

71622-1

71622-1

NO. 71622-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AIGALELEI PUA,

Appellant.

01 OCT 17 11:31
COURT OF APPEALS
STATE OF WASHINGTON

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court's statements to the jury during deliberations violated Mr. Pua's constitutional right to a fair and impartial jury trial.

2. The trial court's statements to the jury violated CrR 6.15(f)(2).

3. The trial court erred when it instructed the jury it had to answer the interrogatory form "yes" or "no" (CP 20).

4. The trial court erred when it improperly admitted testimony concerning propensity evidence under ER 404(b).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The accused's constitutional right to due process and a fair trial includes the requirement that the jury reach its verdict uninfluenced by factors other than the evidence, argument of counsel, and jury instructions. Although Mr. Pua's jury stated it had reached a verdict, the jury's announced verdict failed to comport with its instructions, since the jury convicted Mr. Pua of assault in the second degree and simultaneously stated that it failed to convict Mr. Pua of assault in the second degree and thus considered the lesser-degree count. The court informed the jury that its verdict was ambiguous and ordered them to complete an interrogatory. Did the trial court's

comments suggest a requirement for agreement in violation of CrR 6.15(f)(2)? Where jurors could interpret the court's comments as a suggestion that they give in for the sake of the unanimous verdict the judge wanted, is there a reasonable possibility that the court's comments improperly influenced the verdict in violation of Mr. Pua's constitutional right to a fair and impartial jury under the Sixth Amendment and Article I, § 22?

2. Before propensity evidence may be introduced at trial pursuant to ER 404(b), the court must conduct a full evidentiary hearing on the record and must make a determination that the evidence is relevant and more probative than prejudicial. Here, where the trial court admitted propensity evidence which did not satisfy the criteria of ER 404(b), and in the absence of such determinations, was Mr. Pua deprived of his right to a fair trial?

C. STATEMENT OF THE CASE

On July 4, 2013, Joshua Phair, a local SeaTac heroin and amphetamine addict and small-time drug dealer, suffered an alleged

beating. RP 200, 233, 301-15, 376, 380-82, 410.¹ Mr. Phair did not immediately report the incident, since he was holding a large amount of heroin and cash at the time of the purported assault. RP 315, 350. Instead, he borrowed a phone and called his mother, who took him to the hospital, which released him in an approximately one hour. RP 346.

When Mr. Phair did contact the police, he reported that he knew his assailants, and that he had not only been assaulted, but that he had lost his phone and some cash in the incident.² Following an investigation, Aigalelei Pua was charged with robbery in the first degree, assault in the second degree, and intimidating a witness – the latter two counts with deadly weapon enhancements. CP 18-19.

Despite Mr. Phair's claim that he had been hit numerous times by Mr. Pua and several other men, who he claimed were armed with a metal bat, a piece of rebar, and other items, the State offered no evidence of broken bones or other serious physical injury, and no testimony from medical professionals at trial. RP 718. Mr. Phair's claimed financial

¹ Mr. Phair testified that he has been attending a methadone program for three years; however, he also admitted that he continues to spend his time with drug addicts and drug dealers, and that on the day of the incident, he was delivering a large quantity of heroin to his friend, "Rachel." RP 276, 372-74.

losses grew exponentially as he recounted the tale of the alleged attack – from the amount he initially told the detective he had lost (\$57), to the amount he testified at trial he had lost (\$400). RP 378. The defense argued at trial that Mr. Phair had been injured, not by Mr. Pua or his associates, but as a result of Mr. Phair’s own drug dealing gone wrong. RP 636-37, 740-50, 775-76.

The State’s theory at trial rested on the premise that the beating of Mr. Phair was conducted by Mr. Pua, along with several others, in retaliation for certain previous acts of disrespect and wrongdoing by Mr. Phair. These included an allegation that Mr. Phair had stolen a laptop belonging to a friend of Mr. Pua. RP 248. In addition, Mr. Phair had previously been a passenger in a car driven by Mr. Pua, when the car had run out of gas by the side of the freeway. RP 255-58. Mr. Pua had given Mr. Phair some money and a gas canister, asking him to come back with some fuel. *Id.* Mr. Phair had apparently disappeared, never to return with the gas money, nor the fuel. *Id.* The State argued that the beating of Mr. Phair was in retaliation for both his theft of the laptop and the incident with the gas money. RP 101.

² He did not immediately disclose the loss of his heroin or the other drugs he was carrying. RP 315, 370-71.

Mr. Pua moved under ER 404(b) to preclude Mr. Phair from testifying that Mr. Pua had been driving a stolen car. RP 101-04. Mr. Pua's motion in limine was denied, and the stolen vehicle testimony was admitted at trial. RP 255-58.

Following a jury trial, Mr. Pua was acquitted of robbery in the first and second degrees, but was convicted of the lesser-included count of theft in the third degree. RP 789; CP 23. Mr. Pua was also acquitted of intimidating a witness. CP 29.

The jury then returned a contradictory verdict on the assault count. RP 783; CP 24, 25. When the jury read its verdict forms in open court, it became clear that the jury had, in addition to finding Mr. Pua guilty of second-degree assault, mistakenly considered the lesser-degree offense of third-degree assault, as well. RP 783; CP 24, 25.³ This rendered the jury's verdict wholly ambiguous, since Verdict Form B1 read, in part, "We, the jury, find the Defendant ... guilty of the crime of Assault in the Second Degree." RP 783; CP 24. Verdict Form

³ This process revealed a scrivener's error, as well, since the jury had never been instructed on third-degree assault as an inferior degree offense, but rather on fourth-degree assault. RP 783, 795-96; CP 25; CP 110-13 (Instruction 35-38). Mr. Pua does not assign error to this particular mistake -- the substitution of third for fourth degree assault in the lesser-degree offense -- in the trial court's instructions or verdict forms.

B2 read, in part, “We, the jury, having found the Defendant ... not guilty of the crime of Assault in the Second Degree ... or being unable to unanimously agree as to that charge ...”. RP 783; CP 25 (emphasis added).

Following a colloquy with counsel, the trial court further instructed the jury that its verdict was ambiguous, and directed the jury to return the following business day, in order to continue deliberating. RP 793.

During the next court session, the jury was given an interrogatory and was directed to complete it. RP 799-801. The jury’s only two options were to find whether Mr. Pua was guilty of assault in the second degree, “YES or NO (circle one).” RP 799; CP 20. If the jury was able to complete this section of the form by circling one response, they did not need to complete the second part of the form, which asked them to consider assault in the fourth degree (the clerical error had been fixed, changing third to fourth degree). CP 20. The jury circled “YES,” which ended the court’s inquiry. CP 20; RP 801-02.⁴

Mr. Pua appeals. CP 43.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. PUA'S RIGHT TO A FAIR AN IMPARTIAL JURY AND CrR 6.15(f)(2) WHEN IT IMPROPERLY INSTRUCTED THE JURY AND IMPLICITLY COERCED A VERDICT.

Instructing the jury in a manner that suggests that the jury needs to reach an agreement may violate a criminal defendant's constitutional right to a fair and impartial jury. State v. Boogaard, 90 Wn.2d 733, 735, 585 P.2d 789 (1978); U.S. Const. Amend. VI; Art. I, §§ 21, 22. Mr. Pua's conviction should be reversed because the trial court's comments improperly coerced the jury in violation of his constitutional right to a fair trial.

- a. Due process prohibits the trial court from making statements that could coerce a jury.

A criminal defendant's right to a fair trial before an impartial jury is protected by the federal and state constitutions. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The Washington Constitution further requires a twelve-person jury unanimously find every element of the crime beyond a reasonable doubt. Const. art. I, §§ 21, 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

⁴ This time, the jury apparently did not proceed to consider the

Additionally, each juror must be permitted to reach his or her verdict uninfluenced by factors other than the evidence, the court's proper instructions, and argument of counsel. Boogaard, 90 Wn.2d at 736. Thus, due process requires that the trial court judge not bring coercive pressure on the jury deliberations. Boogaard, 90 Wn.2d at 736-37.

CrR 6.15(f)(2) was adopted to curtail judicial coercion of a deadlocked jury and interference in the jury's deliberative process. State v. Watkins, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); Boogaard, 90 Wn.2d at 736. The rule prevents the trial court from instructing a potentially deadlocked jury in a manner that suggests (1) the need for agreement, (2) the consequences of not agreeing on a unanimous verdict, or (3) the length of time the jury should deliberate.⁵ Id.; CrR 6.15(f)(2).

Here, the trial court coerced the jury by instructing them in a manner that suggested the need for agreement and implied the jury

lesser-degree offense.

⁵ CrR 6.15(f)(2) reads:

After jury deliberation has begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

would be held until such time that their prior verdict which was flawed (“ambiguous”) was somehow repaired.

- b. The court’s further instructions improperly coerced the jury by suggesting the need for agreement and implying that the jury would be held until such agreement was reached.

The court’s additional instructions violated Mr. Pua’s right to a fair and impartial jury. The additional day of deliberations, as well as the court’s comments, suggested to the jury that they were supposed to return a unanimous verdict and, to that end, they would be expected to remain in the courthouse until they reached agreement.

In Boogaard, the trial court faced with a deadlocked jury asked the jury foreman about the history of the jury voting and if the foreman believed the jury could reach a verdict within 30 minutes. Boogaard, 90 Wn.2d at 735. The jury was ordered to deliberate and returned a verdict within the time allotted. Id. The Washington Supreme Court concluded the judge’s inquiry constituted coercion because it “unavoidably suggested to the minority jurors that they should ‘give in’ for the sake of that goal which the judge obviously desired – namely, a verdict within a half hour.” Id. at 736.

The court’s comments here could be seen as signaling the jury to reach a unanimous verdict, and a sign that something was amiss with

their prior verdict. Although the court instructed the jury, “So, it is not my intention to comment on your verdicts in any way,” the fact that the jurors had been summoned back to remain impaneled following rendering the verdict, had been ordered to maintain their oaths as jurors, and were ordered to resume deliberating – these facts could not be overlooked by the jurors. RP 793, 799. Clearly the court was dissatisfied with the verdict, and the jury was sent back with this admonition: they must complete an interrogatory, “and then we’ll move forward.” RP 799.

The Watkins Court recognized “the broader principle ... that the jury must be free from judicial pressure in reaching its verdict.” 99 Wn.2d at 176. The trial court’s additional instruction to the jury simply narrowed the options available to the jury during its further deliberations by requiring a unanimous verdict of “YES or NO” as to the assault in the second degree count, when it was apparent the jury had sought a third option. See id. at 178; State v. Ford, 171 Wn.2d 185, 203, 350 P.3d 97 (2011) (Stephens, J., dissenting). By directing the jury to complete the interrogatory, “YES or NO,” the trial court effectively removed from the jury the option to leave the interrogatory blank. RP 799. The jury had no option but to answer the first question

as to assault-two, then to proceed to the next question, as to assault-four. CP 20.

It is well-settled law that the jury always had three options, rather than two: to agree to find Mr. Pua guilty, to agree to find him not guilty, or to reach the point they could not agree to a verdict. Ford, 171 Wn.2d at 202 (Stephens, J., dissenting). Leaving the interrogatory blank “is an option to which the jury was entitled under the law, as we do not allow courts to essentially hold jurors hostage until they can come to a unanimous verdict.” Id. Following the court’s additional instruction, however, the jury was given only one remaining option – to complete the interrogatory before they would be permitted “to move forward.” RP 799.

Because the trial court’s improper instruction removed the third available option from the jury, it thus interfered with the jury’s deliberative process.

c. Mr. Pua’s conviction should be reversed.

A claim of jury coercion is a manifest constitutional error that may be raised for the first time on appeal. Ford, 171 Wn.2d at 188; RAP 2.5(a). When the defendant argues the court’s instructions to the jury constitute coercion, the conviction will be reversed if the defendant

establishes “a reasonably substantial possibility that the verdict was improperly influenced by the trial court’s intervention.” Watkins, 90 Wn.2d at 178. Thus, the Boogaard Court reversed the defendant’s conviction because it concluded the court’s comments “tended to and most probably did” influence the minority or hold-out jurors. Boogaard, 90 Wn.2d at 740.

The court’s comments in this case were no doubt well-intentioned. However, they telegraphed to the jury that its verdict contained an apparent “ambiguity” and that clarifying this ambiguity could only be accomplished in two ways. The court’s comments also failed to consider that the jury had proved itself incapable of following the court’s instructions during the previous week’s deliberations, since the jury had simultaneously convicted and acquitted Mr. Pua of assault in the second degree, according to its verdict forms. CP 24-25. The court’s limitation of the jury to two options: yes or no, as to the assault in the second degree count -- telegraphed the court’s desire for a unanimous verdict. This inference was borne out when the jury returned a guilty verdict five minutes later. RP 801; CP 20.

The court’s instructions to the jury here constituted jury coercion requiring the reversal of Mr. Pua’s conviction.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED PREJUDICIAL ER 404(b) EVIDENCE AGAINST MR. PUA.

- a. Evidence Rule 404(b) prohibits the admission of propensity evidence.

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Where the only relevance of the other acts is to show a propensity to commit similar bad acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character, and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Before admitting such evidence, a trial court must first find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If prior bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

Here, the trial court erroneously admitted evidence of Mr. Pua’s alleged prior theft of a motor vehicle, as well as hearsay evidence of his reputation for driving other stolen cars, which was irrelevant and highly prejudicial. RP 256-58. Mr. Pua’s motion in limine to exclude this testimony under ER 404(b) was denied. RP 101. In addition, although

his objection to the specific testimony about the stolen car was sustained, his motion to strike the testimony was denied. RP 258.

- b. The trial court erred by finding that the prior conduct was relevant to the offense charged.

In the context of ER 404(b),

[t]he trial court must first consider the relevance of prior bad acts by deciding whether the evidence makes the existence of any fact that is of consequence to the determination of the action more or less probable.

State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991), aff'd 120 Wn.2d 616 (1993) (citing ER 402); ER 401. Even where the evidence is relevant, the court must balance the probative value against the prejudicial effect of the evidence before admitting it. Schaffer, 63 Wn. App. at 768 (citing ER 403). To be admissible, evidence must be logically relevant, that is, necessary to prove an essential element of the crime charged. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000) (citing State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982)).

Here, the trial court admitted testimony concerning Mr. Pua driving a stolen car, despite a defense motion in limine, as well as a specific objection. RP 101-04, 256-58. During the alleged victim's testimony, he not only said the car Mr. Pua was driving the day he ran

out of gas was stolen, but elaborated that he knew Mr. Pua to drive stolen cars, “off and on.” RP 258. Mr. Pua’s objection to this latter characterization was sustained; however, his motion to strike was denied. Id. These allegations of additional car thefts had no plausible connection to the charges before the jury – assault, robbery, and intimidating a witness – and were clearly unduly prejudicial.

In admitting the testimony regarding prior car theft, the trial court failed to carefully consider the relevance of the prior acts to the issues before the jury, overruling all but one of the defense objections. RP 255-58.

Under ER 404(b), the trial court must consider the introduction of prior bad acts, weighing probative value against prejudicial effect, balancing these concerns on the record. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); see also State v. Wade, 138 Wn.2d 460, 463, 979 P.2d 850 (1999). Without a thorough analysis on the record, an appellate court is unable to determine whether the trial court’s ruling was based on a “careful and thoughtful consideration” of the issues. Saltarelli, 98 Wn.2d at 362. Where a trial court fails to conduct such a balancing test on the record, ER 404(b) “evidence is not properly admitted.” Tharp, 96 Wn.2d at 597; Gresham, 173 Wn.2d at 420.

Here, the trial court made insufficient effort to balance the probative value against the prejudicial effect of the prior alleged car theft on the record, as required by ER 404(b). After overruling the defense objections and permitting the complainant to testify in open court about Mr. Pua's alleged prior crimes, the court failed to perform an ER 404(b) balancing test of prejudicial and probative value on the record, and simply indicated the evidence could be introduced. The court's explanation of its own ruling was simply, "The 404(b) analysis is not really pertinent given that what we expect Mr. Phair will testify to would be the case regardless of whether the car was stolen ... I'll allow everything." RP 104-05.

Such actions are not the "careful and thoughtful" balancing test envisioned by ER 404(b) and our Supreme Court. Gresham, 173 Wn.2d at 420; Saltarelli, 98 Wn.2d at 362; Tharp, 96 Wn.2d at 597. By failing to perform such a balancing test, the court abused its discretion in admitting the evidence.

c. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would

have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599.

Here, the introduction of the alleged prior bad acts affected the verdict. Since Mr. Pua had exercised his constitutional right to remain silent and the jury had heard nothing regarding his criminal history, the ER 404(b) testimony regarding the alleged stolen vehicle is the only context the jury heard for Mr. Pua's past.

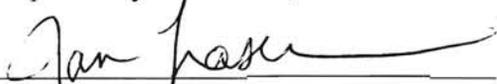
The admission of these alleged bad acts was irrelevant and highly prejudicial, and inevitably affected the verdict; thus, Mr. Pua's conviction should be reversed and remanded. Gresham, 173 Wn.2d at 420; Freeburg, 105 Wn. App. at 501, 507.

E. CONCLUSION

For the foregoing reasons, Mr. Pua respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 16th day of October, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71622-1-I
v.)	
)	
AIGALELEI PUA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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