NO. 316980

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEE SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00028-0

BRIEF OF RESPONDENT

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2. Whether substantial evidence supported Mr. Smith's conviction for possession of a stolen firearm.

3. Whether the trial court properly exercised its discretion when it admitted evidence of other bad acts when the bad acts evidence was inextricably intertwined with the crime charged, was res gestae evidence, and admission of evidence that Mr. Loyd sold drugs for Mr. Smith was harmless error.

B. STATEMENT OF THE CASE

Appellant Steven Lee Smith (Mr. Smith) appeals his conviction of Possession of a Stolen Firearm, RCW 9A.56.310.

The state accepts and adopts the procedural and substantive facts recited in the Brief of Appellant, and supplements that statement.

On January 2, 2013, Lt. Reggie Bartkowski Bartkowski (Lt. Bartkowski) of the Goldendale Police Department took a telephone report of a stolen High Point model 995 rifle (High Point 9-mm). RP 180. The High-Point 9-mm is a semi-automatic weapon. RP 236. The firearm had been stolen December 24, 2012 from a vehicle parked in Goldendale behind the bowling alley. RP 180. The owner did not know the serial number and Lt. Bartkowski was unable to get the serial number from the gun shop from which it had been purchased. RP 182. However, Lt.

Bartkowski got the "best" description of the stolen gun from the owner and entered it into the computer system. RP 182.

Appellant Steven Lee Smith (Mr. Smith) was arrested at his residence on February 5, 2013 following execution of a search warrant. RP 184–86. Klickitat County Sheriff's Detective Mike Kallio (Det. Kallio) had learned of the stolen firearm report during a discussion with Goldendale police officers right before executing the search warrant on Mr. Smith's residence. RP 195. Immediately following his arrest, while still at his residence, Mr. Smith revealed that there were six firearms in his house and described the firearms and their location. RP 187–89. Mr. Smith also revealed that a High Point 9-mm rifle was hidden in the back of his Durango. RP 189. Det. Kallio obtained a second search warrant for the Durango. RP 189. A High Point 9-mm rifle was recovered from a hidden compartment in the Durango. RP 234. That was the only firearm located outside of Mr. Smith's residence. RP 214–32. The Goldendale Police Department closed its case file on the stolen High Point 9-mm on February 7, 2013, two days after Mr. Smith's arrest. RP 182.

On February 6, Mr. Smith gave a recorded statement to Det. Kallio. RP 20, 192. A transcript was made of the recorded interview. RP 20. Detective Kallio referred to a transcript of that statement during his trial testimony, telling the jury what Mr. Smith had revealed about the High Point 9-mm. Det. Kallio told the jury that Mr. Smith had gotten the

High Point "from right here in [Goldendale]". RP 192. "Mark", later identified as Mark Qualls, RP 194[1] had called Mr. Smith to ask if he were interested in a 9-mm. RP 192 Mr. Smith responded that he would come into town and "check it out." RP 192 - 93. Mark did not have the firearm in his possession when Mr. Smith arrived. RP 193. Mark called "Harley", (later identified as Harley Huff RP 199). Both Mr. Qualls and Mr. Huff were known to Det. Kallio. RP 199. Mr. Huff asked Mr. Smith if he were interested in a 9-mm rifle. RP 193. Mr. Smith told Detective Kallio he thought that was odd, but then realized that both men were talking about the same firearm. RP 193. Mr. Smith left to pick up Mr. Huff and brought him and the firearm back to Mr. Qualls's location. RP 193. Mr. Smith then made the deal with Mr. Qualls but Mr. Huff possessed the firearm and was "right there" during the transaction. RP 193. A third person, "John", was also present but not directly involved. RP 194. Mr. Smith bought the firearm for $50 cash and 4 grams of methamphetamine. RP 195. Mr. Qualls, Mr. Huff, and John divided the cash and methamphetamine among themselves. RP 195.

Klickitat County Range/Timber Deputy Robert L. Songer (Dep. Songer) testified that, in the past thirteen years both as a Klickitat County Range/Timber Deputy and as a gun enthusiast, he has come into contact

[1] "Mark" is later identified in the transcript as Mark "Faltz". This is a mistranscription. The gentleman was identified as Mark Qualls, but the audio is not clear.

with a lot of firearms and people with firearms. RP 237. He was familiar with the High Point 9-mm but had never before seen one outside of a gun shop or gun show. RP 238–39.

Charles Loyd, a convicted felon who had known Mr. Smith since 2005, RP 246, testified that Mr. Smith told him in November 2012 that he was in debt to someone for approximately $2,400 and could pay off the debt with a "substantial amount of guns". RP 253. He was trying to obtain somewhere between 1,000 and 2,000 firearms. RP 253. Mr. Smith asked Mr. Loyd to help him, which Mr. Loyd did. RP 253.

Mr. Loyd told the jury that he had seventeen felony convictions, RP 260, and that he was testifying in exchange for favorable treatment from the State. RP 248–50.

Mr. Loyd testified that he and Mr. Smith "always" had stolen firearms. RP 255. He testified that everybody from whom they acquired guns "pretty much stole" them. RP 255. Mr. Loyd testified that he and Mr. Smith had purchased firearms in the past from Harley Huff and that, to the best of his knowledge, those firearms had been stolen. RP 255. Mr. Loyd testified that he knew that Mr. Huff could not legally possess firearms. RP 256. Mr. Loyd testified that between mid-November 2012 and February 5, 2013, some of the guns he and Mr. Smith acquired had been transferred to Mr. Smith's creditor. RP 256. Mr. Loyd had learned this from Mr. Smith but had not been present during the transfer. RP 256.

Mr. Loyd testified that he and Mr. Smith were riding around together in Mr. Smith's Durango in the early morning hours of February 4, 2013, the day before they were arrested. RP. 264. The High Point 9-mm was in the Durango. RP 264. Mr. Loyd saw Mr. Smith put the firearm in the hidden compartment from which it was seized on February 5th. Mr. Loyd told Mr. Smith he was upset that they were riding around "dirty". RP 254. He explained to the jury that "dirty" meant they "were riding around with stolen guns and stuff, and things that [they] weren't supposed to have." RP 254. Mr. Loyd testified that he and Mr. Smith used the word "dirty" to refer stolen property. RP 259, 263. He testified that they hardly ever used the word "stolen". RP 263. In the February 4 conversation, Mr. Loyd was specifically referring to guns in the Durango, including the High Point 9-mm. RP 256–58. Mr. Smith's response had been tell Mr. Loyd not to worry because the vehicle was licensed and insured and there was no probable cause to search it, even if they were stopped. RP 258. Mr. Loyd was not reassured and asked that, if apprehended, Mr. Smith take evasive action sufficient to allow Mr. Loyd to exit the vehicle and flee. RP 258.

During closing argument, the State told the jury that they did not have to believe beyond a reasonable doubt that the recovered High Point 9-mm was the firearm reported stolen Christmas Eve. RP 308. The State told the jury that although there was substantial circumstantial evidence that this was the same gun, all that the State had to prove was that the

High Point 9-mm in evidence was a stolen firearm and that Mr. Smith knew it was stolen. RP 309-10. The State also reminded the jury that they were to focus their inquiry only on the High Point 9-mm and were not to consider whether the other six firearms were stolen. RP 312.

Two days before trial, the State filed a limine motion seeking admission of the following evidence:

1. That the defendant was attempting to fill a "purchase order" for a large quantity of guns from someone to whom he owed a substantial sum of money and that he was having difficulty paying the debt;

2. That the defendant acquired the gun alleged to be stolen in Count 8 from two individuals to whom he paid $50 and 4 grams of methamphetamine;

3. That the defendant knew that all of guns the defendant had purchased in the past from at least one of these individuals had been stolen; and

4. That one or two days before execution of the search warrant, the defendant was in a vehicle with witness Mr. Loyd, "armed to the teeth" and that the defendant and Loyd had a discussion concerning the fact that all of the guns in the vehicle, one of which is the gun at issue in Count 8, were stolen.

During opening, the State told the jury that Mr. Loyd "dealt drugs for Mr. Smith, drugs provided by Mr. Smith." RP 172. Defense counsel, outside the presence of the jury, objected that the testimony was unduly prejudicial and outside the scope of the limine ruling, which had authorized testimony from Mr. Loyd concerning his general relationship with Mr. Smith. RP 204. The State responded that Mr. Smith had already

admitted trading drugs for the High Point 9-mm and that Mr. Loyd's credibility was at issue, especially in light of his extensive felony history. RP 205. The State argued that the jury had every right to know the the nature of the relationship between the two men and that it was "perfectly appropriate to look – not in great detail – about the nature of the relationship[.]" RP 205. The court then overruled the objection without comment. RP 205.

Mr. Loyd testified that he had started selling drugs for Mr. Smith shortly before Thanksgiving. RP 250. His later statement, that Mr. Smith "was in debt with his drug dealer", was objected to and stricken. RP 253.

C. ARGUMENT

1. The High Point 9-mm Was Properly Admitted Into Evidence Without Objection and the State Was Not Required to Prove that the Firearm in the Courtroom was the Firearm Stolen Christmas Eve.

The High Point 9-mm was properly admitted into evidence as Exhibit 33 after being offered without objection. "Without an objection, an evidentiary issue is not preserved for appeal." *State v. Davis*, 141 Wn.2d 798, 849, 10 P.3d 977 (2000) (citing *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995)); ER 103(a)(1). Regardless of whether there had been an objection, the firearm would have been admitted because it was relevant and necessary to prove both Count 7, Unlawful Possession of a Firearm in the First Degree and Count 8, Possession of a

Stolen Firearm

To convict for the crime of the knowing possession of a stolen firearm, the State need not allege or prove who owned the property. *State v. Haddock*, 141 Wn.2d 103, 116, 3 P.3d 733 (2000) (Madsen, J., concurring). The State need only allege and prove that the firearm at issue was stolen. *Id.* Here, the State was not required to prove that the High Point rifle in the courtroom was the High Point rifle stolen Christmas Eve, a point the State impressed upon the jury during closing argument.

2. Substantial Evidence Supported Mr. Smith's Conviction for Possession of a Stolen Firearm.

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977)). Direct evidence and circumstantial evidence are equally reliable. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *Salinas,* 119 Wn.2d at 201 (citing *State v. Green,* 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980)). "A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff,* 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The High Point 9-mm rifle in the courtroom was recovered approximately six weeks after another High Point of the same make and model was stolen from a vehicle in Goldendale. Although not formally included in the trial evidence, each juror had driven through Goldendale to get to the courthouse and was aware that Goldendale is a very small town.[2] Mr. Smith told Det. Kallio that he had gotten the rifle "right here" in Goldendale. He had gotten it from people who lived in Goldendale. In Dep. Songers's thirteen years as a Klickitat County Range/Timber Deputy, and as a gun enthusiast, he had never seen a High Point 9-mm rifle outside a gun shop or gun show. Although the Goldendale Police Department did not have a serial number for the gun reported stolen, their case was closed on February 7, 2013, two days after the firearm in evidence was seized from Mr. Smith's Durango. From this evidence, the jurors could reasonably infer that the High Point 9-mm is not a firearm commonly found in Goldendale, that the firearm in evidence had come from Goldendale and that the Goldendale Police Department had concluded that the recovered rifle was the rifle that had been reported stolen.

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[2] Goldendale's 2012 population is estimated to be approximately 3,500 people.

The jury also heard that the High Point 9-mm was not found with the other six guns recovered from Mr. Smith's residence. It was hidden in the back of his Durango. From this, the jury could reasonably infer that there was something that set this particular firearm apart.

The jury learned that Mr. Smith had been acquiring guns in order to pay a debt. Mr. Qualls called to ask Mr. Smith if he were interested in a 9-mm rifle. Mr. Qualls and Mr. Huff were paid in cash and methamphetamine. From this, the jury could reasonably infer that Mr. Smith's interest in acquiring firearms was known to certain members of the local community, people who, in turn, were willing to exchange a firearm for drugs.

When Mr. Smith met Mr. Qualls in Goldendale he learned that Mr. Huff, not Mr. Qualls, actually possessed the proffered firearm. Mr. Huff could not legally possess firearms. Mr. Huff was not with Mr. Qualls. Mr. Smith picked up Mr. Huff and returned to Mr. Qualls's location with Mr. Huff and the firearm. Mr. Smith had purchased stolen firearms from Mr. Huff in the past. Although Mr. Huff had possession of the firearm, Mr. Smith conducted the transaction with Mr. Qualls. Mr. Smith bought the High Point 9-mm semi-automatic rifle, a relatively uncommon weapon in this area, with $50 and 4 grams of methamphetamine. Another man was present, and although he did not participate in the transaction, the money and the drugs were divided among the three men. From these facts, the

jurors could reasonably infer that neither Mr. Huff nor Mr. Qualls were the legal owners of the firearm nor was it likely to have belonged to the third man. The relatively low purchase price, with proceeds divided among three non-owners, creates a strong inference that the firearm had been stolen. The jurors could also reasonably infer from these circumstances that Mr. Smith either knew, or reasonably should have known, that he had acquired a stolen firearm. See, e.g. *State v. McPhee,* 156 Wn.App. 44, 62, 230 P.3d 284, *review denied,* 169 Wn.2d 1028, 241 P.3d 413 (2010) (purchase of four guns, field binoculars and tusks for $100 could lead to reasonable inference defendant suspected items stolen).

Mr. Loyd and Mr. Smith commonly possessed stolen firearms. Everybody from whom they acquired firearms "pretty much stole them." The jury learned that between mid-November 2012 and February 5, 2013, some of the guns Mr. Loyd and Mr. Smith acquired were transferred to Mr. Smith's creditor. The High Point 9-mm was in Mr. Smith's Durango the day before he was arrested, when he was driving around with Mr. Loyd. The jury heard that Mr. Loyd and Mr. Smith used the word "dirty" to refer to stolen propery. Mr. Loyd, a 17-time convicted felon, told Mr. Smith he was nervous about "driving around dirty". Mr. Smith responded only that law enforcement did not have probable cause to search the Durango. Mr. Smith did not challenge or refute Mr. Loyd's assertion that the High Point 9-mm was stolen or that they were "driving around dirty".

From this, especially in light of all of the other evidence, the jury could reasonably infer that the High Point 9-mm was, indeed, stolen and that Mr. Smith knew it was stolen.

A jury verdict will not be overturned unless it is clear that there is no substantial evidence to support it. *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303, 306 (1992) *abrogated on other grounds by State v. Trujillo*, 75 Wn.App. 913, 883 P.2d 329 (1994) (citing *Lamborn v. Phillips Pac. Chem. Co.,* 89 Wn.2d 701, 709, 575 P.2d 215 (1978)). Substantial evidence is evidence that 'would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.'' *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972)).The reviewing court does not need to be convinced of the defendant's guilt beyond a reasonable doubt in order to determine that the necessary quantum of proof exists. *Galisia*, 63 Wn.App. at 838. The verdict will be upheld if there was substantial evidence to support the State's case. *Id.* (citing *State v. McKeown,* 23 Wn.App. 582, 588, 596 P.2d 1100 (1979)).

Considering all the reasonable inferences in favor of the verdict, the State's evidence was sufficient for a rational jury to find beyond a reasonable doubt that the High Point 9-mm recovered from Mr. Smith's Durango was a stolen firearm and that Mr. Smith knew it was stolen. Mr. Smith's conviction for knowingly possessing a stolen firearm should be affirmed.

3. The Court Properly Exercised Its Discretion When Admitting Evidence of Other Bad Acts When the Bad Acts Evidence was Inextricably Intertwined with the Crime Charged, was Res Gestae Evidence, and Admission of Evidence that Mr. Loyd Sold Drugs for Mr. Smith was Harmless Error.

The trial court granted State's Motion in Limine to admit evidence that Mr. Smith needed to pay off a debt with a large quantity of firearms, that he bought the allegedly stolen High Point 9-mm from two men for $50 and 4 grams of methamphetamine, that the he previously had purchased stolen guns from one of these men, and that he and Mr. Loyd discussed "driving around dirty" with stolen firearms within one or two days of Mr. Smith's arrest.

At trial, over Mr. Smith's objection, the court admitted limited testimony that Mr. Loyd sold drugs for Mr. Smith after the State argued that the basic nature of the relationship between the two men was necessary to establish context and to determine credibility in light of Mr. Loyd's extensive felony history.

Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. *State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "Before exercising its discretion to admit evidence of prior bad acts, 'the trial court should weigh the necessity for its

admission against the prejudice that it may engender in the minds of the jury.' " *State v. Gogolin*, 45 Wn.App. 640, 645, 727 P.2d 683, 686-87 (1986) (quoting *State v. Tharp,* 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). " 'The principal reason advanced for putting the balancing process on the record is that a reviewing court needs it in order to decide whether the probative value of the evidence outweighed its prejudicial effect.' " *Id.* (citing *State v. Jackson,* 102 Wn.2d 689, 694, 689 P.2d 76 (1984)).

In *Gogolin*, the trial court failed to balance on the record probative value against prejudicial effect before admitting evidence of prior bad acts. Noting that evidentiary errors under ER 404(b) are not of constitutional magnitude, the Court of Appeals held the lack of balalancing to be harmless error. *Gogolin*, Wn.App. at 645.

> [W]here, from the record as a whole, the reviewing court can decide issues of admissibility without the aid of an articulated balancing process on the record, the court should do so. In such cases, the trial court's failure to state the reasons for its ruling on the record becomes harmless error because it does not affect the admissibility of the evidence in question or impede effective appellate review of the trial court's decision. To send a case back for a retrial under such circumstances would be pointless.

Id. (citing *Tharp,* 96 Wash. at 600).

Here as well, the trial court's failure to articulate its balancing is harmless error. The record amply allows this Court to determine that the admitted evidence was relevant and probative. The issue for the jury was whether the High Point 9-mm was a stolen firearm, and, if so, whether Mr.

Smith knew it was stolen. First, the evidence concerning Mr. Smith's need to acquire guns and the circumstances surrounding the purchase of the High Point 9-mm was inextricably intertwined with the crime charged. "When evidence of the 'other acts' and the evidence of the crime charged are inextricably intertwined, such evidence is direct evidence and should not be treated as 'other crimes' evidence." *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1327 (9th Cir. 1992). "The direct evidence is used to flesh out the circumstances surrounding the crime with which the defendant has been charged, thereby allowing the jury to make sense of the testimony in its proper context." *Id.*

Inextricably entwined evidence is not analyzed fall under ER 404(b). *State v. Niblack*, 74 Wn.2d 200, 443 P.2d 809 (1968). Evidence of the defendant's misconduct may be admitted in when the other criminal acts "are an inseparable part of the whole deed." *Id.* at 206 (citing *State v. Priest*, 132 Wn. 580, 232 Pac. 353 (1925); *State v. Conroy*, 82 Wn. 417, 144 Pac. 538 (1914); *State v. McDowell*, 61 Wn. 398, 112 Pac. 521 (1911); 1 J. Wigmore, Evidence § 218 (3d ed. 1940); 29 Am. Jur. 2d *Evidence* § 321 (1967)).

In *Niblack,* the trial court admitted testimony from a witness who had been given a ride by the defendants in the truck the defendants were alleged to have stolen. *Id.* at 204. The witness testified, among other things, that he and the defendants drank wine as they drove, that the truck

was driven at high speed, that the defendants had later assaulted two old men in the "drunk tank", and that he was afraid of the defendants. *Id.* The *Niblack* Court noted that all of the evidence at issue "concerned the circumstances of the crime charged and was admissible under the rule allowing such evidence when it is an inseparable part of the whole deed." *Id.* at 207.

> Such evidence is not open to the objections which justify exclusion of other unrelated crimes. It does not raise the possibility that the jury will condemn the defendant, although he is innocent of the act charged, because it is prejudiced by his former crimes; and the defendant cannot claim surprise, because the misconduct is an integral part of the crime charged.

Id. at 206. The evidence that Mr. Smith needed to obtain firearms to pay a creditor and that he purchased the High Point 9-mm for $50 and 4 grams of methamphetamine from someone from whom he had purchased stolen guns in the past concerned the circumstances of the crime charged are inseparable parts of the whole deed. Thus, these acts do not require an ER 404(b) analysis and are exempt from the balancing requirement.

The evidence was also properly admitted under the "res gestae" or "same transaction" exception to ER 404(b). Res gestae supports admission of evidence offered to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *Tharp*, 27 Wn.App. at 204. "[E]vidence of criminal acts which are inseparable parts

of the whole deed is admissible." *Id.* (citing *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971)).

> The jury [is] entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

Id. (quoting *State v. King,* 111 Kan. 140, 145, 206 P. 883, 885 (1922)). The circumstances under which Mr. Smith acquired the High Point 9-mm are relevant and probative. Had Mr. Smith purchased the firearm with cash from someone unknown to him, such evidence would be admissible. The jury had a right to know that drugs were included in the transaction and that the transaction was with someone from whom Mr. Smith had previously purchased stolen guns. The evidence is prejudicial because the particular circumstances of the transaction are substantial evidence that the defendant knew he was acquiring a stolen firearm. The evidence is not, however, unfairly prejudicial. ER 404(b) protects only against "unfair prejudice", prejudice more likely to arouse an emotional response than a rational decision by the jury. *State v. Gould,* 58 Wn.App. 175, 183, 791 P.2d 569 (1990). Evidence must be balanced in context, bearing in mind fairness to both the defendant and the State. *State v. Bernson,* 40 Wn.App. 729, 736, 700 P.2d 758, *review denied,* 104 Wn.2d 1016 (1985).

The trial court, while not specifically referring to the res gestae exception, correctly articulated that Mr. Smith's attempts to fill a large purchase order "goes directly [to] and has a nexus with the state's theory of the case". RP 72. The trial court also found that the facts of the acquisition of the gun went "to the defendant's knowledge and the possible inference by the jury that in fact he knew [the gun] was stolen." RP 72. Likewise, the fact that Mr. Smith failed to contradict Mr. Loyd's assertion that they were "driving around dirty" is admissible to show knowledge and absence of accident or mistake. Although the trial court did not engage in detailed discussion supporting its conclusion that this was "more probative than prejudicial, and a proper usage of [ER] 404(b)", the court had recognized that the conversation, like the circumstances of acquisition, went to the heart of the State's case. "The true test of admissibility is that the evidence of other criminal offenses must be relevant and necessary to prove *an essential ingredient* of the crime charged." *State v. Dinges*, 48 Wn.2d 152, 154, 292 P.2d 391 (1956) (emphasis in original).

The fact that Mr. Loyd sold drugs for Mr. Smith was not necessary to prove an essential ingredient of the crime of charged. It was, however, relevant to context and necessary for the jury's assessment of Mr. Loyd's credibility. Nevertheless, if this Court concludes that the trial court erred, any error was harmless. The jury heard substantial evidence to support its

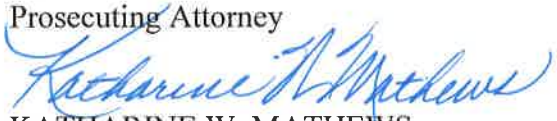
reasonable conclusion that the High Point 9-mm was stolen and that Mr. Smith was aware that it was stolen. The record as a whole makes it clear that even without the fact of drug dealing, the remaining evidence was sufficient to convict Mr. Smith of knowingly possessing a stolen firearm. ER 404(b) rulings do not constitute constitutional error and are not prejudicial unless, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Tharp*, 96 Wn.2d. at 599 (citing *State v. Cunningham*, 92 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Given the circumstances under which Mr. Smith purchased the firearm, the jury was unlikely to have been emotionally aroused by the fact that Mr. Loyd sold drugs for him. It is not reasonably probable that this evidence could have affected the outcome of trial.

D. CONCLUSION

Mr. Smith's conviction for knowingly possessing a stolen firearm should be affirmed.

Respectfully submitted this 4th day of February, 2014.

LORI LYNN HOCTOR
Prosecuting Attorney



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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON Respondent, vs. STEVEN LEE SMITH, Appellant	NO. 31698-0-III CERTIFICATE OF MAILING

I, Shari Seward, certify that on February 4, 2014, I emailed, a copy of the Brief of Respondent to:

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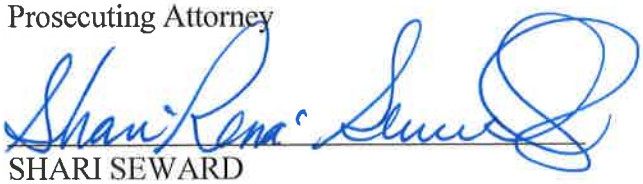
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2014.

LORI LYNN HOCTOR
Prosecuting Attorney



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COURT OF APPEALS OF WASHINGTON
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STATE OF WASHINGTON Respondent, vs. STEVEN LEE SMITH, Appellant	NO. 31698-0-III CERTIFICATE OF MAILING

I, Shari Seward, certify that on February 4, 2014, I deposited in the United States mails by certified mail, proper postage affixed, a copy of the Brief of Respondent to:

Steven Lee Smith
DOC #737289
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2014.

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