IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEROME CEASAR ALVERTO, Appellant.	No. 38323-3-II UNPUBLISHED OPINION

Penoyar, J. — Jerome Ceasar Alverto appeals his convictions of attempted first degree murder, first degree burglary, and first degree robbery. He argues that the trial court abused its discretion by admitting a notebook found in his vehicle. He also raises numerous claims in his statement of additional grounds (SAG).[1] We affirm.

FACTS

I. Background

In the early morning of May 13, 2006, Stephanie Wilson received a phone call from her ex-husband, Alverto. Alverto said to Wilson, "So you got a concealed weapons permit, huh?" 6 Report of Proceedings ("RP") at 267. He told her that she should not have married him and asked her if she was going to marry her boyfriend, Eric Rogers. Alverto told Wilson that she was going to be sorry. Wilson told Alverto she did not want to talk anymore and hung up her phone.

Wilson sent a text message to Rogers, who called her back. Wilson set her house alarm and then went into her bathroom, where she was hit on the head from behind with a wine bottle. Wilson fell to the ground and was then hit repeatedly on the head with a gun. Her attacker told

[1] RAP 10.10.

her, as he hit her, that she should not have married him. Wilson recognized Alverto's eyes, body, and voice, even though he wore black clothing, black gloves, and a bandanna around his face.

Alverto then picked Wilson up by her hair, brought her into her bedroom, put a gun to her head, and told her that he was going to kill her and that her kids were going to come home and find her. Wilson asked Alverto to take her elsewhere. She picked up her cellular phone to call the police; however, she ultimately did not call, believing that the police would be unable to detect her location.[2]

Alverto had told Wilson to put some clothes on, so she went into her walk-in closet. Alverto picked up Wilson's safe, which contained her wedding ring, from inside her closet. He put the safe onto Wilson's bed, taking his eyes off of Wilson. Wilson then ran out of her bedroom and down the stairs. Alverto caught up to her and then proceeded to hit her on the head repeatedly with the butt of his gun.

Next, Alverto told Wilson to turn off her house alarm. As she went to turn off the alarm, Alverto kicked her. At one point, Alverto lost eye contact with Wilson, and she was able to run out the front door. Wilson ran to her neighbor's house; however, Alverto chased after her and shot her in the chest. Wilson collapsed, and Alverto then shot her in her right hand.

Wilson played dead until she heard Alverto run off. She looked up and could not see him, so she went to a neighbor's house for help. Alverto then appeared again and shot her in the back of her neck. Wilson collapsed, and Alverto grabbed her by the hair and pulled her body down the stairs and onto the neighbor's lawn. He shot Wilson twice in the head and then ran off.

[2] At trial, Wilson testified that she could not remember what happened to her phone.

Wilson managed to reach a neighbor's house and knocked on the door. This neighbor had previously called 911, around 4:50 a.m., after hearing a series of booms and then seeing a man dragging a woman by her hair off the patio of a neighbor's home. Wilson told the neighbor the name of her attacker; the types of cars he drove, a green Volvo and a champagne Mercedes; and his address. When the police arrived, she gave them the same information that she had given the neighbor.

Pierce County Deputy Sheriffs Mark Fry and Bryan Cline were dispatched to Alverto's residence at around five in the morning. As they were driving, they observed a man in a tan Mercedes. Cline stopped the vehicle, which Alverto was driving. Alverto wore a black shirt, blue pants, and black shoes. Fry noticed blood on Alverto's pants. Alverto denied shooting anyone and told Fry that he was going deer hunting. It was not deer hunting season.

Later that morning, a framing contractor found a duffel bag at a construction site and called the police. The construction site was located approximately one to two miles from Wilson's home. The duffel bag contained a backpack, a leather jacket, light blue respirator-type masks, four gas masks with filters, and a blue bandanna. The jacket pockets held two pairs of silver handcuffs and Wilson's cellular phone. The backpack held three white trash bags; two stocking caps, one with the eyes, nose, and mouth cut out; clothes, including a pair of jeans; a garage door opener for Wilson's garage door; a photograph of Wilson and Rogers; two bracelets, one with an inscription that said "Songs of Solomon 8:6 . . . Love, Stephanie." 9 RP at 756. Wilson later identified the bracelet as one she had given Alverto when they were in a relationship. The duffel bag also contained a handgun; there was blood on the lower receiver, on the upper slide around the barrel, and on the pistol grip. Inside the pair of jeans, an investigator found a

grocery list with Alverto's name printed across the top of it.

Detectives found no indication of a forced entry into Wilson's home. Police found a steak knife in Wilson's master bedroom, hidden between her mattresses. DNA testing showed that the blood stains on Alverto's pants matched Wilson's DNA.

II. Procedural History

On May 16, the State charged Alverto with attempted first degree murder, first degree burglary, and first degree robbery.[3] Before trial, Alverto moved to suppress "any/all items seized" during a warrantless police search of his house immediately after his arrest. Clerk's Papers (CP) at 8. The trial court found that there was not sufficient evidence for a warrantless search of Alverto's home under the community caretaking exception. The trial court ruled that it would not suppress evidence from Alverto's house that the police subsequently obtained under a valid search warrant.

At trial, the trial court admitted into evidence a notebook found in the front seat of Alverto's vehicle. The notebook contained what appeared to be a "to-do list." 10 RP at 785. The following was written on the first page of the notebook: "[R]emove cell (GPS); 5:30 [to] 6 am (5 am); has to look natural; cuts, ra[n]sack truck [and] purse." CP at 43 (semicolons added). There were also two phone numbers on the notebook's first page; neither was Wilson's. On the second page, the following was written: "(Tools), gun, taser, knife, handcuffs, tape, shoe covers, gloves, flashlight, scarf or face mask, [u]se white face mask, trash bags (2 large, 4 small), stranger hair/condom." CP at 44 (commas added). The third page states, "(dress code), dark pants, dark

[3] The State filed an amended information, correcting the spelling of Wilson's name, on August 18, 2008.

shirt, glove, stocking cap [and] face mask, tape gloves to shirk [sic], tape eyebrows, tape pants to shoe cover, tape pockets." CP at 45 (commas added). The fourth page reads, "(execute)[;] no communication[;] enter garage 5 am, wait til anyone enter; taser individual; handcuff right arm to [left] leg; handcuff [left] arm to right leg; tape arms [and] tape legs together (added restraint)." CP at 46. The final page reads, "(options), set her on fire, act out a carjacking gone bad, taser – stab her in her garage and smear blood in garage." CP at 47 (commas added). At trial, Wilson identified the handwriting in the notebook as Alverto's.

Previously, Alverto had moved in limine to exclude the notebook. The trial court stated:

> The defense argument had been regarding *State v. Whalon*[, 1 Wn. App. 785, 464 P.2d 730 (1970)] . . . . And I read that very carefully, and I think it's very distinguishable. That was a situation where there was a charge of [r]ape, and there was [sic] some writings by the defendant having to do with, it appeared to be, sort of planning out a rape.
>
> But in that case, not the victim, but a different woman's name was there, a different woman's address was there, and other contact information. So there was nothing particularly about the victim in that alleged case related to the notebook. And the Court of Appeals then said that was too prejudicial.
>
> This is a little bit different. Perhaps, vaguer, but I think that under 403, it is very prejudicial. It is also very probative. And it is my understanding from -- I guess what I'm saying is, even if it's equal in terms of prejudice and probative, everything the State wants to admit is usually prejudicial to the defendant; that on balance that it would be admissible to - - in terms of being relevant to the issues in this case.
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> It's not a 404(b) kind of prior bad act. It is in and of the same time frame, just that it was found in the defendant's car at the time of his arrest, shortly after the alleged assault occurred, but again, on balance. I think that it's probative, given the issues that have been raised by the defense, in terms of identification, and - - anyway, that's my ruling.

7 RP at 429-30.

The jury found Alverto guilty on all charges. Alverto appeals.

ANALYSIS

I. Admission of Notebook

Alverto asserts that the trial court erred by admitting into evidence the notebook from his vehicle. He argues that the trial court applied an incorrect legal standard to evaluate the admissibility of the notebook and that the "unfair prejudice of this evidence is not outweighed by the probative value and therefore the evidence should have been excluded under both ER 403 and ER 404(b)." Appellant's Br. at 10. We disagree.

We review a trial court's decision as to the admissibility of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence is admissible; however, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 402, 403. The trial court has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996). "[T]he record must in some way show that the court, after weighing the consequences of admission, made a 'conscious determination' to admit or exclude the evidence." *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Generally, we defer to the assessment of the trial judge, who is best suited to determine the prejudicial effect of evidence. *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Also,

"[i]n almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged." *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Thus, the focus must be on whether the admitted evidence was unfairly prejudicial. *Bernson*, 40 Wn. App. at 736. Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

First, Alverto argues that the trial court abused its discretion by applying an incorrect legal standard to evaluate the admissibility of the notebook. Specifically, he argues that "the trial court applied an incorrect standard when it held that when the probative value was equal to the prejudice, the evidence should be admitted." Appellant's Br. at 10. The State asserts that "[t]he balancing test is required but because the scales have to be tipped by substantial prejudice in order to exclude the challenged evidence, if the balance is even, the evidence should be admitted." Resp't's Br. at 13.

Here, the court found that the evidence was relevant and balanced its probative value against its prejudicial effect. The trial court noted that the evidence was prejudicial in that "everything the State wants to admit is usually prejudicial to the defendant." 7 RP at 429. Evidence that may contribute to proving beyond a reasonable doubt that Alverto committed the crime with which he was charged is not the type of unfairly prejudicial evidence that ER 403 seeks to exclude. We conclude that the trial court weighed the evidence's probative value against its prejudicial effect and did not abuse its discretion in finding the notebook admissible.

Next, Alverto asserts that the notebook's probative value did not outweigh the unfair

prejudice, so the notebook should have been excluded under ER 403 and ER 404(b). We disagree.

Alverto relies on *State v. Whalon*, 1 Wn. App. 785. In *Whalon*, we held that a defendant's nine-step list for committing rape in an automobile was more prejudicial than probative and should not have been admitted. 1 Wn. App. at 787, 794. In *Whalon*, the crime took place in the victim's bedroom, and the list was found on the defendant's person about two months after the crime. 1 Wn. App. at 786-87. We concluded that evidence showing lustful disposition should only be admitted in a sex offense case where it tends to show such lustful inclination toward the victim. 1 Wn. App. at 794. Our case is distinguishable from *Whalon*.

Here, the trial court allowed admission of the notebook for identification purposes.[4] The notebook, found in Alverto's vehicle on the morning of Wilson's attack, contained entries and notes of "remove cell," "5:30 [to] 6 am (5 am)," "gun," "trash bags," "gloves," "handcuffs," "scarf or face mask," "(dress code) dark pants dark shirt," and "enter garage 5 am" CP at 43-46. Wilson's attacker wore a bandanna around his face, gloves, and dark clothing. The attack occurred just before 5 a.m. A garage door opener for Wilson's garage, a gun, trash bags, two pairs of handcuffs, masks, and Wilson's cellular phone were found in a duffel bag at a construction site on the morning of the crime. The duffel bag also contained a grocery list with Alverto's name on it and a bracelet that Wilson gave Alverto when they were in a relationship. Further, the notebook establishes that Alverto had a premeditated intent to cause Wilson's death.

[4] It is unclear from the record under what rule the trial court admitted the notebook. It appears, however, that the trial court did not admit the notebook under ER 404(b). The trial court stated, "I think that under 403, it is very prejudicial. It is also very probative . . . . It's not a 404(b) kind of prior bad act." 7 RP at 429.

See RCW 9A.28.020(1); RCW 9A.32.030(1)(a). While not all of the entries in the notebook match what happened during the attack, the notebook's probative value outweighed its prejudicial value.

Moreover, any error in admitting such evidence would have been harmless. An error in admitting evidence that does not prejudice the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Such an error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. *Bourgeois*, 133 Wn.2d at 403 (quoting *Tharp*, 96 Wn.2d at 599). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Bourgeois*, 133 Wn.2d at 403. Wilson identified Alverto as her attacker. When Fry arrested Alverto, he noticed blood on Alverto's pants. The blood stains on Alverto's pants matched Wilson's DNA. This evidence demonstrates that the notebook evidence had only minor significance in reference to the overall, overwhelming evidence as a whole. Thus, any error would have been harmless.

II. Statement of Additional Grounds

A. Search of Wilson's Residence

In his SAG, Alverto first appears to argue that the police conducted an unlawful warrantless search of Wilson's home. Alverto also challenges the validity of the search warrant police subsequently obtained to search Wilson's home. Fourth Amendment rights are personal rights that may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). A defendant who does not personally claim a legitimate expectation of privacy in the area searched or property seized generally has no standing to

challenge the search or seizure. *State v. Gocken*, 71 Wn. App. 267, 279, 857 P.2d 1074 (1993) (quoting *State v. Foulkes*, 63 Wn. App. 643, 647, 821 P.2d 77 (1991)). Alverto had no legitimate expectation of privacy in Wilson's home and, therefore, he has no standing to challenge the search or the warrant to search Wilson's home.

B. Statement of Probable Cause

Alverto also argues that the officer who submitted the statement of probable cause for Alverto's arrest committed perjury in the statement. There is no evidence in the record to support these assertions and we do not consider matters outside the record in a direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

C. Search of Alverto's Vehicle and Residence

Next, Alverto contends that Detective Warren Dogeagle made a false statement on his complaint for a search warrant of Alverto's residence. In *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the court held that:

> where defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and if the allegedly false statement is necessary to the fining of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

A defendant bears the burden to make a substantial preliminary showing that an officer providing an affidavit for a search warrant made a false statement or omitted information knowingly and intentionally, or with reckless disregard for the truth. *See State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992). Further, the allegedly false statement or omission must be necessary to the finding of probable cause. *Garrison*, 118 Wn.2d at 874. Alverto asserts that Dogeagle intentionally lied when he wrote that he believed evidence was concealed in Alverto's house when

the evidence "he just described as being found, and [was] found, in Mr. Alverto's 'car.'" SAG at 7 (emphasis omitted). Alverto fails to meet his burden of making a substantial preliminary showing that Dogeagle intentionally made a false statement; we hold that his argument is without merit.

Further, Alverto appears to argue that the warrantless search of his car and home were unconstitutional. An officer may conduct a vehicle search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring in judgment)). Thus, the warrantless search of Alverto's car at the time of his arrest was permissible as a vehicle search incident to a lawful arrest, because officers reasonably believed evidence relevant to the attempted murder of Wilson might be found in the vehicle.

In regards to the warrantless search of Alverto's home, the trial court found before trial that there was not sufficient evidence for a warrantless search of Alverto's home under the community caretaking exception. The State asserted that nothing was seized during the warrantless sweep of Alverto's house and that when a search warrant was obtained for Alverto's home, the warrantless sweep was not mentioned. Eventually, the trial court ruled that it would not suppress evidence obtained under the valid search warrant that the police later obtained. The trial court already resolved this issue in Alverto's favor by ruling that there was insufficient evidence to justify the warrantless search of Alverto's home; thus, there was no trial court ruling adverse to Alverto on the warrantless search issue giving rise to an appealable action.

D. Perjury and Use of Perjured Testimony

Alverto contends that Officer Robert Johanson's testimony was perjured. Credibility determinations are for the trier of fact and are not subject to our review. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008).

Alverto also appears to argue that the State knowingly presented false testimony. We do not address this argument as it depends on facts not in the record. *See McFarland*, 127 Wn.2d at 335. There is nothing in the record to indicate that the prosecutor presented false testimony knowingly or otherwise.

E. Violation of the Code of Judicial Conduct

Alverto appears to argue that the trial court judge violated Alverto's right to a fair trial by exhibiting judicial bias and prejudice against Alverto. To support his claim, he argues that the trial court demonstrated bias when it did not allow the defense to impeach a witness and admitted evidence relating to the relationship between Alverto and Wilson. Evidentiary rulings, even if erroneous, do not constitute judicial misconduct. Further, even if the trial court erred, any error was harmless.

Furthermore, we presume that a trial court properly discharged its official duties without bias or prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Thus, a defendant claiming a violation of the appearance of fairness doctrine must make a threshold showing of a trial court's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992). A defendant must provide specific facts supporting his allegation of bias. *Davis*, 152 Wn.2d at 692. Judicial rulings alone almost never constitute a valid showing of bias. *Davis*, 152 Wn.2d at 692. There is no evidence in the record that the trial judge was prejudiced against Alverto. We hold that this argument is without merit.

Affirmed.

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.

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.