22. The right to a fair trial bars the admission of unreliable evidence. *Michigan v. Bryant*, 562 U.S. 344, 370 n.13, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "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 (1998). Consistent with this purpose, the rules of evidence require irrelevant evidence to be excluded and prohibit the admission of evidence that is more prejudicial than probative.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Only relevant evidence is admissible. ER 402. Even relevant evidence should be excluded, however, if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. In addition, evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b).

Evidence which does no more than imply that defendant is guilty because he is a criminal type who would be likely to commit the charged crimes is never admissible. A court abuses its discretion when it admits such propensity evidence. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

"ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). ER 404(b) must be read in conjunction with ER 403, which requires exclusion of evidence, even if it is relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 775-76, 725 P.2d 951 (1986).

For example, courts have recognized that generalized gang evidence is often highly prejudicial and must be tightly constrained to comply with the rules of evidence. *State v. DeLeon*, 185 Wn.2d 478, 491, 374 P.3d 95 (2016). In *DeLeon*, the trial court improperly admitted extensive testimony on how gangs generally operate that had absolutely no relevance to the case. One officer testified, for example, that gangs "do some

really, really bad crimes out there, whether they get caught or not." *DeLeon*, 185 Wn.2d at 490. This Court found no probative value in that type of evidence, but noted it was certainly prejudicial, as it could suggest the forbidden inference underlying ER 404(b), that the defendants were part of a pervasive gang problem and were criminal types likely to commit the crimes charged. *Id.* at 490. *See also State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012). In *Mee*, the Court of Appeals held that generalized evidence regarding the behavior of gangs, absent evidence showing the defendant adhered to those behaviors and a finding that the gang evidence is relevant to an element of the charge, serves no purpose but to allow the State to suggest the defendant is guilty because he is a criminal type likely to commit the crime charged. *Mee*, 168 Wn. App. at 159.

The type of generalized evidence permitted in this case is similarly prejudicial. The jurors heard that before executing a search warrant to look for Breslin, Detective Peterson conducted

a threat assessment to identify potential safety concerns. 4RP 279-80. They heard that this assessment looked not only at the property to be searched but also at Breslin's prior law enforcement contacts, his criminal history, and any prior weapons involvement. 4RP 280-81, 366. While the jurors were not given specific information about Breslin's history, they were told that after evaluating this information about Breslin, law enforcement determined that SWAT involvement was necessary in serving the warrant. 4RP 282-83, 369.

When the defense objected to this evidence as irrelevant and improper propensity evidence, the State argued that it was simply laying the foundation for how law enforcement proceeded when they arrested Breslin. 4RP 279-80. The court overruled the objection without explaining its reasoning. 4RP 280.

Evidence that completes the story of the crime charged or provides immediate context for events close in time and place to the crime may be relevant and not subject to the requirements of ER 404(b). *State v. Sullivan*, 18 Wn. App. 2d 225, 237, 491 P.3d

176 (2021) (evidence that defendant was involved in shooting 25 minutes after the charged robbery relevant to whether he possessed a firearm and therefore not excluded as other misconduct under ER 404(b)), *review denied*, 198 Wn.2d 1037 (2022). Thus, some evidence as to the reason for law enforcement presence on the property was permissible to provide context. Peterson testified he obtained a warrant to search for Breslin and guns. 4RP 284. That evidence was sufficient to clarify the circumstances for the jury. Testimony that Peterson used the SWAT team to execute the warrant might also be admissible. And testimony that Breslin did not obey law enforcement's commands when they announced their presence was relevant to the charge of obstructing. *See* RCW 9A.76.020(1).

The Court of Appeals reasoned that the challenged evidence was permissible to rebut the defense theory, as outlined in opening statement, that law enforcement went onto the property with overwhelming force based on an assumption that

Breslin had done something wrong. Opinion, at 9-10 (citing *State v. Broussard*, 25 Wn. App. 2d 781, 792, 525 P.3d 615 (2023)). While comments during opening statements can open the door to otherwise inadmissible evidence, the goal is to "preserve fairness and determine the truth." *State v. Wafford*, 199 Wn. App. 32, 36-37, 397 P.3d 926 (2017). The evidence allowed in this case went far beyond what was necessary to accomplish this purpose. The detailed description as to why use of the SWAT team might be deemed necessary, the specialized nature of that team, and the reasons for the tactics employed, served only to suggest that Breslin, who would be the only person present when the warrant was executed, was determined to be a dangerous, criminal type, the kind of person likely to possess firearms unlawfully and commit assault. Even if there was some slight relevance to this evidence, the probative value was greatly outweighed by the danger of unfair prejudice.

The Court of Appeals' conclusion that this highly prejudicial propensity evidence was admissible to rebut

comments made in opening statement raises an issue of substantial public importance which this Court should address. RAP 13.4(b)(4).

F. CONCLUSION

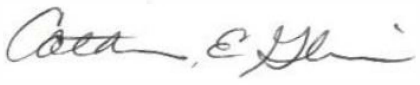
For the reasons discussed above, this Court should grant review and reverse Breslin's convictions.

I certify that this document contains 3033 words as calculated by Microsoft Word.

DATED this 23rd day of July, 2024.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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Filed
Washington State
Court of Appeals
Division Two

June 25, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN LAWRENCE BRESLIN, III, Appellant.	No. 57544-2-II UNPUBLISHED OPINION

PRICE, J. — Breslin appeals his 21 convictions for various crimes related to contact with his former girlfriend. Breslin argues that the trial court erred in allowing the testimony of several law enforcement officers about the planning and execution of a search warrant by a special weapons and tactics team (SWAT team) because the testimony was not relevant to his convictions. Breslin also argues that the testimony of two officers should have been excluded as cumulative. And Breslin challenges the trial court's imposition of a crime victim penalty assessment (VPA) and a DNA collection fee.

We determine that the evidence Breslin challenges was relevant, and therefore admissible, because it was related to rebutting Breslin's defense theory of the case and to his charge for obstruction of a law enforcement officer. And the evidence Breslin challenges as cumulative was admissible because it was additional information the jury had not previously heard.

We affirm Breslin's convictions. But we remand for the trial court to strike the DNA collection fee and determine whether Breslin is indigent for purposes of striking the VPA.

FACTS

I. BACKGROUND

In September 2021, Breslin was served with a no-contact order that prevented him from contacting Kimberly LaFuente, a former girlfriend. The no-contact order also prohibited Breslin from coming within 500 feet of LaFuente or her residence.

In September and October, notwithstanding the no-contact order, Breslin and LaFuente were living together on a heavily-wooded, five-acre property. LaFuente asked Breslin to leave the property multiple times, but Breslin refused. LaFuente and Breslin had multiple altercations with each other, one of which involved a firearm and resulted in LaFuente receiving a gunshot wound.

Throughout October, LaFuente was in contact with law enforcement to try to remove Breslin from her property. LaFuente informed law enforcement that Breslin had access to LaFuente's two guns on her property (a handgun and a rifle) and was "using methamphetamine." Clerk's Papers (CP) at 73.

Law enforcement began gathering information about Breslin's criminal history and additional information about the layout of the property. Detective Peterson of the Pierce County Sheriff's Office prepared, and obtained, a warrant to search LaFuente's property to look for firearms and arrest Breslin. On November 10, 2021, the warrant was executed with the use of a SWAT team. When the SWAT team arrived, Breslin ran into the woods surrounding LaFuente's house but was soon found and arrested.

Breslin was ultimately charged with 21 different counts: one count of second degree assault, one count of fourth degree assault, two counts of second degree unlawful possession of a

firearm, one count of theft of a firearm, one count of obstruction of a law enforcement officer (based on fleeing from the SWAT team), and 15 counts of violating no-contact orders.[1]

II. BRESLIN'S TRIAL

Prior to trial, Breslin filed a motion in limine to exclude as cumulative the testimony of some of the SWAT officers. Breslin acknowledged that some of the officers may have relevant testimony but stated that the State's witness list included "a very large number of law enforcement officers," and he requested exclusion of testimony of "[a]ny officer whose testimony is substantially identical to other officers on the scene." CP at 106. Breslin argued the testimony would be "unfairly prejudicial and a waste of time [under] ER 403." CP at 106. The State responded that it had curated the witness list and cumulative evidence should not be an issue. The trial court did not make an express ruling on the motion.

The parties gave their opening statements. The State's opening statement explained that the jury would hear testimony from different SWAT team members about the events that occurred when law enforcement executed the warrant. The State did not, however, describe the scope or intensity of the SWAT team involvement in its opening statement.

During Breslin's opening statement, defense counsel referenced the State's comments about the SWAT team and then characterized the State's use of this information as trying to make Breslin out to be a "boogyman." Verbatim Rep. of Proc. (VRP) (Sept. 29, 2022) at 10. As part of this theory, defense counsel explicitly described the magnitude of the SWAT team response:

[1] In November, Breslin was served with another no-contact order which contained the same prohibitions as the first. While in custody, Breslin sent numerous letters to a post office box in LaFuente's name.

> You've heard the State. I think the State has made Mr. Breslin to be a little bit of a boogyman, and they've already told you the day that Mr. Breslin got arrested, they came out with a SWAT team. They came out with a bunch of guys in body armor, helmets, combat boots, fatigues, assault rifles.
>
> They came in an armored car that they call a Bear Cat. They came with snipers. They came with a canine unit. They came for Mr. Breslin with an overwhelming force because they thought he did some stuff wrong. That's what the State thinks. That's what the police thought on that day. You're not here really just to say, "Do I think Mr. Breslin did something," or, you know, that somebody thinks Mr. Breslin did something.
>
> Your job isn't really just to sit there and just judge Mr. Breslin. In many ways, you're here to examine what the State has done. . . .
>
> You're here to ask yourself, when the police came that day, did they make an assumption? Did they just assume that what Ms. LaFuente said was true? Did they make assumptions about the things that they saw? Were they blinded by their own conviction that Mr. Breslin was guilty that they never looked for any evidence to the contrary, that they never thought for a moment to investigate any other avenue that would lead to any other conclusion?

VRP (Sept. 29, 2022) at 10-11.

The State began its case by calling several law enforcements officers to testify, starting with Detective Petersen. Detective Petersen testified that he was the officer who prepared the search warrant. As part of preparing the warrant, Detective Peterson wrote a "threat assessment," which reviews the risks that officers may face when executing a warrant. VRP at 279. Breslin objected to this testimony, arguing that the reasons why law enforcement took their chosen actions were not relevant to Breslin's charged crimes and were inadmissible under ER 404(b). The State responded that the information was foundational and that the "defense spent a fair amount of time in [its] opening [statement] about SWAT." VRP at 280. The trial court overruled Breslin's objection.

Detective Peterson's testimony continued; he explained the threat assessment included a person's past contact with law enforcement, criminal history, and the involvement anyone suspected to be on the property has had with weapons. The detective explained that at a certain threat level, SWAT team involvement is discretionary, but there is a threshold where their involvement is mandatory. (Detective Peterson did not specify any of the background information used for Breslin's threat assessment or whether SWAT-team involvement was discretionary or mandatory for the execution of Breslin's warrant.) Detective Petersen explained that the execution of Breslin's warrant involved 15 to 20 SWAT team members and an armored van.

The State called a second officer to testify, Detective dos Remedios, who was a sniper included in the SWAT team response. While testifying about the general response planning process, Detective dos Remedios specifically pointed out that whether the scene will likely include weapons is a critical factor for whether a SWAT team should be involved.

The State asked Detective dos Remedios specifically what "considerations were made" in the execution of Breslin's warrant, and Breslin objected, based on relevance, a lack of foundation, and cumulativeness. VRP at 370. The trial court essentially sustained the objection, agreeing that a foundation for the detective's direct knowledge had not been laid.

The State then asked Detective dos Remedios if he knew why a SWAT team response was needed to serve the warrant in this case, and Breslin said, "[S]ame objection." VRP at 371. The trial court again essentially sustained the objection, responding, "What I want to avoid is any reference to [ER] 404(b), and we are getting awfully close to that. So I need the questions to be directed in a way that elicits the information, but does not put information before the jury that they should not be hearing." VRP at 371.

Detective dos Remedios then testified about his observations on the day the warrant was executed, including seeing someone running the opposite direction of him, despite law enforcement's announcements for Breslin to "come out." VRP at 374. He stated that he had placed himself in the woods behind LaFuente's house and that his role was to provide the SWAT team with information from the heavily-wooded back property. After the other SWAT team members began responding, Detective dos Remedios heard someone running across a flat area and into the trees. As Detective dos Remedios saw the subject running away, he informed other SWAT members. Detective dos Remedios described the person he saw, including describing a jacket and the person's stature and build, but he did not specifically identify Breslin.

The State next called Deputy Coggin, another member of the SWAT team. Deputy Coggin explained his involvement and said he saw a man with facial hair on-scene, but he also did not identify Breslin.

During a break the next day, and before additional SWAT team members testified, Breslin requested to readdress his motion in limine about limiting law enforcement testimony. Breslin specifically objected to two of the witnesses the State intended to call that day, Deputy Seavey and Deputy Nielsen, arguing their testimony would be cumulative because Breslin anticipated they were not going to provide any new information to the jury.

The State responded that Deputy Nielsen would provide different, additional information about events at the scene of Breslin's arrest and that both officers could testify "that it was John Breslin" at the property. VRP at 541.

The trial court determined that the State could call the officers to testify about Breslin's identity and for the State to "fill the gaps" in its explanation about what happened on the property

that led to Breslin's arrest, but, to prevent cumulative testimony, the trial court said it would not allow additional testimony about the reasons the SWAT team was present. VRP at 545. With those restrictions, the trial court allowed the testimony.

The State continued its case with the testimony of Deputies Nielsen and Seavey. Deputy Nielson briefly testified, explaining that he was a tactical team leader for the SWAT operation and was part of a search team that looked for Breslin after he fled LaFuente's property. The deputy also identified Breslin in the court room, recognizing him from both the day of his arrest and a prior law enforcement contact.

Deputy Seavey testified that he was a member of the SWAT entry team and searched the house and outbuildings on LaFuente's property. Deputy Seavey also testified that he heard a negotiator on-scene announcing Breslin's name numerous times over a loud speaker. But the deputy testified that he did not see anyone on the property, and he did not specifically identify Breslin.

Both LaFuente and Breslin also testified. LaFuente testified consistent with the facts above. She also testified that she owned two firearms and Breslin usually carried her handgun. Testifying for the defense, Breslin also said that on the date of his arrest there were two firearms, owned by LaFuente, on the property.

The jury returned verdicts of guilty on all 21 counts and found via a special verdict form that Breslin used a firearm for the second degree assault. The trial court sentenced Breslin to 164 months in total confinement. The trial court also imposed a $500 VPA and a $100 DNA collection fee. The judgment and sentence did not indicate a finding on whether Breslin was indigent, but the trial court separately entered an order of indigency for the purposes of an appeal.

Breslin appeals.

ANALYSIS

I. CHALLENGE TO OFFICER TESTIMONY

Breslin argues that the trial court erred in allowing officer testimony during his trial that was not relevant to his charges and was cumulative. We disagree and determine the trial court did not abuse its discretion when it admitted the testimony.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). An abuse of discretion occurs when the decision was manifestly unreasonable or based on untenable grounds or reasons. *Id.* We also consider whether a reasonable judge would rule as the trial judge did. *Id.* The trial court's evidentiary rulings can be affirmed on any grounds supported by the record and the law. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012).

A. TESTIMONY ABOUT SWAT THREAT ASSESSMENT AND RESPONSE WAS RELEVANT

Breslin argues the trial court erred in allowing officers to testify about how the threat assessment was conducted for a potential SWAT team response because that evidence was not relevant to any of his charged crimes but, rather, was propensity evidence intended to portray him as a criminal who would have committed the crimes. Breslin also argues that the details of the warrant execution (including the description of about 20 SWAT members in military style uniforms with helmets and weapons and that a large armored vehicle was used for announcements to contact Breslin) were not relevant to his charged crimes.

Under the rules of evidence, relevant evidence is admissible. ER 402. " '[R]elevant evidence' " is that which has "any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "[C]omments made during opening statement can open the door to otherwise inadmissible evidence." *State v. Broussard*, 25 Wn. App. 2d 781, 792, 525 P.3d 615 (2023).

Here, Breslin explained during his opening statement his defense theory that the State was going to try, apparently inappropriately, to make Breslin look like a "boogyman." VRP at 10. As part of his explanation of the defense, Breslin specifically highlighted the intensity of the SWAT team response during the arrest, stating,

> You've heard the State. I think the State has made Mr. Breslin to be a little bit of a boogyman, and they've already told you the day that Mr. Breslin got arrested, they came out with a SWAT team. They came out with a bunch of guys in body armor, helmets, combat boots, fatigues, assault rifles.
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> They came in an armored car that they call a Bear Cat. They came with snipers. They came with a canine unit. They came for Mr. Breslin with an overwhelming force because they thought he did some stuff wrong. That's what the State thinks. That's what the police thought on that day. You're not here really just to say, "Do I think Mr. Breslin did something," or, you know, that somebody thinks Mr. Breslin did something.

VRP (Sept. 29, 2022) at 10-11. He also directly focused the jury on scrutinizing the fairness of law enforcement's actions that day:

> Your job isn't really just to sit there and just judge Mr. Breslin. In many ways, you're here to examine what the State has done. . . .
>
> You're here to ask yourself, when the police came that day, did they make an assumption? Did they just assume that what Ms. LaFuente said was true? Did they make assumptions about the things that they saw? Were they blinded by their own conviction that Mr. Breslin was guilty that they never looked for any evidence to the contrary, that they never thought for a moment to investigate any other avenue that would lead to any other conclusion?

VRP (Sept. 29, 2022) at 11.

Once Breslin overtly raised, and intentionally cast aspersions on, the intensity and motivations of the SWAT team's response as part of his defense theory, the door was opened and the general reasons behind the SWAT team's involvement became relevant; the State was permitted to rebut Breslin's defense theory to show the SWAT team assessment and execution of the warrant was justified.

The testimony, both about the preparation of the warrant and the execution of it, solicited by the State was consistent with this relevant purpose. First, the circumstances about the preparation of the warrant were testified to by Detective Petersen and Detective dos Remedios. Detective Peterson explained the criteria behind a threat assessment, including any potential involvement a person on the property has had with weapons.[2] And Detective dos Remedios also testified that an important factor for whether a SWAT team is involved in a law enforcement action was whether the scene was likely to include weapons—which both LaFuente and Breslin admitted were present on the property. Given that Breslin cast doubt during his opening statement on the legitimacy of the SWAT team response, the State's questioning of Detective Petersen and Detective dos Remedios about the general procedure to determine SWAT's involvement was relevant and the trial court did not abuse its discretion by allowing the testimony.

[2] Breslin also argues the trial court erred in allowing testimony that should have been excluded under ER 404(b) ("evidence of [previous] crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"). Breslin's argument is unpersuasive because he can point to no ER 404(b) evidence that was admitted at trial. The trial court was clearly aware of the risk of ER 404(b) evidence coming in and its vigilance ensured that the jury was not informed of bad acts specifically performed by Breslin—the jury was given an explanation about why SWAT teams may be present on-scene for background information, but it heard no information specific to Breslin that was used for the threat assessment.

Second, the details about the warrant's execution were also relevant to explain the SWAT response and rebut the defense theory that it was overkill. Once defense counsel itemized the scope of the response in his opening statement, the State was entitled to offer an explanation of the actual events. Moreover, not only was this evidence relevant to rebut Breslin's defense theory, a large portion of it was also relevant to one of Breslin's specific charges. Breslin's charge for "obstruction of a law enforcement officer" was based on the events surrounding Breslin's arrest when he fled the scene. Much of the testimony about the execution of the warrant was necessary for the jury to hear a complete picture of the circumstances leading to this charge and to explain how police ultimately determined Breslin fled.

In short, Breslin's own defense theory outlined in his opening statement and the specific charges Breslin faced made this limited SWAT testimony relevant.[3] Accordingly, Breslin fails to show the trial court abused its discretion in admitting the officers' testimony about both the process used to determine if a SWAT team should be involved and the actions taken during the warrant execution.

[3] We emphasize that even though this information was made relevant by Breslin's own defense theory and the obstruction charge, there would still be limits beyond which the prejudicial impact, including its potential misuse by the jury as propensity evidence, would outweigh its relevance. We note, however, that under the specific facts of this case, any prejudicial impact was reduced by the presence of firearms on the property (which both Breslin and LaFuente conceded in their testimony). As the detectives' testimony made clear, the presence of firearms was a significant factor in whether SWAT would be involved. By giving the jury an explanation for the need for SWAT involvement from this admitted evidence, the risk was minimized of the jury misusing the evidence and speculating about other hypothetical and potentially prejudicial explanations.

B. CHALLENGED TESTIMONY WAS NOT CUMULATIVE

Breslin also argues the trial court erred in admitting the testimony of Deputies Nielsen and Seavey because it was cumulative. We disagree.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or a needless presentation of cumulative evidence. ER 403. The trial court has considerable discretion when handling cumulative evidence. *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994); *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994).

When Breslin moved to prevent Deputies Nielsen and Seavey from testifying based on cumulativeness, the trial court sustained, in part, and overruled, in part, his objection. The trial court ordered that duplicative testimony about the general considerations behind the threat assessment or warrant execution would not be allowed. But the trial court allowed testimony about Breslin's identity and for the State to fill in gaps in its narrative of how Breslin was moving through the property.

From our review of the record, both Deputies Nielsen and Seavey testified consistently with the trial court's prudent limitations. Both deputies only briefly explained their involvement in the case and then gave new information about Breslin's movements on the property that other testimony had not included. And Deputy Nielsen specifically identified Breslin as the person present on the property, which had not previously been done by any other witness. Thus, Breslin's argument that this testimony was cumulative fails. *See Christensen*, 123 Wn.2d at 241 (explaining that even if some evidence is somewhat cumulative, it may be "helpful to the jury's understanding of the issues, and some similar responses may have been unavoidable . . . .").

Because the trial court did not abuse its discretion in admitting law enforcement testimony, we affirm Breslin's convictions.

II. VPA AND DNA COLLECTION FEES

Breslin also asks us to remand for the trial court to strike the VPA and the DNA collection fee. The State has no objection to remanding for that purpose.

Effective July 1, 2023, the VPA is no longer authorized for indigent defendants. LAWS OF 2023, ch. 449 § 1; RCW 7.68.035(4). The legislature also removed authorization for the DNA collection fee. LAWS OF 2023, ch. 449 § 4; RCW 43.43.7541. And changes to the legislation governing LFOs apply to cases on direct appeal when the change was enacted. *State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023). Because Breslin's case is still on direct appeal, these legislative changes apply to Breslin. On remand, the trial court should strike the DNA collection fee. But because the trial court did not make a finding in the judgment and sentence on whether Breslin was indigent, the trial court should determine whether Breslin is indigent and if the VPA should also be stricken.

CONCLUSION

We affirm Breslin's convictions. But we remand for the trial court to strike the DNA collection fee and determine whether Breslin is indigent for purposes of striking the VPA.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

MAXA, P.J.

CHE, J.

GLINSKI LAW FIRM PLLC

July 23, 2024 - 2:25 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57544-2
Appellate Court Case Title:	State of Washington, Respondent v. John Lawrence Breslin III, Appellant
Superior Court Case Number:	21-1-03545-9

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