70947-0

70947-0

NO. 70947-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES HAGER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. When a defendant claims that certain conduct was the result of an accident, mistake or good faith, evidence of similar prior bad acts is admissible and highly relevant to rebut that claim. Here, after being charged with burglary for entering a rural, privately-owned piece of property, cutting the lock off a storage container, and taking items, the defendant (who was a police officer at the time) claimed that he had received permission to do so from the purported owner of the property as part of a favor to him. In an incident two weeks later, the defendant entered a different person's rural, privately-owned property, cut down a tree and some bushes, and claimed that he had received permission to do so from the owner as part of a favor to him. Did the trial court properly exercise its discretion in admitting limited evidence of the prior bad act?

2. A structure definitively qualifies as a building under its "ordinary meaning" for purposes of the burglary statute if it is (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being. The State presented evidence that the defendant entered a large shipping container that was enclosed, large enough to enter and able to accommodate a

human being. Is this sufficient evidence to demonstrate that the defendant entered a building?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant James Hager was charged by information with burglary in the second degree. CP 1. The State alleged that on May 4, 2012, Hager unlawfully entered Marc Swenson's property and stole items from Swenson's shipping container. CP 3-4. Trial began on August 6, 2013. 2RP 2.[1] The jury found Hager guilty as charged. CP 70. The court sentenced him to 14 days of work release. CP 75-82.

2. SUBSTANTIVE FACTS

In 2002, Marc Swenson purchased property from Iola Kay in Skykomish in King County off of Highway 2. 4RP 26-28; CP 3-4. The property is rural, located "way out in the woods" on a forest

[1] The verbatim report of proceedings consists of nine non-consecutively numbered volumes which will be referred to as follows: 1RP (November 15, 2012); 2RP (August 6, 2013); 3RP (August 7, 2013); 4RP (August 8, 2013); 5RP (August 12, 2013); 6RP (August 13, 2013); 7RP (August 14, 2013); 8RP (August 15, 2013); 9RP (September 20, 2013).

service road and reachable only through two sets of locked gates. 4RP 28, 112. Only Swenson, the two adjacent property owners, and the Bonneville Power Administration validly possess keys. 4RP 28-29. Multiple signs clearly posted near the gates warn that the property is privately owned and that violators are subject to arrest for trespass; one sign is posted immediately next to the first gate, which is stenciled "guests only," and another is nailed to a stump about 1500 feet down the road past the first gate. 4RP 30-32; Ex. 9-11.

After purchasing the property, Swenson installed a yurt and two small additional buildings. 4RP 32-33; Ex. 12. Already present was a large red container, also known as a Connex box, about a minute's walk past the other structures. 4RP 35-36, 141-42; 6RP 151; Ex. 13. Upon buying the property, Swenson cleaned out the box and put his belongings inside, including a cast iron woodstove valued at approximately $450-500, a fairly expensive double-insulated steel stovepipe, and a disassembled cedar hot tub. 4RP 37, 43-45, 47. He kept the box locked with a padlock. 4RP 42-43.

Swenson and his wife and children only went to the property every 2-6 weeks. 4RP 29. Late at night on May 11, 2012, he drove up with his family and discovered the electricity was not working. 4RP 38-39. When he awoke the next morning, he saw deep ruts in the road leading to the shipping container that appeared to be large tire tracks from a 4x4 vehicle. 4RP 41-42. He then noticed that the padlock on the box was missing and items had been stolen from inside: the 200-pound woodstove; the stovepipe; and a significant percentage of the hot tub. 4RP 43-45. He also noticed that the yellow extension cord stretched across the road from his yurt to the power source was gone. 4RP 47.

Swenson examined his video-surveillance system, which captures a series of still images at a rate of one frame per second using a video camera mounted on the side of a shed on his property. 4RP 46, 50-51. He observed a series of images from May 4, 2012 at around 2:00 p.m. that showed a large truck entering the property with an empty trailer; leaving with the woodstove and other items inside the trailer; and a male exiting the truck near the yurt, taking the yellow extension cord from the ground, and walking around the yurt peering inside the window and looking at some

lumber beneath. 4RP 51-56; Ex. 16.[2] The truck had a unique yellow winch/hoist in the truckbed. 4RP 55.

On May 14, 2012, Swenson sent the still color photos to King County Sheriff's Deputy Garrett Jorgensen, who noted the make, model and color of the truck (a silver Ford F-350), but was most struck by the unique yellow hoist attached to the yoke of the trailer. 4RP 70-71, 73; Ex. 25. Two days later on May 16, 2012, Jorgensen saw defendant Hager driving the same truck toward him on Highway 2 heading away from Skykomish: a silver Ford F-350 with the distinctive yellow hoist. 4RP 76-77.

At the time of the incident, Hager had been a deputy with the Snohomish County Sheriff's Department for approximately six years, beginning in 2006. 6RP 90-91. He had been working patrol in the contract city of Gold Bar since late 2008 or early 2009 and described himself as both a deputy and a detective. 6RP 101-02. When Jorgensen pulled the truck over and approached, Hager quickly informed him that he was not only armed but a police

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[2] The disc containing the video and all of the individual stills (Ex. 16) was physically marked with the word "thief" by Swenson, and the stills themselves also display the word "thief" on top of the screen when played in a slideshow format. However, the actual video that was played to the jury does not contain the word "thief," which was explained clearly on the record by the prosecutor. 4RP 48-49. Exhibits 20-25, individually printed photos of certain still images from the video, also do not contain the word "thief."

officer, claiming to have backed Jorgensen on prior calls for service. 4RP 78-79. Jorgensen did not recognize him. 4RP 79.

When Jorgensen informed Hager that there was a video camera at the Swenson property that had captured him during the burglary, Hager was shocked. 4RP 80. He admitted to using a Bonneville Power key he had purportedly gotten from work to access the two gates on the property, taking the woodstove, chrome piping, and cedar planking. 4RP 81; Ex. 17-18. He claimed someone named Don Anderson had given him permission to enter the property and recover some items.[3] 4RP 81.

Anderson had been living with Bill Pearson, a local resident who owned two properties in and around Gold Bar/Sultan, including one on Fern Bluff Road. 4RP 148-49. The properties had devolved into giant junkyards replete with squatters and homeless camps. 6RP 8-11. Pearson had allowed Anderson to stay in a trailer on the Fern Bluff property as a "watchman." 5RP 80-81. At some point, when Pearson wanted Anderson to leave, he asked Snohomish County Deputies Scott Berg and Hager for assistance. 5RP 84.

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[3] Anderson had owned the property approximately fifteen years prior but had lost it back to the original owners. Swenson then purchased it ten years ago. 4RP 125-26.

When Jorgensen asked Hager on the day of the traffic stop for Anderson's phone number, Hager claimed that he was unable to find it and would get it to Jorgensen later, even though Hager later admitted at trial that he had it in his cell phone at the time of the stop. 7RP 47. Jorgensen released Hager and confirmed that same day with Swenson that Anderson had no authority to grant anyone permission to enter the land or retrieve property since he clearly owned neither. 4RP 82-84, 94.

On May 17, 2012, Jorgensen called Hager and told him that his story did not correspond with that of Swenson, who did not know Hager and who had never given him permission to be on his property. 4RP 38, 89, 102-03. At that point, Hager asked if he needed to turn himself in and indicated that he was willing to give the property back, on condition that Swenson not press charges. 4RP 86, 91, 96-97. Despite having Anderson's phone number available, he still did not provide it to Jorgensen during the call, claiming he had "no opportunity." 4RP 48.

Less than a week later, on May 23, 2012, Hager's friend and fellow Snohomish County Deputy Terry Haldeman brought Hager to the property of John Tharp, located twenty miles from Pearson's property, as part of a raid on a potential chop-shop operation.

5RP 92, 107-09. Tharp was present. 5RP 97. Neither Hager nor Haldeman saw Anderson there that day. 5RP 111; 6RP 171. Later that night, at 2:00 or 3:00 a.m., Tharp awoke to noise and lights and saw Hager, this time in civilian clothes, talking to Anderson outside. 5RP 98-99.

Anderson later testified that Hager had come to the property to ask him to tell the police that Anderson had given Hager permission to be on Swenson's property. 4RP 160. Despite the fact that Hager had already spoken with Jorgensen at that point and now undeniably knew Anderson's location, it was Haldeman who brought King County officers to Tharp's property two days later on May 25, 2012 to interview Anderson. 5RP 102-05, 107-08, 140.

King County Sheriff's Detective Larry Williams[4] took over the investigation into the Swenson burglary and interviewed Swenson, Anderson, Hager, and Hager's friend Kelly Eubanks. 4RP 111. On June 11, 2012, Hager gave Larry Williams an audiotaped confession, claiming once again that he was on the property to obtain items for Anderson. Ex. 27 at 4-11; Ex. 39. Hager initially asserted that he had never been to the property before, had no

[4] There are two detectives with the last name of Williams in this case: King County Detective Larry Williams and Everett Police Detective Eric Williams. For clarity, each will be referred to by his full name.

idea that he would need a key to enter, and had only learned of the property through a map and directions provided by Anderson. Ex. 27 at 3; Ex. 39. Hager then changed his story and admitted that he had hunted near the property on prior occasions and knew there was a gated and locked area. Id.

Hager described unlocking Swenson's gates using a "PUD key" he had received from "a friend, a contact" and driving his personal pickup truck and trailer onto the property. Ex. 27 at 3-4; Ex. 39. He then cut the lock on the shipping container with boltcutters. Ex. 27 at 6; Ex. 39. Hager admitted that Anderson had never told him what personal property he actually wanted; he characterized the items he took as "burnt, miscellaneous stuff," "tools," "garbage," and "logging stuff." Ex. 27 at 5, 7-9; Ex. 39. Even though Anderson had never described the yurt to him, Hager nevertheless collected the power cord around it. Ex. 8-9; Ex. 39. He claimed that his girlfriend and child were with him but stayed in the car the whole time. Ex. 27 at 12-13; Ex. 39.

Hager claimed that his purpose was to retrieve items for Anderson as part of a larger effort to evict him from some other property. Ex. 27 at 5-11; Ex. 39. He professed that Anderson claimed to own Swenson's land but could not access it because he

could not drive and was no longer allowed on his own property because he had over-logged it. Ex. 27 at 9; Ex. 39. Hager described Anderson as a "liar" whom he had known for only two months "through work" and admitted that he knew of his criminal history, which included convictions for false statement in 2007, criminal trespass in 1997 and 2005, misdemeanor assault in 2004 and 2001, and a drug charge in 1998. Ex. 27 at 4, 19; Ex. 39; 4RP 147-48, 171-73. He agreed that based on all of this, "[I] shouldn't trust a thing he tells me." Ex. 27 at 4; Ex. 39.

Nevertheless, Hager said he did not doubt Anderson's claim of ownership at all. Ex. 27 at 17-20; Ex. 39. When questioned as to why he did not verify title to the land before departing for the property, he claimed that "the local turds around here" had satisfied any potential concern: "Stop any little turd around here . . . and they may not tell you where he is living at right now but they will tell you, yeah, he lived up in Skykomish." Ex. 27 at 6, 19; Ex. 39. He professed that "I didn't even think about a lie on this crap." Ex. 27 at 4; Ex. 39.

When challenged as to how he could accept Anderson's claim of abandoning the land for three years given its relatively well-maintained appearance and the obvious improvements to the

property, Hager believed that Anderson's neighbor was either taking care of the place or that perhaps Anderson had lied to him and was actually still living there. Ex. 27 at 9, 19. Hager also admitted that he never attempted to bring the property to Anderson, claiming that Anderson "was gone . . . could not be contacted." Ex. 27 at 10; Ex. 39. He insisted that he had tried to find Anderson for 2-3 weeks and that he was finally able to reach him by phone, but Anderson "wouldn't give up an address, where he was at, nothing." Ex. 27 at 15; Ex. 39. At some point, he "heard that . . . [Anderson] was living with a John Thrope [sic] . . . but [c]ouldn't find out where John Thrope was." Ex. 27 at 16; Ex. 39.

Anderson testified at trial that he had never told Hager he needed items from the shipping container or drawn him a map, saying he had abandoned the Skykomish property about 15 years ago and it had reverted back to someone else's ownership. 4RP 155-58. Anderson himself had never even tried to return to the shipping container. 4RP 158. Contrary to Hager's claims that they had only known one another for a couple of months through work, Anderson testified that they had been friends for a year and a half and saw one another once or twice per week. 4RP 159.

At trial, Hager elaborated that his fondness for Bill Pearson drove him to assist Anderson, who was avoiding Pearson's demands to leave. 6RP 127. Hager's supervisor and close family friend, Sergeant David Casey, described this as a type of "proactive" contact during trial.[5] 6RP 28-29. Hager testified that Pearson insisted that he remove Anderson before Pearson would agree to begin cleaning up his properties, a task Hager described at one point as "a great cause." 6RP 128, 131, 174.

Hager further detailed that Anderson had told him that Anderson could not leave until someone helped him move items from his Skykomish property. 6RP 134-40. This discussion allegedly occurred in Anderson's trailer on Pearson's property. 6RP 134-35. Hager claimed that Anderson drew a map on a napkin in front of Anderson's girlfriend, Kerry Eubanks. RP 135, 142-43. Eubanks, who admitted to disliking Hager at the time she gave a statement to Larry Williams about the trailer conversation "because I didn't like cops . . . [and] I still don't," testified that she had seen Anderson draw a map. 6RP 110, 115, 119, 122.

[5] Casey, who described the Gold Bar officers as a "family," acknowledged that his wife had attended Hager's court appearances to support him and described the friendship between the two men's families. 6RP 5, 12-13, 36.

Once on the stand, Eubanks added some details to her original statement, testifying that Anderson had laughed at Hager after he left the trailer and said that Hager was going to get in trouble. 6RP 114-22. When confronted with her earlier statement, Eubanks admitted that she had never mentioned these details in the statement she had given to Larry Williams during his investigation, only disclosing it thirteen months later, after she had become friends with Hager, his wife, and baby. 6RP 114-22. Eubanks also admitted that Anderson had been open with Hager that he didn't live at the Skykomish property. 6RP 115-17.

Hager, who admitted during his testimony that he could have confirmed the land's ownership "right off the Internet," described Anderson as a "known criminal" repeatedly throughout his testimony. 6RP 132, 140. Despite this, and after spending some time describing how he was both an officer and an investigator during his time in Gold Bar, he insisted that he "didn't even think" to question Anderson's claims and that "it just never crossed my mind" because "I just knew that that was his property." 6RP 101, 103, 132, 140-41, 145. When asked why he would believe Anderson owned land in Skykomish when he was clearly squatting on Pearson's property, Hager rationalized that Anderson couldn't drive

and inferred that Anderson needed to live in Gold Bar so he could be closer to his criminal associates and better conduct his illegal activities. 6RP 141-42. Somehow, this did not raise a concern as to Anderson's credibility.

Hager left for the property on May 4th without ever asking what exactly he was supposed to collect and with no specific instruction from Anderson, having never checked the ownership of the property online. 6RP 144, 158. Larry Williams testified that he was able to obtain this information easily and simply looked in county records since it was a public record. 4RP 126.

When he arrived, Hager testified that "by chance" he had keys that opened the gate and said, "'Whoa, awesome.'" 6RP 147. When asked where he got the key, he responded that he "can't even explain that," that "I have keys from everywhere," and that he asked for it from "personal friends that are loggers or friends that are into power lines." 6RP 146. When further pressed, he said that someone named "Eric or Butch or Paul or John" gave it to him at a bar. 7RP 52. Neither Deputy Jorgensen, the assigned patrol deputy in that area, nor Sergeant Casey, Hager's supervisor, possess Bonneville Power keys. 4RP 71; 6RP 35.

After passing through the gates, Hager stated he "might have" seen the multiple no-trespass signs, despite both Deputy Jorgensen and Larry Williams testifying to the clarity of the signage during their investigation. 4RP 85, 113; 6RP 148; Ex. 9-11. Hager portrayed the items he took as "junk" with no value unless taken to a scrapyard. 6RP 148, 155. Although he purported to select things in a "very random" manner, he acknowledged taking the woodstove, which Larry Williams described as so heavy it required two people to move, and which required Hager to use a hoist just to lift into the bed of the truck. 4RP 119-20; 6RP 156. Contrary to Hager's testimony, his girlfriend, Briana Handran, testified that she was out of the truck for 30 minutes and had to help him put the stove in because it was so heavy. 6RP 73-75.

Hager conceded that he stopped by the yurt on his way out to look inside the windows, claiming he saw DVD players and a television inside and children's toys on the ground outside.[6] 6RP 157. When questioned about this evidence of another's ownership, Hager denied realizing that this was not Anderson's property, insisting that he now believed Anderson or his friends were either running a Boy Scout camp or that this was simply his

[6] Swenson testified that they had no such electronics in the yurt. 4RP 39.

"retreat that he's not telling anybody about." 6RP 157-58. He then collected the power cord all around the yurt because "I've gone above and beyond the call of duty . . . to get [Anderson] out of here. He can't be dissatisfied." 7RP 158. Detective Haldeman later testified at trial that the woodstove and the metal wiring inside the electrical cord could be sold as scrap metal. 5RP 138-40.

Although it was still daylight, Hager admitted that he did not go straight to Anderson's trailer on Pearson's property and drop off the items, instead bringing them to his house where Larry Williams would later collect and photograph them. 6RP 159; Ex. 17-18. In contrast to his taped interview with Larry Williams, Hager claimed at trial that he "never actually got a hold of Donnie Anderson" again. 6RP 162. All Hager's "connections in the community" who had insisted that Anderson owned property in Skykomish now claimed ignorance as to where he had gone. 6RP 162.

Eventually, Hager heard that Anderson had moved onto Tharp's property. 6RP 169. Despite his testimony at trial that he tried as a regular practice to "hit every street, go by at least every resident I could" at least once per month in his 400-square mile patrol area, and that "I know just about everybody pretty well," Hager claimed to Larry Williams that he "ha[d] no clue at that time"

who Tharp was or where he lived until Haldeman took him there on May 23, 2012, even though Tharp lived only twenty miles from Pearson's property. 5RP 92; 6RP 102-03, 163, 169; Ex. 27 at 16; Ex. 39. Hager maintained at trial that he had "no clue" where Tharp lived and had to reach out to a Department of Health (DOH) officer to locate the home. 6RP 169-70.

Despite his professed goal of going to Tharp's property on the 23rd to find Anderson, Hager also testified that he "wasn't looking for him for any reason to return property or anything like that," because he had deduced that neither the items nor the land belonged to Anderson. 6RP 170-73. He denied returning to Tharp's property to meet Anderson that night. 6RP 172. He also claimed that he was well aware that he was being recorded on Swenson's video camera on May 4, that it was "blatantly obvious," and that he had flipped off the camera with the intention of flipping off Anderson. 6RP 174. The video shows none of this. Ex. 16.

Hager claimed that "lots of people, street informants" from who "you'd take a fifty-fifty on that kind of stuff" told him Anderson had property in Skykomish. 6RP 141. Kerry Eubanks, who Hager claimed was present during the encounter in Anderson's trailer, testified, "We all know [Anderson] didn't live there." 6RP 118.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED EVIDENCE UNDER ER 404(b).

Hager contends that the trial court improperly admitted evidence of his unlawful entry and activity on another rural property in the area two weeks after the Swenson burglary. This argument fails. The trial court did not abuse its discretion where it properly weighed the factors for admissibility under ER 404(b), excluded most of the evidence requested by the State, and ruled that evidence of one of Hager's unlawful acts was admissible to rebut his claim of mistake or accident on the charged count.

a. Relevant Facts.

At trial, the State moved to admit evidence of three prior bad acts under ER 404(b).[7] 3RP 47-70; Supp. CP __ (sub 39, State's Trial Memorandum) at 10-13.

[7] Detective Brad Williams testified that during his investigation of Hager, he also learned of a fourth incident in which Bill Pearson had caught Hager loading two vehicles onto a trailer that Donnie Anderson had brought onto Pearson's property. 3RP 53-59. The State did not try to offer this incident at trial.

i. Hager's drug use.

After learning of Hager's substance abuse problem around the time of the charged crime, Detective Haldeman, Deputy Berg and Hager's brother staged an intervention for him. 3RP 54-55; Supp. CP__ (sub 39) at 12. Hager admitted that he was planning to check into a drug rehabilitation center the next day. 3RP 55; Supp. CP __ (sub 39) at 12.

The State's purpose in seeking to admit this was to explain Hager's motive and intent to steal for the charged crime, as well as res gestae. 3RP 48-50, 54-57; Supp. CP__ (sub 39) at 12. The trial court ruled that this evidence was inadmissible. 3RP 66.

ii. Theft of utility trailer.

During the May 23rd chop-shop raid on John Tharp's property, Haldeman and Hager discovered a stolen trailer belonging to someone named Baker. 3RP 31-32, 49-50, 65; Supp. CP __ (sub 39) at 11. Baker had no means to transport the trailer, so Hager offered to tow it for him, telling him that either he or the city of Gold Bar might have interest in buying it for $200. 3RP 31-32; Supp. CP __ (sub 39) at 11. Hager towed the trailer to his home for a week or two and then to a lumberyard, where he

secured it, but admitted never paying for or returning the trailer. 3RP 31-32; Supp. CP __ (sub 39) at 11. Baker complained that there was never any actual agreement to sell, just a hypothetical discussion. 3RP 31-32; Supp. CP __ (sub 39) at 11.

The State's purpose in seeking to admit this evidence was to explain Hager's motive, intent to steal for the charged crime, res gestae and lack of mistake or accident. 3RP 48-54, 65-66; Supp. CP__ (sub 39) at 12. The trial court ruled that this evidence was inadmissible. 3RP 67.

iii. Incident on Fernald property.

On May 19, 2012, approximately two weeks after the Swenson burglary, Hager went onto the property of John Fernald just outside of Index on Highway 2. 4RP 145-46, 157-58. The property was "rugged," located about a quarter mile up a steep hill in rural Snohomish County. 5RP 51. A large cable gate padlocked to a steel post cordoned off access to the property halfway up the hill. 4RP 12; Ex. 32. Fernald, who had moved to Nevada two and a half years earlier but kept the property, described the 32-acre parcel as "raw land" and said he had been "liv[ing] off the grid" in a cabin and a half-built shop there. 5RP 50; Ex. 32-36. After moving,

he asked two friends, Gerald Reule and Bill Cross, to act as caretakers to the property and gave them keys. 5RP 51.

The property began suffering from constant theft, and in August 2011 during a visit home, Fernald called 911 to report some missing solar panels. 4RP 52-54. Hager arrived to take the report. 4RP 52. During that conversation, Fernald did not discuss letting Hager access the property. 4RP 53. Reule, who was also present, spoke briefly with Hager and gave him permission to come back on the property in his capacity as a police officer, giving him the combination to the lock, but did not give him permission to hunt or camp on the land. 7RP 62-64. Neither Fernald nor Reule ever contacted Hager for help regarding the property again. 5RP 54-55; 7RP 62.

Although the first lock on the gate was a combination lock, it only lasted about six weeks before it was cut, so Reule and Cross always used key locks after that. 5RP 16; 7RP 60-61. After Fernald and Reule gave permission to their friend Teresa Kohler to stay on the property for the summer of 2012, Reule gave her a current key to the lock. 4RP 12; 5RP 63, 69.

On May 19, 2012, Kohler was cleaning out one of the buildings when she heard a large truck driving quickly up the road.

4RP 17. Because she did not recognize the truck or driver, she became scared, hid and eventually tried to access her vehicle. 4RP 17-21. However, when she got to her car, she discovered that Hager had left a signed note on her vehicle telling her to come up the hill if she wanted her things; he had taken the spark plugs from her car and the registration from her glove box. 4RP 20-22. Kohler called 911. 4RP 22. When Snohomish County Deputy Ross arrived, Kohler went up in Ross' patrol car to the residence and saw Hager in civilian clothes sitting on her car. 4RP 27, 30.

Hager claimed that he'd been hunting bear and removing a stump out of the road, that he was friends with Fernald and that he had permission to keep watch on the property. 4RP 28. Kohler saw that the two men accompanying Hager had been inside the barn moving her personal items and that one of them had taken her eyeglasses. 3RP 49. One of them was Richard Wagner, the manager of Loth Lumber, which Hager and Larry Williams described as a multi-use site with various businesses and large equipment. 6RP 138, 152-53; 7RP 50.

When Everett Police Detective Brad Williams was assigned to the case on May 29, 2012, Hager told him that he had been up to the property multiple times to track and hunt and occasionally

check up on the property. 5RP 147, 157. On May 19, 2012, he had gone up to do "cleanup" with two civilians and clear some bushes for sightlines for hunting bear. 5RP 159. He claimed to know the combination to the lock and said he became suspicious of Kohler's car, hypothesizing that there might be a marijuana grow operation in the area.[8] 5RP 159, 161. Fernald testified that on the day after the incident, Hager called him in Nevada to belatedly request permission to hunt a bear on his property, telling Fernald that he had been up there a number of times keeping an eye on his property. 5RP 60. Fernald initially granted permission, but after learning what had happened the day before with Kohler and that it was not even bear hunting season, he rescinded permission by email on May 24, 2012. 5RP 61-64. Hager admitted that he'd called Fernald to find out what he already knew and to ask him to clear things up with his department. 2RP 28-29; 5RP 163; 6RP 189. At trial, Hager continued to insist that he had entered the property to hunt bear after receiving permission, but until recently "it [was] still confused in my brain" who had granted that permission. 6RP 179. He then claimed that it was Reule. 6RP 178.

[8] Hager testified that it was "common" to have marijuana grows in the area but acknowledged that he had seen no actual evidence of a grow operation on Fernald's property. 5RP 161.

The State's purpose in seeking to admit this evidence was to explain Hager's motive, intent to steal for the charged crime, res gestae and lack of mistake or accident. 3RP 48-54, 64-65; Supp. CP __ (sub 39) at 12. The trial court ruled that this evidence was partially admissible as proof of absence of mistake. 3RP 67-68. In order to restrict the prejudicial effect, the court limited the evidence to testimony regarding Hager's actions and excluded his associates' actions, specifically their taking and moving of Teresa Kohler's property. 3RP 67-68.

b. The Fernald Incident Was Properly Admitted To Prove Lack Of Mistake Or Accident.

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find

that the evidence is related to that purpose, and (4) balance the probative value of the evidence against the prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002).

An appellate court reviews the interpretation of an evidentiary rule de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, the trial court's decision to admit or exclude evidence under a correctly interpreted rule is reviewed for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Discretion is abused only where no reasonable person would take the position adopted by the trial court. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

ER 404(b) explicitly identifies the absence of mistake or accident as a proper purpose for the admission of prior bad acts. It is recognized as a "well-established exception to ER 404(b)."[9] State v. Roth, 75 Wn. App. 808, 818, 881 P.2d 268 (1994). Indeed, it has recently been held that "when a defendant asserts that certain conduct is accidental, evidence of prior misconduct is *highly*

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[9] This has also been characterized as evidence necessary to "rebut a claim of mistake, accident or good faith." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook On Washington Evidence ch. 5, at 192 (2013-14). Tegland has described good faith, or the "doctrine of chances," as "simply another way of describing admissibility to prove intent, lack of accident, or a common scheme or plan." 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.30, at 595 (5th ed.2007).

relevant as it will tend to support or rebut such a claim." State v. Olsen, 175 Wn. App. 269, 282, 309 P.3d 518 (2013) (emphasis in original). Such evidence must be sufficiently similar to meet a threshold of noncoincidence. State v. Baker, 89 Wn. App. 726, 735, 950 P.2d 486 (1997).

In Olsen, the trial court admitted three of the defendant's prior acts of domestic violence against his wife after he denied pouring gasoline on her and threatening to set her on fire, claiming instead that he had doused a dog with gasoline that happened to jump on her bed. 175 Wn. App. at 278. The Olsen court held that the trial judge had correctly interpreted ER 404(b) on the appropriate legal grounds of motive, intent "and, especially, to counter his claims of accident." Id. at 282. Moreover, it found no abuse of discretion because "the evidence admitted clearly had a high degree of probative value – especially in light of Olsen's claim that the spilling of gasoline . . . was an accident incidental to his attempt to *relocate* the dog." Id. at 282-83 (emphasis in original).

This Court has reached the same conclusion when the defendant's victims in the prior bad act and the current charged crime are not the same. Roth, 75 Wn. App. at 818-20; State v. Fernandez, 28 Wn. App. 944, 628 P.2d 818 (1980). In Fernandez,

this Court held that evidence of the defendant's two prior assaults and thefts against different men in rural areas was properly introduced in the defendant's trial for the murder of his heavily insured wife, which also occurred in a remote location, to prove identity and to "rebut the defense explanation of an accident – essential ingredients of the State's case." 28 Wn. App. at 952-53.

In Roth, after the defendant claimed as accidental the death of his wife, despite physical evidence that disputed the feasibility of his account, the trial court admitted evidence that the defendant's first wife had also mysteriously died in similar circumstances where the physical evidence was inconsistent with his explanation of the accident. 75 Wn. App. at 810-15. This Court held that the evidence of the prior act was "highly relevant to a crucial aspect of the State's case: the need to rebut Roth's claim of accident and to establish an intentional [crime.]" Id. at 819.

Here, the trial court properly interpreted ER 404(b) and admitted the Fernald incident under appropriate legal grounds to prove absence of mistake, accident or good faith. Hager's defense theory centered on a claim that he believed, in good faith, that he had permission to enter Swenson's property and to remove what he wanted. He professed to eventually realizing his mistake and

blamed the accident on Donnie Anderson, who he said had tricked him. It was thus highly relevant, probative of his criminal intent, and crucial to the State's case to be able to rebut that claim of accident, mistake and good faith by introducing evidence that not two weeks later, Hager claimed falsely to have permission to enter Fernald's property and to remove trees and bushes to accommodate his personal hunting habits.

Hager essentially agrees with this characterization of his defense trial, but inexplicably claims that "the [trial] court's rationale is untenable because Hager's actions on the Fernald property did not show Hager acted other than according to a good faith belief in the information Mr. Anderson provided." App. Br. 13. This is, however, the very definition of a claim of mistake, accident or good faith for which rebuttal evidence is permitted under ER 404(b).

Hager's protestations may be based on his somewhat incomplete characterization of his trial defense: "that he had mistakenly taken the Swensons' property believing he was actually retrieving it for the rightful owner." App. Br. 13. This is inaccurate insofar as it was not just his retrieval but his very act of entry and presence on the land that was allegedly "mistaken." So it was with his entry and presence on Fernald's property. Hager claimed to

police to have rightfully obtained permission from Fernald (and later Reule) in 2011 to hunt and camp at will.

In both the charged case and the Fernald incident, the alleged grantors of permission adamantly denied ever granting Hager such license. Donnie Anderson and Fernald outright refuted it. The most Reule allowed was that he had granted Hager leave to watch the property as a patrol officer, which Hager inherently had anyway. Hager nevertheless came onto the land in a civilian capacity, in civilian clothes, with his civilian companions. His claim that he had license to be there is defeated by his own admission, confirmed by Fernald himself, that he called Fernald the very next day to ask for belated permission and a plea to work things out with his police department.

Hager's contention that the Fernald incident was too dissimilar to the charged incident is without merit. Contrary to his assertion that the Fernald incident did not involve a theft, Hager and Kohler both testified that Hager removed Kohler's spark plugs from her car without permission. Hager also cut down a large tree. Moreover, the claim that the Fernald incident involved no theft is specious, since Hager's friends did in fact go into the buildings and take Kohler's property, a detail elided by the trial court to protect

Hager against additional prejudice. Moreover, the distinction between entering a property to destroy versus remove property is inconsequential to the threshold of noncoincidence; in both cases, the owner is deprived of his property.

c. The Court Properly Exercised Its Discretion.

The probative value of the Fernald incident was clearly high: it occurred only two weeks after the charged incident and was within Hager's patrol area, and involved similar facts. In both cases, Hager entered remote, infrequently occupied properties off rural Highway 2, went past clearly marked gates, took and destroyed items, and when caught, claimed to have been granted permission by the property owner.

Contrary to Hager's assertion, the trial court on balance exercised considerable discretion in limiting the impact of Hager's prior bad act. The court limited the evidence to testimony regarding Hager's actions only and excised any mention of the theft perpetrated by Hager's friends. Hager nonetheless takes issue with minute details such as Detective Brad Williams' self-identification as a property crimes detective who investigates burglaries, thefts and arsons. App. Br. 15. This testimony

engenders no prejudice; it arose during the standard introduction of an officer's training, experience, and current duties. 5RP 145. Hager certainly does not allege that Brad Williams'' testimony that he was also a domestic violence detective somehow paints Hager as a batterer.

Hager's other claims can also be summarily rejected. Hager does not contest that Detective Haldeman was properly allowed to testify earlier in the trial regarding the marketable value of scrap metal and thus rebut Hager's own claim that the items he took from Swenson's property were merely junk. 5RP 138-40. Therefore, Brad Williams' brief mention that he photographed a potentially valuable metal pipe during his investigation of the Fernald incident was not improper or prejudicial, and fell under the court's ruling regarding lack of mistake and addressed Hager's intent on the property.

Teresa Kohler's testimony regarding her fears upon seeing Hager enter Fernald's property was not prejudicial and directly rebutted Hager's claim that he was welcome there. It also demonstrated that Fernald and Reule had given only Kohler, not Hager, their permission to be onsite. Neither can Hager simultaneously claim that the Fernald incident was not similar

enough to the charged crime because it lacked sufficient evidence of theft, and then protest that the court admitted evidence that Hager stole Kohler's spark plugs from her car. App. Br. 16. Hager also does not explain how any mention of Loth Lumber or its manager Richard Wagner implied that Hager was a criminal; there was no evidence admitted that Loth Lumber was a criminal outpost or that people associated with it were criminals. App. Br. 15-16.

Finally, as Hager himself pointed out, the trial court "excluded most of what the State sought to introduce" and refused to permit mention of the trailer theft or Hager's admitted drug use. App. Br. 13. He cannot establish abuse of discretion and his claim must be rejected.

d. Any Error Was Harmless.

Evidence admitted erroneously under ER 404(b) is harmless unless it can be determined that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

Here, the evidence of the Swenson burglary by itself was overwhelming. Hager confessed to almost every element of the

crime. There was a videotape of him entering the property and taking items. Photographs and testimony from Larry Williams, Deputy Jorgensen, and Swenson established clearly marked signs warning against trespass.

Most importantly, Hager's testimony regarding the incident was deeply contradictory and damaging: he called Donnie Anderson a liar multiple times and knew of his convictions for criminal trespass and false statement, yet claimed "it just never crossed my mind" to doubt his claim of ownership; despite being a trained officer and investigator, he chose not to verify land title over the internet because the word of the "the local turds around here" had satisfied any of his potential concerns; he admitted opening the lock with an improperly possessed key that he claimed he received from work, then friends, then someone named "Eric or Butch or Paul or John" at a bar. He admitted that Anderson never told him what to collect but went up anyway; he attested to taking junk almost casually, but chose a $400 iron woodstove that required a winch and the help of his girlfriend to load; when he saw clear evidence of someone living on property that Anderson purportedly abandoned, the most he could say was that he thought the neighbor was running a Boy Scout camp. Finally, despite his

insistence that this was all for Anderson, he did not bring the items to him or ever put Deputy Jorgensen in touch with the one man who purportedly could have verified his story.

Hager cannot meet his burden of proving within reasonable probabilities that the outcome of the trial would have been materially affected absent evidence of the Fernald incident. The evidence was properly admitted. This Court should affirm his conviction.

2. SUFFICIENT EVIDENCE SUPPORTS HAGER'S CONVICTION FOR SECOND DEGREE BURGLARY.

Hager challenges the sufficiency of the evidence of his conviction for burglary in the second degree, claiming that the State failed to prove beyond a reasonable doubt that the shipping container was a building. This argument fails because the State produced substantial evidence for a rational trier of fact to find that the container was a building under its ordinary meaning.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368

(1970); State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the State. Id. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence exists in the record to support the conviction. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000).

RCW 9A.52.030 states that a person commits burglary in the second degree "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." The instructional definition of "building" that the State offered and the court presented to the jury stated: "Building, *in addition to its ordinary meaning*, includes any dwelling or fenced area." CP 54 (emphasis added).

"When analyzing the general understanding of 'building' under the burglary statute, Washington courts have determined that structures or premises that are (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being, *definitively qualify as a 'building.'*" State v. Johnson, 159 Wn. App. 766, 772, 247 P.3d 11 (2011) (emphasis added) (citing State v. Miller, 91 Wn. App. 869, 872-73, 960 P.2d 464 (1998), review denied, 137 Wn.2d 1012 (1999)). In Johnson, the court held that a locomotive or railway car qualifies as a building. 159 Wn. App. at 771.

The photographs of the container clearly depict a completely enclosed structure that was large enough to enter and accommodate a human being. Ex. 13, 14. It looks, in fact, much like a railway car or the detached shipping containers carried on flatbed train cars. The photographs of the items taken out of the container were big enough to substantially fill the trailer, and Hager testified that even after taking those items, "there was quite a bit of stuff still left there." Ex. 17; 6RP 153. Hager, who is obviously a human being, testified himself that he physically entered the container in order to take items out of it. 6RP 152.

There was sufficient evidence to establish that the shipping container was a building under the ordinary meaning of that term. This Court should reject Hager's argument.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hager's conviction.

DATED this 23 day of July, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to KATHLEEN SHEA, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JAMES HAGER, Cause No. 70947-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

07-23-14
Date

Done in Seattle, Washington