

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29234-7-III

Respondent,

)

)

) **Division Three**

v.

)

)

ANITA SUE WOLF,

) **UNPUBLISHED OPINION**

)

Appellant.

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)

Kulik, C.J. — Anita S. Wolf was convicted of second degree murder for shooting her fiancé. Ms. Wolf appeals, contending the trial court erred by admitting evidence of a prior incident where Ms. Wolf bumped her fiancé with a truck during an argument. Under ER 404(b), the court looks at the record as a whole to determine if the prejudicial effect of prior acts outweighs the probative value of the acts. The court did so here, prohibited introduction of some acts, but allowed one—the truck bumping. We conclude the court properly admitted this one act and, therefore, affirm the conviction.

FACTS

Ms. Wolf and Michael “Mike” White were engaged to be married. Ms. Wolf said she loved Mr. White and that he was the only man she trusted. Sometime between June 22 and June 25, 2009, Ms. Wolf shot Mr. White. Mr. White died of a gunshot wound to his chest.

The day after the shooting, Ms. Wolf called her cousin, Steven Smith, and asked him to come to her house. Upon entering, Mr. Smith saw Mr. White’s body. Ms. Wolf told Mr. Smith that she accidentally shot Mr. White after the two had been fighting. She also said that the door jammed when Mr. White was reentering the house. During reentry, there was some sort of struggle and the gun discharged, shooting Mr. White.

Ms. Wolf also told Jeff Roza that she accidentally shot Mr. White. She claimed that at the time of the shooting, she was standing in front of the house. She turned while Mr. White was closing the door. The muzzle of the gun hit the window pane in the door and discharged.

Ms. Wolf also gave an account of the situation to Mr. Roza’s mother, Charlotte Dehne. She told Ms. Dehne that she accidentally shot Mr. White while Mr. White was exiting the house and she was entering the house. Ms. Wolf also told Ms. Dehne that Mr.

White had been dead for four days and that she had not reported his death due to lack of cell phone reception. Ms. Wolf, Mr. Roza, and Ms. Dehne viewed the body at Ms. Wolf's house. Afterward, they returned to Ms. Dehne's home where Ms. Dehne's companion helped Ms. Wolf call 911.

Ms. Wolf was charged with one count of murder in the second degree, domestic violence, in violation of RCW 9A.32.050, RCW 10.99.020 and RCW 9.94A.125. Ms. Wolf contended that the shooting was an accident and that she lacked motive to kill Mr. White.

Before trial, Ms. Wolf filed a motion in limine requesting that the court prohibit the State from introducing any prior allegations of domestic violence. The court initially granted this motion.¹ However, upon reconsideration, the trial court decided that it would allow one incident involving Ms. Wolf and Mr. White that occurred two months before the shooting.

At trial, the State presented evidence that Mr. White died of a gunshot wound to the chest. His body was found inside the house, face up, with the lower half of his body blocking the door. There was no bullet hole or graze on the door or its glass window.

¹ This court was not provided a record of the hearing or the trial court's rulings regarding Ms. Wolf's motions in limine. The necessary facts were gathered from Ms. Wolf's motion and the trial court transcript.

There was no blood in the living room area except in the saturation area immediately under and next to the body.

A Washington State Patrol (WSP) forensic scientist testified that the deoxyribonucleic acid found on the weapon that killed Mr. White matched Ms. Wolf's profile. Another WSP forensic scientist testified that the only way the gun could have fired was if the trigger had been pulled.

Mr. White's sister, Elizabeth Porritt, testified to the prior incident of domestic violence between Ms. Wolf and Mr. White. A few months before the shooting, Ms. Porritt witnessed an argument that occurred between Mr. White and Ms. Wolf. During the argument, Mr. White walked in front of a pickup truck being driven by Ms. Wolf. He turned to the front of the truck and yelled at her to "shut her mouth bitch." Report of Proceedings (RP) at 636. Ms. Wolf accelerated and hit Mr. White with the truck. Mr. White was not hurt. Ms. Wolf then firmly told Mr. White not to scream at her and not to tell her to shut up.

Before deliberation, the trial court gave the jury a special verdict form. The special verdict form asked if Ms. Wolf was armed with a firearm at the time of the commission of the crime. The trial court instructed the jury not to use the special verdict form unless it found Ms. Wolf guilty. The trial court also gave the instruction that the

jury must reach a unanimous “no” decision in order to answer “no” on the special verdict form. RP at 756-57. The jury instructions mirrored those suggested in 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 630 (3d ed. 2008).

The jury found Ms. Wolf guilty of second degree murder. The jury answered “yes” to the use of a firearm question on the special verdict form. RP at 810. The trial court imposed a 232 month sentence. Ms. Wolf was also sentenced to community custody under RCW 9.94A.712, a statute used in sentencing sex offenders. Ms. Wolf appeals, assigning error to the admission of the prior act of uncharged domestic violence, the jury instruction for the special verdict form, and the imposition of community custody.

ANALYSIS

ER 404(b). We review a trial court’s rulings on a motion in limine or the admissibility of evidence for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). Evidentiary rulings “may be sustained on any proper basis within the record and will not be reversed simply because the trial court gave

a wrong or insufficient reason for its determination.” *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992).

As a threshold matter, “[w]hen an evidentiary ruling is pursuant to a motion in limine, . . . *the losing party* is deemed to have a standing objection and need not specifically object at trial to preserve the issue for appeal,” unless the trial court states that objections are needed at trial. *State v. Finch*, 137 Wn.2d 792, 819-20, 975 P.2d 967 (1999).

Here, through a motion in limine based partly on ER 404(b), Ms. Wolf requested that the trial court prohibit the State from introducing any evidence of domestic violence. The trial court initially granted this motion. Upon reconsideration, the trial court admitted one instance of uncharged domestic violence between Ms. Wolf and Mr. White because, under ER 404(b), the evidence could be used to show motive or state of mind. Because this evidentiary issue was brought in a motion in limine, and the trial court ultimately ruled against Ms. White and allowed the prior act of domestic violence to be admitted, the issue is preserved for appeal without Ms. White having to object at trial.

ER 404(b) prohibits the admission of other bad acts to prove a person acted in conformity with the bad acts on a particular occasion. However, prior bad acts may be admitted for other reasons, including proof of motive, intent, or the absence of mistake or

accident. ER 404(b).

When admitting evidence under ER 404(b), the trial court must identify the purpose for the evidence and determine whether the evidence is relevant. *Powell*, 126 Wn.2d at 258. Relevant evidence makes the existence of a consequential fact more or less probable. *Brown*, 132 Wn.2d at 571.

“Evidence of previous quarrels and ill feeling is admissible to show motive.” *State v. Hoyer*, 105 Wash. 160, 163, 177 P. 683 (1919). When domestic violence is involved, witness testimony establishing a hostile relationship can be presented in order to show the hostile relationship was a motive for murder. *Powell*, 126 Wn.2d at 260-61.

The trial court stated that the prior act of domestic violence between Ms. Wolf and Mr. White was allowed to address Ms. Wolf’s motive and state of mind. Ms. Wolf contended that she did not have a motive to kill Mr. White because he was the only man she loved and that he treated her right.

During the domestic violence incident, Mr. White yelled at Ms. Wolf using profane language. In turn, she hit him with a truck. This incident contradicts Ms. Wolf’s statements that Mr. White treated her well. The State contended that this incident showed that Mr. White and Ms. Wolf did not always have a loving relationship and that she intentionally killed Mr. White. For this reason, evidence of a tumultuous relationship

went directly to prove that Ms. Wolf had a motive and the intent to kill Mr. White.

Additionally, the evidence is relevant. The trial court allowed the evidence after determining that the testimony involved a domestic violence dispute specifically between Mr. White and Ms. Wolf. Additionally, the court considered the fact that the incident occurred two months before the shooting. This prior act between Ms. Wolf and Mr. White in a relatively close timeframe to the shooting is relevant to show Ms. Wolf's intent to harm Mr. White. The trial court did not abuse its discretion in admitting the incident of domestic violence under ER 404(b) to show motive and intent.

Prejudicial. Even if otherwise admissible for a valid purpose, the probative value of the evidence must outweigh its prejudicial effect. *Powell*, 126 Wn.2d at 264.

Prejudice exists when the evidence is likely to stimulate an emotional response rather than a rational decision. *Id.* Evidence admitted under ER 404(b) must be balanced by the court on the record. *Powell*, 126 Wn.2d at 264. The court record is examined as a whole to determine if the court weighed the overall prejudicial effect of all the evidence in its decision to admit the ER 404(b) evidence. *Powell*, 126 Wn.2d at 264.

In the record provided to this court, the trial court determined that the incident of domestic violence was relevant to prove motive, therefore, giving the incident probative value. The trial court did not specifically address whether this incident of domestic

violence was prejudicial. Nevertheless, when looking at the record as a whole, the court weighed the prejudicial effect of evidence of domestic violence in general. The court prohibited the State from introducing all other prior acts of domestic violence.

Additionally, the court severed charges for firearm violations from the murder charge because the State would be forced to introduce Ms. Wolf's previous conviction of domestic violence to prove the firearm violations. The court decided that the previous conviction of domestic violence would have a prejudicial effect on the murder charge. The court clearly weighed the body of evidence as a whole and determined that this one act should be admitted for its probative value. The prejudice does not outweigh the probative value.

Harmless Error. A nonconstitutional error is not reversible error unless there is a reasonable probability the outcome of the trial would have been materially different had the error not occurred. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Errors involving evidence under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

In addition to the one act of domestic violence, the State presented a body of evidence to show that Ms. Wolf intentionally killed Mr. White. The State presented

forensic evidence relating to the bullet holes and the position of Mr. White's body to show that the shooting could not have occurred in the manner alleged by Ms. Wolf. The State also presented evidence that Ms. Wolf gave conflicting accounts of the shooting during the week after the shooting. She told Ms. Dehne that Mr. White was exiting the residence; she told Mr. Smith that Mr. White was entering the residence. With reasonable probabilities, the one incident of domestic violence was not strong enough to change the opinion of the jury. Therefore, if any error occurred in admitting the domestic violence incident, the error was harmless.

The trial court did not abuse its discretion by allowing evidence of a prior incident of domestic violence under ER 404(b).

Special Verdict Question. On appeal, challenged jury instructions are reviewed de novo. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010).

RAP 2.5(a) states the general rule that an appellate court may refuse to review any error that was not raised in the trial court. However this court may address a manifest error affecting a constitutional right that is raised for the first time on appeal. RAP 2.5(a)(3).

Based on *Bashaw*, Ms. Wolf alleges the trial court erred in giving a jury instruction that required unanimity in order to answer "no" on a special verdict question.

Ms. Wolf maintains that this error can be raised for the first time on appeal because it presents a manifest error of constitutional magnitude. She specifically alleges that the error violates her right to a jury trial under article I, section 21 of the Washington Constitution. Additionally, Ms. Wolf contends that because *Bashaw* addressed the unanimity issue on appeal, even though no objection was made at trial, the error should be regarded as constitutional. *See State v. Bashaw*, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008), overruled by *Bashaw*, 169 Wn.2d 133. Additionally, the Supreme Court noted in *Bashaw* that an erroneous jury instruction could possibly affect a defendant's constitutional rights, such as due process of law. *Bashaw*, 169 Wn.2d at 146 n.7.

Ms. Wolf's contentions are in disagreement with this court's recent decision in *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011). In *Nunez*, this court determined that a unanimity instruction to a jury is not an issue of manifest constitutional magnitude. *Nunez*, 160 Wn. App. at 162-63; *but see State v. Ryan*, 160 Wn. App. 944, 948-49, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011). Therefore, the unanimity issue cannot be raised for the first time on appeal under RAP 2.5(a)(3). *Nunez*, 160 Wn. App. at 162-63.

Based on the decision in *Nunez*, Ms. Wolf's contention regarding the unanimity instruction is not a manifest constitutional error. It will not be reviewed on appeal.

Moreover, even if the unanimity jury instruction constitutes a constitutional error, the error is harmless. A constitutional error is harmless if, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The Supreme Court in *Bashaw* could not determine beyond a reasonable doubt that the jury instruction requiring unanimity for a “no” answer on a special verdict form was harmless. *Bashaw*, 169 Wn.2d at 148. Despite strong evidence that the jury would have still answered “yes” on the special verdict form, the court still refused to find the error harmless. *Id.* at 144, 147-48. The *Bashaw* court was concerned that requiring unanimity has a coercive effect on jurors with minority opinions. *Id.* at 147-48.

While the *Bashaw* court’s concerns are valid, they are not applicable here. Based on the undisputed facts in the case, the jury’s decision would not have been different even if the unanimity instruction was not given. The jury found Ms. Wolf guilty of second degree murder. The special verdict form asked if Ms. Wolf was armed with a firearm at the time of the commission of the crime. The State presented undisputed evidence that Mr. White died from a gunshot wound. Furthermore, Ms. Wolf admits to shooting Mr. White. Based on the facts, Ms. Wolf had to be in possession of a firearm in order to

shoot Mr. White. The jury's decision that Ms. Wolf was in possession of a firearm would not have changed. Any potential constitutional error is harmless beyond a reasonable doubt.

The trial court's jury instruction that unanimity was required to answer "no" on a special verdict form is not a manifest error affecting a constitutional right and will not be addressed on appeal. In any case, any error regarding the jury instruction is harmless.

Community Custody. Former RCW 9.94A.712 pertains to the sentencing of sex offenders (recodified as RCW 9.94A.507 by Laws of 2008, ch. 231, § 56, effective August 1, 2009). Ms. Wolf was not charged with a sex offense. The State concedes that the trial court erred in using RCW 9.94A.712 as authority when imposing a community custody term upon Ms. Wolf.

Former RCW 9.94A.712 does not apply to Ms. Wolf because she was not convicted of a sex offense. Instead, for a person who commits a serious violent offense, RCW 9.94A.701(1)(b) applies and imposes a three-year term of community custody in addition to the terms of the sentence. Ms. Wolf was convicted of a class A felony, a serious violent offense. RCW 9.94A.701(1)(b) provides the appropriate authority for the sentencing court when imposing community custody on Ms. Wolf.

““When a sentence has been imposed for which there is no authority in law, the

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trial court has the power and duty to correct the *erroneous* sentence.’” *State v. Palmer*, 73 Wn.2d 462, 475, 438 P.2d 876 (1968) (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled in part on other grounds by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973)). Ms. Wolf’s term of community custody should be vacated and the issue of community custody should be remanded to the trial court for sentencing under the correct statute.

We affirm Ms. Wolf’s conviction for second degree murder. We vacate the community custody provision of the judgment and sentence and remand the case for sentencing under RCW 9.94A.701(1)(b).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Kulik, C.J.

Korsmo, J.

Siddoway, J.