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SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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COA No. 361349 - III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT
OF THE STATE OF WASHINGTON

HARLAN DOUGLASS and MAXINE H. DOUGLASS,
Plaintiffs/Respondents

vs.

BRYAN J. REILLY
Defendant/Appellant/Petitioner

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Bryan J. Reilly ("Reilly"). Reilly is the Defendant in the Spokane County Superior Court, and Appellant in Division III Court of Appeals. Reilly's motion for mistrial was denied, despite counsel for the Plaintiffs/Respondents' direct violation of a motion in limine preventing any mention that Reilly was criminally charged for taking jewelry, watches, and gold bullion from Respondents' home, which were the basis of the conversion claims before the jury. There was an additional motion in limine preventing any mention that Reilly was not charged for taking money from the Defendant/Respondents' safe, which was the most substantial claim before the jury. At the time of trial, Reilly had never been convicted of any crime, and this substantial prejudice could not be overcome by Reilly. Reilly appealed the trial court's decision not to grant a mistrial, and the Division III upheld the trial court's decision.

Additionally, Reilly appealed the trial court's denial of the motion for directed verdict and motion to bifurcate unrelated claims. Despite no evidence, Reilly ever possessed the money taken from Respondents' safe, Division III affirmed the trial court's denial of the motion for directed verdict based on a newly raised issue by Division III at oral argument that Reilly's prior bad acts and common scheme was the evidence of

conversion of money from the safe. This newly raised issue, and confusion by the jury, trial court and Division III, is exactly why Reilly sought bifurcation of the unrelated conversion claims.

II. CITATION TO COURT OF APPEAL'S DECISION

Petitioner seeks review of *Harlan Douglass, et ux v. Bryan J. Reilly*, 36134-9-III, 2020 WL 3432978, June 23, 2020, hereafter "Decision."

III. ISSUES PRESENTED FOR REVIEW

1. Whether Respondents' direct violation of the motion in limine preventing any mention that Reilly was criminally charged with the same claims as the conversion claims prevented Reilly from having a fair trial.
2. Whether Division III raised a new issue not raised by the parties and affirmed the trial court's decisions to deny directed verdict and bifurcation of claims based on inadmissible prior bad acts.

IV. STATEMENT OF THE CASE

Relevant Procedural History

On December 22, 2017, Reilly filed a motion for summary judgment seeking to dismiss Respondents' claim for conversion by theft because Respondents could not prove Reilly ever possessed the money they alleged to have been taken from their safe. CP 1311-1425; 1628-1635. On February 2, 2018, the trial court denied Reilly's motion for

summary judgment. The trial court found that it was not necessary for the Respondents to prove Reilly possessed the property, but whether he interfered with the property. RP 37-41. On February 20, 2018, Reilly filed for reconsideration of the trial court's order denying motion for summary judgment. CP 1752-1798. On March 23, 2018, the trial court issued an order denying Reilly's motion for reconsideration.

On March 16, 2018, Reilly filed a motion to bifurcate the unrelated conversion claims. CP 1964-2043. Reilly argued that the conversion claim alleged to have occurred between 2:00 PM and 3:25 PM on September 25, 2015, should be bifurcated into a separate trial from the other conversion claims alleged to have occurred on 2013 and 2014, that were in no way related. CP 1964-2043. The trial court denied Reilly's motion to bifurcate the unrelated claims. CP 2044-2045.

On April 6, 2018, the trial court heard argument and considered the parties' motions in limine. RP 72-150. The trial court ruled the Respondents could not inform the jury of the six pending felonies Reilly had been charged with by Spokane Police related to the same property for which Respondents were seeking damages at trial in their second cause of action, and in turn Reilly could not inform the jury had had never been charged with a crime related to the money being taken from the Respondents safe, which was the subject of Respondents' first cause of

action. RP 83-85; RP 238-245; CP 645-660. On the first day of trial, Respondents counsel intentionally violated the motion in limine when he asked Reilly's mother on the witness stand whether she was aware Reilly had been charged with six felonies related to the property at issue in this trial. RP 238-245. Reilly moved the court for a mistrial as a result of the intentional violation of the motion in limine, and Reilly's motion for mistrial was denied. RP 238-245. The trial court instructed the jury to only consider the evidence, and that Mr. Hassing's statement was not evidence. RP 245. The trial court did not instruct the jury Mr. Hassing's statement regarding Reilly being charged with six felonies was untrue and did not allow Reilly to inform the jury he was not charged with taking the money from Respondents' safe. RP 245.

On April 30, 2018, at the close of the Respondents case, Reilly moved the trial court for a directed verdict on Respondents first cause of action; conversion by theft related to the allegation Reilly took money from their safe on September 25, 2015, between 2:00 PM and 3:25 PM. RP 1985-2023. Respondents failed to present any evidence in their case-in-chief that Reilly ever possessed the money alleged to have been taken from the safe, or that Reilly was even in their home on September 25, 2015, the date they allege the theft occurred. RP 1985-2023. Reilly argued that in order for a case to be based entirely on circumstantial

evidence without any direct evidence, the circumstantial evidence has to be tied together and related such that there is only one reasonable conclusion that can be drawn from the circumstantial evidence; otherwise the jury is allowed to speculate as to the result. RP 1986-1991. The trial court denied Reilly's direct verdict. RP 2019-2023.

The case went to the jury, and the jury returned a verdict in favor of the Respondents in the amount of \$800,281.00. CP 2437-2441. Reilly appealed, and Division III affirmed.

Statement of Facts

The Respondents allege that on September 25, 2015, between 2:00 PM and 3:25 PM, Reilly entered their home and took \$1,080,000 from their safe. CP 645-660. Respondents allege this amount of cash was kept in a large safe in the basement of their home. CP 645-660. Approximately one year prior to the alleged theft, on August 3, 2014, Jeroline Via and Harlan Douglass counted the money located in Respondents' safe. RP 1284. Ms. Via was Harlan Douglass's girlfriend, and August 3, 2014, it was Ms. Via's birthday. RP 1283. Ms. Via and Harlan Douglass counted approximately \$500,000 in cash before they became tired and decided to stop counting the money. RP 1270. A tally sheet created by Ms. Via and Harlan Douglass from the day they counted the money showed they had counted \$264,900 in cash. RP 1267-1269;

Ex. P-73. The money located in the safe was never counted again prior to the alleged theft on September 25, 2015. RP 1284. After counting the money on August 3, 2014, Harlan Douglass periodically took money out of the safe when he would go on trips. RP 1284.

Approximately one year later, on September 21, 2015, four days before the alleged theft, Ms. Via and Harlan Douglass locked the safe prior to leaving on a trip to Paris, France. RP 1285. On Friday, September 25, 2015, the day Respondents allege money was taken from their safe, Ms. Via and Harlan Douglass were out of the country in Paris, France. RP 1382. At 9:52 PM Matthew Dutton, the individual who worked as a security person for Harlan Douglass, arrived at the Respondents' property to conduct his normal patrol. RP 1314-1315. During this visit at 9:52 PM, Mr. Dutton observed an upstairs bedroom light on, as well as lights on in the basement and assumed Harlan Douglass was home, was awake, and did not notice anything to be amiss during his patrol, so he left and went about his business. RP 1326-1329; CP 474-476.

At 3:00 AM, on Saturday, September 26, 2015, Mr. Dutton returned for his second patrol of the Respondents' property. RP 1327; CP 474-476. During his second visit to the property, Mr. Dutton observed that the upstairs bedroom light was now off, the basement lights were still on, and upon closer examination a basement window was open with a

screen removed from the window. RP 1326-1329. The next day, Saturday, September 26, 2015, Mel Taylor, and Deanna Malcome, assistant for Harlan Douglass, entered the home and found the safe located in Respondents' basement to be open. RP 1559. Harley and Lisa Douglass arrived and stayed at the property waiting for the police to arrive, while Mr. Taylor and Ms. Malcome left the property. RP 1559-1563.

When the police arrived Ms. Douglass informed the police she believed \$200,000 in cash was taken from the safe. RP 1632. Ms. Douglass then reported to police that she believed \$250,000, \$400,000, \$750,000 and finally \$1,000,000 was taken from the safe. RP 404; 1632. Ms. Douglass admitted at trial that she increased the amount missing because she believed the police were not treating the theft very seriously. RP 1632-1634. Lisa Douglass had no personal knowledge of how much money was in the safe at the time of the alleged conversion. RP 1627-1628.

Lisa Douglass compiled a list of all the people who were actually at the Respondents' home on September 25, 2015. RP 1661-1664; Ex. D-230. On September 25, 2015, there were several people at Respondents' home, none of which were Reilly. RP 1662-1664; 1667. There were four individuals inside the home cleaning, there was an individual cleaning the

pool, there were multiple people from Mr. Douglass's company working on the property, and there were multiple painters. RP 1663. Based on Lisa Douglass's investigation and the list, she testified there was no evidence that Reilly was ever at the Respondents' home on September 25, 2015. RP 1667.

Detective Mark Newton of the Spokane County Police Department lead the investigation. RP 374-376. Based on his investigation, Detective Newton determined that the break-in occurred sometime between 9:52 PM on Friday, September 25, 2015, and 3:00 AM, Saturday, September 26, 2015. CP 81-128. This same conclusion was reached by Tanner Haynes, the investigator the Douglass family hired to look into the missing money from their safe. RP 1451. Detective Newton had no evidence whatsoever that the alleged theft occurred between 2:00 PM and 3:25 PM on September 25, 2015. RP 400-401.

On Monday, September 28, 2015, Harley and Lisa Douglass were searching Respondents property for money left behind from the safe, and Reilly discovered a garbage bag full of money. RP 383-384. The garbage bag full of money was found near a trail where Harley and Lisa Douglass had parked their vehicle. RP 908-911; Ex D-226. Reilly never touched the bag of money, and took pictures clearly showing various

denominations of money through the white garbage bag. RP 911-915;1673; Ex. D-227; D-228.

Before the police arrived at the scene, the money had been removed from the scene by Hayden Douglass. RP 1434. The police took fingerprints of the white garbage bag that contained the money when it was found by Reilly, and the only fingerprints in the bag were Lisa Douglass's fingerprints; Reilly's fingerprints were not on the bag. RP 400-401; 1673.

On Monday, September 28, 2015, the money taken to Harley and Lisa Douglass's home was counted by Harley, Lisa and Hayden Douglass and they arrived at \$417,406 as the total. RP 1789. At no time did the Spokane County Police ever see the recovered money, nor did they do anything to verify the amount alleged to have been recovered was accurate. RP 402-403. At no time, including through trial, had the Respondent Harlan Douglass seen the recovered money, counted the recovered money, verified what money was actually recovered, and has never had the money returned to his possession. RP 1407.

Because the Respondents' safe was undamaged upon investigation, Detective Newton concluded that the person who took the money from the Respondents' safe had to have the combination, or the safe had to have been left open. RP. 379. The only individuals that possessed the

combination to Respondents' safe were Jeri Via, Harlan Douglass, Lisa Douglass, and Harley Douglass. RP 1282. There was no evidence that Reilly ever possessed the combination to Respondents' safe. RP 385-386; 1294.

C. Division III Decision.

On June 23, 2020, Division III issued a decision upholding the trial court's decision to deny Reilly's request for a mistrial based on Respondent's counsel's direct violation of the motion in limine preventing any mention that Reilly was criminally charged for taking jewelry, gold bullion, and watches from Respondents' home. Division III agreed there was a violation of the motion in limine, but that there was no prejudice to Reilly because it was an isolated incident in a lengthy trial and because uncontested evidence was presented that Reilly could face criminal charges. The Decision ignores there was an additional motion in limine preventing Reilly from mentioning that he was not charged by police for taking the money from Respondents' safe. Respondent's violation of the motion in limine occurred at the very beginning of trial tainting the jury beyond recovery, and Reilly was not even allowed to level the playing field by informing the jury that he was not criminally charged with taking money from Respondents' safe. The trial court's failure to grant a mistrial, or at the very least, allow Reilly to inform the jury he was not

criminally charged with taking money from Respondent's safe prevented Reilly from receiving a fair trial.

Division III created its own justification for affirming the trial court's denial of Reilly's motion for directed verdict and denying Reilly motion to bifurcate. The Decision affirms the trial court's decisions based on Reilly's prior acts based on a common plane and motive. ER 404(b). This issue was never raised by any party to this case and was only raised during oral argument for the first time by Division III. Reilly moved Division III for the opportunity to provide briefing on the newly raised issue pursuant to RAP 12.1(b), but Reilly motion was denied.

Division III's use of prior bad acts under ER 404(b) violated the trial court's motion in limine preventing any mention Reilly was criminally charged for any of the alleged conversion claims asserted by the Respondents'. By affirming the trial court's decisions to deny the motion for directed verdict regarding conversion of money from the safe, and denial of Reilly's motion to bifurcate prior unrelated allegations from the main claim of conversion of money from Respondents' safe, Division III essentially condoned Respondents' violation of the motion in limine. At the time of trial, Reilly had never been convicted of any crime, yet pending criminal charges prevented by a motion in limine, which was violated by Respondents', ultimately became the basis for the Decision.

V. ARGUMENT

A. Standard of Review.

“The trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion.” State v. Thompson, 90 Wash. App. 41, 45, 950 P.2d 977 (1998). A mistrial is appropriate where the *“defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be tried fairly.”* Id. In determining whether a trial irregularity warrants a new trial, the Appellate Court considers, *“(1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction to disregard the remark, an instruction a jury is presumed to follow.”* State v. Escalona, 49 Wash. App. 251, 255, 742 P.2d 190 (1987).

A trial court’s ruling on a directed verdict is reviewed *de novo*. Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wash.2d 842, 848, 348 P.3d 389 (2015). *“A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.”* Chaney v. Providence Health Care, 176 Wash.2d 727, 731, 295 P.3d 728 (2013).

A trial court’s ruling regarding a motion to bifurcate is generally reviewed for abuse of discretion. State v. Roswell, 165 Wash.2d 186,

192, 196 P.3d 705 (2008). A trial court abuses its discretion if it makes a decision based on untenable ground or for untenable reasons. Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003).

B. Nothing Short of a New Trial Could Cure the Prejudice Suffered by Reilly as a Result of the Violation of the Motion in Limine.

In determining whether a trial irregularity warrants a new trial, the Appellate Court considers, “(1) *the seriousness of the irregularity*; (2) *whether the statement in question was cumulative of evidence properly admitted*; and (3) *whether the irregularity could have been cured by an instruction to disregard the remark, an instruction a jury is presumed to follow.*” Escalona, 49 Wash. App. at 254. In affirming the trial court’s decision to deny the motion for mistrial, Division III did not perform the about-stated analysis. Douglass v. Reilly, 2020 WL 3432978 * 4. Instead, Division III justified the trial court’s denial of the motion for mistrial because the violation was an isolated incident in a lengthy trial and evidence was presented Reilly could be criminally charged. Id.

The seriousness and irregularity of the Respondents’ direct violation of the motion in limine cannot be understated. By making the statement in the presence of the jury that Reilly had been charged with six felonies by Spokane County Police in relation to the property subject to Plaintiffs’ conversion claim, it made it clear to the jury that the authorities

had already investigated, considered the evidence and determined Reilly had wrongfully taken the property from Respondents' home. The trial court instructed the jury to consider the evidence, but did not instruct the jury Mr. Hassing's statement regarding Reilly being charged with six felonies was untrue, and did not allow Reilly to inform the jury he was not charged with taking the money from Respondents' safe. RP 245.

There was no finding by Division III that informing the jury Reilly had been charged with six felonies directly related to the conversion claims alleged was cumulative evidence. Douglass v. Reilly, 2020 WL 3432978 * 4. The Decision merely states there was other evidence presented suggesting Reilly could face criminal charges. Id. There was no other evidence that Reilly was charged with six felonies for taking property from Respondents' home, and any evidence Reilly could face criminal charges is not cumulative evidence. Further, the trial court did not provide a curative instruction, inform the jury the charges were untrue, or allow Reilly to provide evidence he was not charged with taking the money from Respondents' safe as the result of a police investigation. RP 245. The trial court merely instructed the jury to consider the evidence. RP 245.

Because there was no cumulative evidence or curative instruction by the trial court, the prejudice was substantial and the motion for mistrial

should have been granted. State v. Young, 129 Wash. App. 468, 479, 119 P.3d 870 (2005). In Escalona, the Appellate Court found the trial court abused its discretion by not granting a mistrial where a witness violated a motion in limine not to mention the defendant's stabbing, which was similar to the charge before the jury. Escalona, 49 Wash. App. at 256-257. The trial court struck the statement and instructed the jury to disregard the witness's statement. Id. at 253. In this matter, it was not a witness who inadvertently violated a motion in limine in response to question, but rather an intentional violation of the motion in limine by Respondents' counsel to prejudice the jury. The resulting prejudice is clear, and Reilly should have been granted a mistrial.

By intentionally violating the motion in limine, Reilly was not afforded a fair trial. The Decision fails to conduct the proper analysis and affirmed the trial court's denial of the motion for mistrial without finding the violation to be cumulative evidence and that a curative instruction was provided to cure the prejudice to Reilly. Therefore, the Supreme Court should accept review to cure the violation of Reilly's Constitutional right to a fair trial.

C. Prior Bad Acts and Common Scheme Evidence are Inadmissible and cannot be the Basis for Respondents' Conversion of Money from their Safe Claim.

In the Decision, because Respondents' failed to provide evidence that Reilly converted money from their safe, Division III affirmed the trial court's decision to deny the motion for directed verdict based on prior bad acts and common scheme evidence. Douglass v. Reilly, 2020 WL 3432978 * 3-4. First, the Decision is problematic because it literally basis its affirmation of the trial court's decision and support for the jury verdict on the very subject matter prohibited by the violated motion in limine preventing any mention of criminal charges. At the time of trial, Reilly has never been convicted of any crime, and to justify the verdict and trial court ruling based upon prior bad acts is clear error.

Pursuant to ER 404(b), 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.*" ER 404(b). To be admissible to show a common plan or scheme, evidence of prior acts must meet a four-part test:

the prior acts were (1) proved by a preponderance of the evidence, (2) offered for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial."

Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wash. App. 407, 167 P.3d 1193 (2007). The prior alleged conversions of property occurring in 2013 and 2014 were not offered to show a common plan or scheme. The prior alleged conversions were not

relevant to prove any element of conversion of money from the Respondents' safe alleged to have occurred in 2015. Allowing the prior conversions to proceed in the same trial was substantially more prejudicial than probative, as these are separate claims that each require their own burden of proof.

Further, there was an order in limine preventing Respondents from mentioning that Reilly had been criminally charged for the allegations relating to Respondents' property that occurred in 2013 and 2014. RP 72-150; 83-85; 238-245; CP 645-660. At the same time, Reilly could not mention that he was never charged with a crime related to the allegations related to the money taken from Respondents' safe in 2015. Id.

Respondents directly violated the trial court's order in limine preventing Respondents from mentioning the criminal charges, which caused Reilly irreparable prejudice. Much like Division III raised the issue of prior bad acts and common scheme to justify the verdict and trial court's decision, Respondents' violation of the trial court's order in limine allowed the jury to consider the prior allegations of conversion in connection with the allegation Reilly converted the money from Respondents' safe.

The motion in limine preventing any mention Reilly was charged with six felonies for the same conduct underlying Respondents' conversion claims was based on the ER 404(b) and ER 609 analysis and

case law. RP 83-85. Despite this being specifically excluded by the trial court in the motion in limine, Division III used the excluded evidence to justify the trial court's decision to deny directed verdict and justify the jury's verdict regarding Reilly's conversion of money from Respondents' safe. Douglass v. Reilly, 2020 WL 3432978 * 3-4.

The Decision clearly conflicts with ER 404(b), ER 609, and the trial court's ruling in limine preventing any mention of these prior alleged bad acts and common scheme. Therefore, the Supreme Court should accept review.

D. Bifurcating the Prior Claims Would have Cured All Prejudice, Confusion, and Afforded Reilly with a Fair Trial.

CR 42(b) grants a trial court wide latitude in determining whether to allow for separate trials in a particular case. Myers v. Boeing Co., 115 Wash. 2d 123, 140 (1990). The Myers court reasserted the policy that separate trials, or bifurcation, is not to be done liberally, but within the particular trial courts discretion. Id. at 140. In deciding whether to order separate trials, courts balance the savings in terms of expedition and economy against the possible inconvenience, delay, or prejudice to the parties. Brown v. Gen. Motors Corp., 67 Wash. 2d 278, 283 (1965). If a trial court is inclined to grant a motion to bifurcate, unless a party opposing the bifurcation can show prejudice there can be no abuse of

discretion. Slipper v. Briggs, 66 Wash. 2d 1, 3 (1964), adhered to, 401 P.2d 216 (Wash. 1965).

The Decision affirms the trial court's ruling to deny bifurcation and does so by concluding the prior bad acts and common scheme evidence had probative value for proof of all conversion claims. Douglass v. Reilly, 2020 WL 3432978 * 4. The Decision talks about the unrelated conversion claims being part of a common scheme, however no such evidence or argument of common scheme was presented at trial. Further, the trial court's order in limine prevented the type of prior bad acts and common scheme evidence Division III relies upon to affirm the decision of the trial court. Id.

Reilly showed substantial prejudice by allowing separate claims occurring over the course of multiple years from being tried as one matter. This prejudice was recognized by the Decision. Id. Evidence of a person's character is almost always inadmissible in civil cases, unless in the rare instances where the person's character is actually an element of the claim. See, Dickerson v. Chadwell, Inc., 62 Wash. App. 426, 432, 814 P.2d 687 (1991); 5 Wash. Prac., Evidence Law and Practice § 404.3 (6th Ed.). Reilly's character was not at issue at trial, the only issue at trial was whether Reilly converted Respondents' property. Character is not an

element of proving a conversion claim. Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wash.2d 601, 220 P.3d 1214 (2009).

Division III improperly used inadmissible character evidence that was excluded by the trial court as the basis to affirm the trial court's ruling, which is error. The Supreme Court should accept review because Division III's Decision is in direct conflict with ER 404(b), ER 609, and the order in limine in this case.

VI. CONCLUSION

Because Reilly's Constitutional Right to a fair trial was prejudiced and there is no admissible evidence supporting the conversion claim, Reilly asks the Supreme Court to accept review to cure these errors.

DATED this 23rd day of July, 2020.

ROBERTS | FREEBOURN, PLLC

s/ Chad Freebourn

CHAD FREEBOURN, WSBA #35624
Attorney for Petitioner Bryan Reilly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July, 2020, I caused to be served via the Court of Appeal filing system and via Email a true and correct copy of the foregoing document to the following:

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s/ Chad Freebourn

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FILED

JUL 23 2020

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DATE: 7/23/20
TO: Court of Appeals
FAX: 509-456-4288
RE: Petition for Review COA #361349

Please see attached documents: Petition for Review – Please note, the Court of Appeals Portal was down, and would not let me upload the documents

Should you have any questions, please feel free to contact our office.

Thank you,
Heather Nash, on behalf of Chad Freebourn

Total number of pages including this cover sheet: 26

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HARLAN D. DOUGLASS & MAXINE)	No. 36134-9-III
H. DOUGLASS, husband and wife,)	
)	
Respondents,)	
)	
v.)	UNPUBLISHED OPINION
)	
BRYAN J. REILLY, an individual, and)	
DOES 1-10,)	
)	
Appellant.)	

PENNELL, C.J. — Bryan Reilly appeals a jury verdict finding him liable for unlawfully converting property owned by his former employer, Harlan Douglass. We affirm.

FACTS¹

Harlan Douglass is a wealthy real estate developer who owned a home and acreage in Colbert, Washington. As a result of childhood experiences during the great depression,

¹ Given the nature of the claims raised on appeal, the following facts are presented in the light most favorable to the Douglasses, who prevailed at trial. *Strange v. Spokane County*, 171 Wn. App. 585, 592, 287 P.3d 710 (2012).

Mr. Douglass developed a mistrust of banks and had a habit of stashing away large sums of cash in shoeboxes, hidden inside the family home. The cash was primarily large-denomination bills. By 2014, Mr. Douglass had amassed four boxes full of cash. A tally of one of the boxes added up to \$264,900. Given the boxes all appeared similar in size and content, it was estimated the four boxes contained approximately \$1 million.²

In addition to the cash, Mr. Douglass kept other valuables in his home, including diamond rings, gold coins, and Rolex watches.

Bryan Reilly grew up near Mr. Douglass and his family socialized with the Douglasses. When Mr. Reilly entered his teenage years, he began performing odd jobs for the Douglasses and was paid through the family business. Mr. Reilly's tasks included retrieving mail, letting workers in for repairs, interacting with housekeepers, and generally protecting Mr. Douglass's house. Mr. Reilly was entrusted with a remote control letting him open the gate leading to Mr. Douglass's house and a garage door opener. Tax records for 2013 and 2014 indicate Mr. Reilly had an income of less than \$10,000 per year.

In 2013, Mr. Reilly began purloining money and absconding with other valuable items from the Douglass residence, then selling the items for cash. In March 2014, Mr.

² A second box was counted, but there was no written tally.

Reilly obtained two diamond rings, which he then sold for \$20,300.³ In December 2013, Mr. Reilly appropriated two Rolex watches, which were sold for \$9,300.⁴ Mr. Reilly's bank records indicate he deposited money from the sale of Mr. Douglass's valuables into his bank account and then used the funds in his account to secure loans and purchases of high-end vehicles and boats. Throughout 2013 and 2014, Mr. Reilly's illegal conduct went undetected.⁵

At some point in early 2015, Mr. Reilly arranged for a housekeeper to begin cleaning the Douglass home. During one of the cleaning sessions, the housekeeper stumbled upon Mr. Douglass's shoeboxes full of cash. The discovery made the housekeeper nervous. She immediately placed calls to Mr. Reilly and Mr. Douglass. Mr. Reilly was the first to respond. He advised he knew about the shoeboxes and he urged the housekeeper not to tell Mr. Douglass about her discovery. The housekeeper did not

³ At trial, Mr. Reilly claimed Mr. Douglass gave him one of the rings and he found the other one (the more expensive one) on the side of the road. This testimony was inconsistent with the testimony from the jeweler who purchased the two rings. The jeweler testified that Mr. Reilly claimed to have inherited the rings. The jury was entitled to reject as not credible Mr. Reilly's inconsistent statements about how he obtained the rings.

⁴ At trial, Mr. Reilly claimed Mr. Douglass gave him the two watches. He told the jeweler who purchased the watches that they had been inherited. The jury was free to reject Mr. Reilly's inconsistent statements as not credible.

⁵ In addition to the rings and watches, Mr. Reilly admitted to selling several of Mr. Douglass's gold coins. Mr. Reilly claims he had permission to make these sales.

comply. The housekeeper informed Mr. Douglass of what she had found and requested the money be secured in a safe.

After the housekeeper's discovery, the shoeboxes were moved to a safe deposit box. Meanwhile Mr. Douglass commissioned a custom safe for his valuables. Upon completion, the safe was placed in Mr. Douglass's basement. Mr. Douglass's son and daughter-in-law helped move the shoeboxes of money into the safe. Mr. Douglass had a difficult time with the safe's combination. The combination code was written on a sticky note and placed in a medicine cabinet. At some later point, it appears the sticky note with the combination was relocated to a kitchen counter top.

In September 2015, Mr. Douglass left town for a trip to Paris. During his absence, Mr. Reilly was tasked with facilitating the installation of a security system in the Douglass home. Once armed, the security system's use of different key fobs and pass codes would enable Mr. Douglass to track various authorized individuals who came and went from his home. Mr. Reilly received a fob as an authorized individual, as did members of Mr. Douglass's family. According to the alarm company, Mr. Douglass's alarm system was fully operable and set to go live on September 24, 2015.

The jury was free to find this claim not credible.

On September 24, 2015, Mr. Reilly contacted the housekeeper and asked her to perform a last-minute cleaning. Mr. Reilly told the housekeeper he would meet her at the house on September 25 to explain the new alarm system. Because of the scheduled house cleaning, Mr. Reilly did not activate the house alarm on September 24. However, Mr. Reilly did not show up on the 25th as planned. The housekeeper proceeded to clean the house and left around noon or 1:00 pm. The house was not armed when the housekeeper left.

Mr. Reilly left his parents' home at 2:00 pm on September 25. At approximately 5:02 p.m.,⁶ Mr. Reilly arrived at Hills Resort in Priest Lake, Idaho. A direct trip from Colbert to Hills Resort would typically last 1.5 hours. September 25 was a Friday. Mr. Reilly spent the weekend at Hills Resort.

On Saturday, September 26, Mr. Douglass's home was discovered to have been burglarized. The safe was open and the shoeboxes of cash were missing. A detective dispatched to the scene found the circumstances suspicious. There was no evidence of forced entry. A house window had been left open, but the placement of the window screen indicated the window had been opened from inside, not outside. The detective

⁶ Mr. Reilly presented the jury with evidence that he arrived at 4:02 p.m. The jury was not required to accept this information and was free to accept testimony from Mr. Douglass's forensic expert that the actual arrival time was 5:02 p.m.

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surmised the burglary was an inside job. According to the detective, the only potential insiders were Mr. Douglass's son, his daughter-in-law, the house cleaner, and Mr. Reilly. The detective's subsequent investigation ruled out all of the aforementioned insiders except for Mr. Reilly.

Mr. Reilly met with Mr. Douglass's son and daughter-in-law after he returned home from Hills Resort. The three decided to investigate the grounds surrounding Mr. Douglass's property to see if the intruder left any evidence. A search took place on Sunday, September 27, with no results. On Monday, September 28, Mr. Reilly went out to Mr. Douglass's property with his four-wheeler. He sent a text message to Mr. Douglass's daughter-in-law, advising he had spotted an unoccupied vehicle parked near the Douglass house. Mr. Reilly later called Mr. Douglass's daughter-in-law to report he found a shoebox lid bearing a note with a tally of funds. The lid clearly came from one of Mr. Douglass's cash boxes. The son and daughter-in-law soon arrived at the property to help investigate.

Once Mr. Douglass's son and daughter-in-law caught up with Mr. Reilly, the three began searching the area around where Mr. Reilly said he found the shoebox lid. Nothing was discovered. It was beginning to get dark. Mr. Douglass's son and daughter-in-law indicated they were going to leave, but Mr. Reilly said he wanted to check one more area.

Shortly thereafter, Mr. Reilly came back toward Mr. Douglass's son and daughter-in-law, yelling he had found something. He claimed he could see "50s and 100s." Report of Proceedings (RP) (Apr. 25, 2018) at 1595. Mr. Reilly then accompanied Mr. Douglass's son and daughter-in-law to the site of his alleged discovery.

At the discovery site, Mr. Douglass's son and daughter-in-law could see a white plastic bag, buried in pine needles. The bag looked like it might contain garbage. No money was visible. Mr. Reilly insisted they look inside the bag. Mr. Douglass's daughter-in-law poked into the bag and still saw nothing. Only after it was torn open was it possible to see the bag contained a large amount of money. According to a later tally, the money in the bag totaled \$357,252. Mr. Douglass's family surmised the money in the bag came from one of the stolen boxes. The remaining cash was never recovered.

PROCEDURE

Mr. Douglass sued Mr. Reilly for conversion by theft of the money from the safe. The complaint was later amended to include charges of conversion by theft of other property on numerous occasions from 2013 through 2015.

During the pretrial phase of the case, the trial court made two rulings pertinent to this appeal. First, the court denied Mr. Reilly's motion to bifurcate the multiple conversion claims. Second, the court granted Mr. Douglass's motion in limine to preclude

evidence that Mr. Reilly had not been criminally charged with theft. In granting the motion, the court noted it would also “probably” sustain an objection to any testimony that Mr. Reilly had been charged criminally, should such evidence be elicited at trial. RP (Apr. 6, 2018) at 85-86.

The trial proceedings lasted three weeks. During trial, Mr. Douglass’s attorney asked Mr. Reilly’s mother if she was aware Mr. Reilly had been charged with six felonies “associated with the theft of property from Harlan and Maxine Douglass.” RP (Apr. 17, 2018) at 238. Mr. Reilly immediately objected to this question and moved for a mistrial on the grounds that Mr. Douglass violated a previous court order on the motion in limine. The trial court sustained Mr. Reilly’s evidentiary objection but denied the mistrial motion.

At the close of Mr. Douglass’s case-in-chief, Mr. Reilly made a motion for a directed verdict as to the theft from the safe, arguing insufficient evidence. The trial court denied the motion.

The jury returned a verdict in favor of Mr. Douglass. In regard to the theft from the safe, the jury found Mr. Reilly had converted cash in the amount of \$605,148.

Mr. Reilly timely appeals.

ANALYSIS

Sufficiency of the evidence

Mr. Reilly contends the trial court erroneously denied his motion for a directed verdict under CR 50(a)(1) because Mr. Douglass failed to produce sufficient evidence that he converted money from Mr. Douglass's safe. Reviewing the record de novo, *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015), we disagree.

To establish conversion, a plaintiff must prove, by preponderance of the evidence, that the defendant: (1) willfully interfered with chattel, (2) the interference was without lawful justification, (3) the plaintiff was entitled to the chattel, and (4) the plaintiff was deprived possession of the chattel due to the interference. *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195, 713 P.2d 1109 (1985). In short, "conversion means to take and keep another's property." *Repin v. State*, 198 Wn. App. 243, 270, 392 P.3d 1174 (2017). Money, just like any other piece of property, can be the subject of a conversion action so long as it is capable of identification. *Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 852, 138 P.3d 638 (2006). Circumstantial evidence can support a claim of conversion, so

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long as inferences from the circumstantial evidence are reasonable. *See Arnold v. Sanstol*, 43 Wn.2d 94, 99, 260 P.2d 327 (1953).

From the evidence at trial, it was entirely reasonable to conclude Mr. Reilly was the person responsible for taking Mr. Douglass's cash-filled shoeboxes. Mr. Reilly had an ongoing practice of stealing from Mr. Douglass, he had unmonitored access to the shoeboxes at the time of the theft, and he exhibited suspicious knowledge about where to recover a portion of the stolen cash after the theft was complete.

In addition to its liability determination, the jury's loss calculation was justified by competent, nonspeculative evidence. A fair inference from the trial evidence was that the shoeboxes contained at least \$1 million in cash. Of that sum, \$357,252 was recovered. Subtracting the recovered funds from the original total, the jury's award of \$605,148 was a conservative loss estimate. Given the manner in which Mr. Douglass had stored his money, mathematical precision was not required. *Kwik-Lok Corp. v. Pulse*, 41 Wn. App. 142, 150, 702 P.2d 1226 (1985). The jury's assessment must stand.

Motion to bifurcate

The trial court did not abuse its discretion in denying Mr. Reilly's motion to bifurcate the 2015 conversion claim (pertaining to the shoeboxes) from the other conversion claims. The earlier thefts were prior acts relevant to proving the 2015 theft

based on a common plan and motive. ER 404(b). Mr. Reilly complains that evidence of the pre-2015 acts of conversion was prejudicial. True enough. But the prejudice arises from the strong probative value of the pre-2015 acts, not any improper character implications. Because the prior acts were highly relevant to proving the theft of the 2015 conversion claim, joinder was proper. CR 42.⁷

Violation of motion in limine and request for mistrial

Although we agree with Mr. Reilly that Mr. Douglass's attorney improperly questioned Mr. Reilly's mother about the existence of criminal charges, the trial court did not abuse its discretion in denying the mistrial motion. Regardless of whether counsel's question violated an in limine order, the propriety of a new trial turned on the question of prejudice. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 540, 998 P.2d 856 (2000). Here, there was none. Counsel's improper question was an isolated incident in a lengthy trial. Mr. Reilly's objection was sustained and the subject was not explored further. There was uncontested trial evidence suggesting Mr. Reilly could face criminal charges, including testimony from the lead detective that Mr. Reilly was the only suspect who had not been ruled out as a possible perpetrator. Given the totality of these

⁷ Prior act evidence is substantive evidence, not impeachment evidence. ER 609 is inapplicable.


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circumstances, the lone impropriety attributed to Mr. Douglass's counsel did not deprive Mr. Reilly of a fair trial. We will therefore respect the jury's verdict.

CONCLUSION

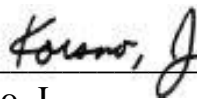
The judgment is affirmed. Mr. Reilly's request for attorney fees is denied.

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.



Pennell, C.J.

WE CONCUR:



Korsmo, J.



Fearing, J.

Renee S. Townsley
Clerk/Administrator

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June 23, 2020

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CASE # 361349
Harlan D. Douglass, et ux v. Bryan J. Reilly
SPOKANE COUNTY SUPERIOR COURT No. 162001968

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:sh

Enclosure

c: **E-mail** Honorable John O. Cooney