IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TOMMY LEE CROW, JR., Appellant.	No. 39075-2-II UNPUBLISHED OPINION

Sweeney, J. — This appeal follows a successful prosecution for two counts of second degree murder and one count of second degree arson. The defendant assigns error to the trial judge's decision to allow evidence of an earlier assault on the question of motive. We conclude that the judge properly admitted this evidence. The defendant also assigns error to two of the court's instructions, one oral, limiting the use of the "prior bad acts" evidence (the earlier assault) and the second instructing the jury on the legal requirements for accomplice liability. We conclude that both instructions were proper statements of the law and that each allowed the defendant to argue his theory of the case. We therefore affirm the convictions.

FACTS

Tommy Lee Crow, Jr., along with Bryan Eke and Christopher Durga, assaulted Scott Cover with a baseball bat in early March 2008; they severely injured him. Mr. Cover wound up in the hospital for six days. Justin Van Horn and Karen Ann Schaeffer, both acquaintances of Mr. Cover, visited him in the hospital. Mr. Cover asked Ms. Schaeffer to tell Mr. Crow and Mr. Eke that he had not told police that they were responsible for the assault.

David Miller saw the assault on Mr. Cover. Officer Bryan Henry arrested Mr. Miller on an unrelated outstanding warrant, and, while in custody, Mr. Miller told Officer Henry that Mr. Eke and Mr. Durga had assaulted Mr. Cover.

On March 27, 2008, Officer Henry found Mr. Durga and followed him to a campsite in the woods where Mr. Durga lived. Officer Henry told Mr. Durga that he had information that Mr. Durga was involved with Mr. Cover's assault and that a baseball bat had been used. Officer Henry had previously seen a baseball bat at Mr. Durga's campsite, and asked him about it; Mr. Durga gave the bat to Officer Henry, who then left.

Mr. Durga told Mr. Crow and Mr. Eke that the police had taken the bat. The three were upset and asked around about who had told police that they assaulted Mr. Cover. They ultimately confronted Mr. Miller and accused him of telling police about Mr. Cover's assault. One of the three drew a line in the dirt with his shoe and said to Mr. Miller, "You've crossed the line." 5 Verbatim Report of Proceedings (VRP) at 828. Another said, "I'm gonna fuck you up." 5 VRP at 831.

Later that evening, around 10:30 pm to 11:00 pm, Messrs. Crow, Eke, and Durga

discussed how to resolve the situation and decided to murder Mr. Miller and burn his body.

The three went to Mr. Miller's camp around 1:00 am on March 28. Mr. Crow confronted Mr. Miller, "Why did you turn us in. I thought we were family?" 6 VRP at 1152. Mr. Crow struck Mr. Miller in the face, and Mr. Durga choked him until he was unconscious. Mr. Durga then dragged Mr. Miller's body into a campsite fire. Norman Peterson showed up at Mr. Miller's camp and saw Mr. Miller's body halfway into a fire. Mr. Crow struck Mr. Peterson in the head with a tree limb, wrestled him to the ground, choked him, and eventually threw him in the fire with Miller. Both Mr. Crow and Mr. Peterson died from asphyxia, most likely by strangulation.

The State charged Mr. Crow with two counts of second degree murder and one count of second degree arson. The trial judge permitted the State to present evidence of Mr. Crow's earlier assault on Mr. Cover. A jury found Crow guilty on all counts.

DISCUSSION

PRIOR BAD ACTS EVIDENCE

Mr. Crow first argues that the trial court erred in admitting evidence of his earlier assault on Mr. Cover.

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Here the questions are whether evidence of Mr. Cover's prior assault was first proved by a preponderance of the evidence; next whether that evidence tended to show something other than propensity to commit these crimes (here motive); and, finally, whether the court appropriately balanced the probative value of this evidence against its prejudicial impact on the jury. *State v.*

Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

Evidence of prior bad acts may not be admitted to show that the defendant had the propensity to commit the crime with which he is charged. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). But that same evidence is admissible to show motive, even if the evidence also shows propensity. *Wade*, 98 Wn. App. at 333. Before allowing the evidence, the court must find that the misconduct actually occurred; it must identify the purpose for the evidence; it must determine that it shows something other than propensity to commit the crime; and it must balance the probative value of the evidence against any unfair prejudice to the defendant. *Pirtle*, 127 Wn.2d at 648-49.

Mr. Crow first contends that the State failed to prove that he was involved in the earlier assault. The test here is whether there is substantial evidence to support the court's finding that he was involved. ER 104(a) (trial judge must resolve preliminary questions of fact necessary for the admissibility of evidence); *State v. Benn,* 120 Wn.2d 631, 653, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993); *State v. Karpenski*, 94 Wn. App. 80, 102-03, 971 P.2d 553 (1999), *rev'd on other grounds*, *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). And that turns on whether the State met its burden of production; that is whether the State produced evidence, which if believed, supported the court's finding that Mr. Crow was involved in the earlier assault. *State v. Nelson,* 152 Wn. App. 755, 770, 219 P.3d 100 (2009), *review denied*, 168 Wn.2d 1028 (2010). And the evidence here easily meets this test.

Mr. Van Horn testified that after he visited Mr. Cover in the hospital, he crossed paths with Mr. Crow and Mr. Eke. They claimed responsibility for Mr. Cover's assault and threatened

that they would also put Mr. Van Horn in the hospital. Ms. Schaeffer testified that, while visiting Mr. Cover in the hospital, he asked her to tell Mr. Crow and Mr. Eke that he had not reported their assault to police. And Mr. Cover testified that he remembered Mr. Crow standing over him and hitting him over the legs and back with a baseball bat. Mr. Cover also identified Mr. Crow and Mr. Eke as his assailants, from two photomontages. Substantial evidence supports the trial court's finding that Mr. Crow was involved with the assault.

Mr. Crow next argues that evidence of his involvement in Mr. Cover's assault was irrelevant to show motive and therefore only showed propensity. Our review of this record also leads us to agree with the court that the evidence tended to show motive. "Motive is an inducement which tempts a mind to commit a crime." *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998). And evidence of prior assaults is admissible to show motive, if motive is relevant. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Here it certainly was.

Evidence of Mr. Cover's assault tended to show Mr. Crow's motive to murder Mr. Miller. The earlier assault shows why Mr. Crow looked to punish Mr. Miller. And Mr. Peterson's murder followed from his walking in on Mr. Cover's murder.

Finally, balancing the probative value of this evidence against any potential prejudice is uniquely a trial court function, which we will not second guess here. *State v. Scherner,* 153 Wn. App. 621, 642, 225 P.3d 248 (2009), *review granted*, 168 Wn.2d 1036 (2010). And the probative value of this evidence easily outweighs any attendant prejudice, given the nature of the crimes with which Mr. Crow was charged and the circumstances of the earlier assault. The trial

court properly admitted this evidence.

PRIOR BAD ACTS INSTRUCTION

Mr. Crow next contends that the court's instruction to the jury to limit consideration of the prior bad acts evidence (the earlier assault) permitted the jury to use the evidence without limitation. He complains that the court did not limit or provide direction about which of the three crimes the evidence pertained to, and as a result, the instruction amounted to a comment on the evidence. Mr. Crow also argues that the court's limiting instruction effectively told the jury that Mr. Crow was involved with the earlier assault on Mr. Cover and thereby "removed the material fact of whether Crow was associated with this evidence." Br. of Appellant at 19. From this he asks us to review this assignment of error in the first instance here on appeal because our state constitution prohibits the trial court from commenting on the evidence. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law").

Of course, the function of a judge in a jury trial is limited to passing and instructing on questions of law (with the notable exception of the findings ER 104 required). *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986); Wash. Const. art. IV, § 16. So, for that reason, the court is not permitted to comment on the evidence. Mr. Crow assigns error to the court's decision to give this limiting instruction:

> I have allowed evidence and will allow evidence regarding an earlier assault upon Scott Cover to be admitted in this case for only a limited purpose. This evidence may be considered by you only on the issue of defendant's motive. You may not consider it for any other purpose. Any discussion of this evidence during your deliberations must be consistent with this limitation.

2 VRP at 326-27. First, the instruction is a comment on the evidence and an appropriate comment at that. The judge told the jury not to consider this prior bad acts evidence for anything other than motive. Second, this assignment of error in the first instance, here on appeal, highlights why it is important that the lawyers make these objections in the trial court. ER 103; CrR 6.15(c). A factual issue at trial was Mr. Crow's motive to murder. The earlier assault explained a motive. Objections at trial that the limiting instruction was not specific enough or not sufficiently categorical would have permitted the court to further refine the wording. But those objections were not made—and may well have not been made—because everyone understood, given the context here, what motive and what crime was at issue.

Finally, the court found as a matter of preliminary fact, which ER 104 requires, that Mr. Crow had assaulted Mr. Cover earlier. *Karpenski*, 94 Wn. App. at 102-03. The court was required to do so by the rules of evidence. And, significantly, it was not necessary to submit the question of the earlier assault to a jury for some finding beyond a reasonable doubt because Mr. Crow was not charged with the earlier assault. ER 104(a).

In sum, the instruction appears to do exactly what ER 404(b) requires—limit consideration of the prior bad acts evidence. It is modeled on 11 *Washington Practice*: *Washington Pattern Jury Instructions: Criminal* 5.30, at 180-81 (2008) (WPIC). The wording did not convey the trial court's personal belief but rather limited consideration of certain evidence in accordance with ER 404(b). And any requests for fine tuning should have been made in the trial court, not here on appeal. ER 103.

ACCOMPLICE LIABILITY INSTRUCTION

Mr. Crow next assigns error to the court instruction to the jury on accomplice liability, instruction 11. He argues that it allowed the jury to convict him as an accomplice based on mere presence and thereby relieved the State of its burden to prove he committed an overt act.

The court instructed that:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Clerk's Papers (CP) at 74. This instruction required the jury to find more than that Mr. Crow assented to the crimes or was simply present. It required the jury to find that he knowingly promoted or facilitated the crime by aiding or agreeing to aid in its commission. It properly informed the jury that mere presence and knowledge of the criminal activity alone does not satisfy the requirements of accomplice liability. But that said, presence can be enough if by being present, one stands ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

Mr. Crow argues, nonetheless, that the court failed to exclude "other situations, such as when a person is present and unwilling to assist but approves of the crime. . . . [and it failed to exclude] presence coupled with silent assent or silent approval, with the result that a person who is present and unwilling to assist, but who silently approves of the crime, could be convicted." Br.

of Appellant at 24. Again, Mr. Crow did not raise these concerns in the trial court where the judge could have done something about them—assuming that the court would have tweaked or amended the instruction.

But even if Mr. Crow objected, the trial court would have been well within its legal authority to instruct as it did. The instruction correctly states the law. *See State v. O'Neal*, 126 Wn. App. 395, 418-19, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007); *State v. Mangan*, 109 Wn. App. 73, 78, 34 P.3d 254 (2001). It does not allow conviction for mere presence because it specifically required something more.

Finally, Mr. Crow contends his lawyer was ineffective for failing to raise the issues we have discussed here in the first instance on appeal. We need not address that challenge given our disposition here.

We affirm the convictions.

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 pursuant to RCW 2.06.040, it is so ordered.

Sweeney, J.

We concur:

Penoyar, C.J.

Worswick, J.