

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 66327-5-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
CURTISS JAY WARE, JR.,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>June 11, 2012</u>

Spearman, A.C.J. — A jury convicted Curtiss Ware, Jr. of murder in the second degree for the shooting death of Melvin Evans. On appeal, he claims reversible error in the trial court’s admission of evidence that he tried to punch a different man minutes before the shooting. Alternatively, he claims he received ineffective assistance of counsel because his attorney did not request a limiting instruction. Because Ware does not argue that the trial court erred in both of its grounds for admitting the evidence and fails to show he was prejudiced by such admission, and also fails to show prejudice for his ineffective assistance claim, we affirm.

FACTS

On August 26, 2009, Melvin Evans spent the day working at a detail shop

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in Seattle with Hal Goldsmith. After closing the shop in the evening and going their separate ways, Evans and Goldsmith met at a car wash early the next morning, around 2:00 a.m. Evans asked to borrow Goldsmith's cell phone so he could call "Curtiss" to arrange to buy drugs. After using Goldsmith's phone, Evans walked toward South Byron Street. Goldsmith was on Rainier Avenue South. Goldsmith saw Evans cross the street and talk to Ware on the corner of Byron and Rainier. The conversation between Evans and Ware became loud and animated. Goldsmith heard them talk about money. He heard Ware say, "You work me for money" and Evans reply, "I ain't getting you for no money." As Evans turned to run, Ware pulled a gun from his waistband, raised his right arm, and fired five or six shots. Goldsmith testified that he saw Ware get into the passenger side of a white truck, which turned onto Rainier Avenue South.

Goldsmith ran to Evans, who was lying in an alley behind a store, and called 911. A resident who lived in an apartment overlooking the scene also called 911 after hearing gunshots. From his window, the resident saw a black male in a white shirt waving his right arm and holding a dark object. The resident saw the man get into the passenger side of a white truck that looked like an older Ford F-250 with a canopy.

Police arrived at the scene within minutes, a little after 3:00 a.m. Evans was lying face up in an alley with a gunshot wound to the back. He was unresponsive and paramedics were unable to revive him. The cause of death was a single gunshot wound that penetrated Evans' lung. A small plastic

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package, or “bindle,” of crack cocaine was next to his body. Ware’s DNA was later found on the bindle.¹ No shell casings were found at the scene.

Police obtained surveillance camera recordings from a man who lived near the location of the shooting and had cameras installed on his house. The recording depicted a white truck arriving at the scene and a person in a white shirt getting out. The person in the white shirt encountered a person in a black shirt. Forensic video analyst Grant Fredericks testified a flash depicted on the recording was consistent with a gunshot being fired an arm’s length away from the person wearing white. Evans was wearing a black shirt when he was killed. Goldsmith saw Ware in a white shirt that morning.

Police officers spoke with Richard Ramey, who knew Evans and had seen Ware in the neighborhood several times. On the morning of the shooting, Ramey encountered Ware on South Byron Street. During this encounter, Ware tried to punch Ramey, but Ramey blocked the punch. As Ramey left, he saw Ware meet Evans. Ramey walked to his mother’s house and heard gunshots six or seven minutes later.²

Ten hours after the shooting, police found a white truck with a canopy parked several miles from the shooting scene. After two or three hours of surveillance, police watched as Ware got into the passenger side and Jenita

¹ A swab taken from the bindle resulted in a mixed DNA profile. Ware matched the major contributor to the DNA profile. Testimony at trial indicated that the statistical probability of a random person having that profile was 1 in 2.3 quadrillion.

² On cross-examination, Ramey testified it may have been 20-40 minutes later. However, the surveillance video from the neighborhood resident showed Ware’s truck arriving at 2:42 a.m. and the shooting occurring at 3:04 a.m.

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Freeman got into the driver's side.³ Ware and Freeman were placed under arrest. A phone taken from Ware contained Goldsmith's phone number. Ware's clothing was not tested for gunshot residue. No weapons were found in the truck.

The State charged Ware with murder in the second degree with a deadly weapon, based on a predicate offense of assault in the second degree.⁴ The information was later amended to include a firearm enhancement.

Before trial, the State moved to admit evidence of Ware and Ramey's encounter and that Ware had tried to punch Ramey. The State argued two bases to admit the evidence: (1) to establish Ware's identity and show he was at the scene and (2) to show Ware's state of mind and that he was angry just before the shooting occurred. The trial court admitted the evidence on both bases.⁵ The court said it was willing to give a limiting instruction, but none was requested.

At trial, Ramey testified that Ware tried to punch him in the face but he

³ At trial, Fredericks compared the depiction of the truck in the surveillance recording from the neighborhood resident to photos of the truck that police saw Ware get into. He found that the make and model matched, and also found that the two trucks shared traits such as dents, damage, and decals.

⁴ Freeman was charged as a co-defendant with rendering criminal assistance. However, those charges were dismissed upon Freeman's motion to dismiss for insufficient evidence.

⁵ The judge stated:

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

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was able to catch Ware's fist with his hand. Ware said "nice catch" and told Ramey to "get off the block." Ramey testified that Ware sounded "real serious," so he left. In closing, the prosecutor referred to the evidence by stating, "Mr. Ware was angry already, even before he was coming in contact with Mr. Evans. Mr. Ware was already angry. He tried to hit Richard Ramey and told him 'You'd better get off this block.'"

The jury found Ware guilty as charged and returned a special verdict finding he was armed with a handgun. The court imposed a standard-range sentence. Ware appeals.

DISCUSSION

Ware appeals his judgment and sentence, claiming the trial court committed reversible error by admitting evidence that he attempted to punch Ramey. In the alternative, he claims defense counsel provided ineffective assistance by not requesting a limiting instruction.

Admission of ER 404(b) Evidence

We review the trial court's interpretation of ER 404(b) de novo as a matter of law. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court interprets the rule correctly, we review the court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. Id. Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

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ER 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts “to prove the character of a person in order to show action in conformity therewith.” Such evidence “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). Courts read ER 404(b) in conjunction with ER 403, which prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.⁶ State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence, (2) identify the purpose for admission, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against its prejudicial effect. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

Ware first argues evidence of the attempted punch was not relevant to a material issue. He specifically argues it was not relevant to show intent, citing State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) in support. But “[w]e will uphold a trial court’s decision to admit evidence of prior misconduct under ER 404(b) if one of its cited bases is justified.” Id. at 264. Here, the evidence was admitted on two bases, to show Ware’s (1) state of mind and (2) identity. While

⁶ ER 403 provides, “Although relevant, evidence may be excluded 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.”

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Ware argues the evidence was inadmissible on the first ground, he provides no argument that the evidence was not relevant and admissible on the issue of identity. Because we conclude that the evidence was relevant to establish identity, the trial court did not abuse its discretion in admitting it.

Ware also argues the evidence was not admissible because its probative value was outweighed by its prejudicial effect. He contends the attempted punch was not sufficiently similar to the shooting to be of probative value, citing State v. Wade, 98 Wn. App. 328, 335, 989 P.2d 576 (1999). We hold the trial court did not abuse its discretion on this issue. Where the defense argued that the evidence at trial was insufficient to show that Ware shot Evans, Ramey's testimony placing Ware at the scene minutes before the shooting was probative.⁷ Furthermore, the court did not abuse its discretion in ruling that, given the crime at trial, testimony about the attempted punch was not particularly prejudicial. Wade is distinguishable. There, a juvenile was charged with possession of cocaine with intent to deliver, and evidence of his previous possession with intent to deliver offenses was admitted to prove intent as to the charged crime. Wade, 98 Wn. App. at 331-32. That was not the purpose of the

⁷ We note that the evidence was particularly probative in light of defense counsel's efforts to impeach Ramey's credibility during cross-examination by asking about his use of alcohol and prescription drugs that night. 10RP 15. In the following exchange, Ramey testified that his encounter with Ware stood out in his mind because of the attempted punch.

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

A: Okay.

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

A: Oh, my God.

Q: I mean --

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

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evidence in this case. Furthermore, the prior acts in Wade occurred at least months before. In contrast, Ware's encounter with Ramey took place minutes before the shooting.

Finally, any error was harmless. The erroneous admission of evidence under ER 404(b) is harmless unless there is a reasonable probability that the error materially affected the outcome of the case. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The evidence against Ware was overwhelming. Goldsmith testified that he saw Ware and Evans arguing and then saw Ware shoot Evans. The shooting was captured on video, depicting a person wearing a white shirt, as Ware was seen wearing, shoot another person as the latter turned to flee. A truck matching the one police saw Ware enter was seen on the surveillance recording of the shooting. Phone records established that Goldsmith's phone, which Evans borrowed, had been used to call Ware before the shooting. Ware's DNA was on the bindle found at Evans' feet. There is no reasonable probability that the jury's verdict was unduly affected by hearing that Ware tried to punch Ramey.

Ineffective Assistance of Counsel

Ware argues that his conviction should be reversed because counsel's failure to request a limiting instruction amounted to ineffective assistance of counsel. A claim of ineffective assistance involves mixed questions of law and fact that this court reviews de novo. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, a

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defendant must meet both prongs of a two part test: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different, but for counsel's performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

Ware's claim is not well taken because he fails to show prejudice. He fails to establish a reasonable probability that a limiting instruction would have affected the verdict given the overwhelming evidence against him.

Affirmed.

Speckman, A.C.T.

WE CONCUR:

Jau, J.

Becker, J.