Supreme Court No. 98623-1
(COA No. 79455-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANTHONY BALLOU,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Joseph Anthony Ballou, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision, issued on May 4, 2020, affirming his conviction for possession of a stolen motor vehicle. Mr. Ballou has attached a copy of this opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The State bears the burden of proving a defendant knowingly and intelligently waived his *Miranda* rights. Mr. Ballou was under the influence when he waived his *Miranda* rights, and he could not even remember his interaction with the police by the time of trial. Should this Court accept review because the Court of Appeals found Mr. Ballou knowingly, intelligently, and voluntarily waived his *Miranda* rights despite the fact that he was under the influence at the time he "waived" his *Miranda* rights? RAP 13.4(b)(3).

2. ER 404(b) precludes the State from introducing evidence of a person's prior acts to show the defendant had the propensity to commit the crime at issue. Although evidence of other acts may be admissible for other purposes, a trial court must carefully conduct a four-pronged analysis on the record before admitting such evidence.

Here, the court admitted evidence indicating Mr. Ballou was previously convicted of a crime that involved a stolen car with damage to its steering column. This was purportedly to show Mr. Ballou knew the car at issue in the present case was stolen. But the car at issue in the present case had damage to its ignition and stereo system, not damage to its steering column. Moreover, this evidence merely painted Mr. Ballou as the kind of person who would necessarily possess a stolen vehicle, and was therefore inadmissible propensity evidence. Nevertheless, the Court of Appeals affirmed. Should this Court accept review because the Court of Appeals erred in concluding this evidence was relevant and more probative than prejudicial? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Joseph Ballou was under the influence and asleep in an older Toyota Camry that is commonly stolen. 9/6/18RP 290; 9/11/18RP 296, 377, 420. He awoke to the police instructing him to put his hands up and get out of the car. 9/11/18RP 385, 401, 403. The police arrested Mr. Ballou because the Toyota Camry was reported stolen. 8/29/18RP 83.The police read Mr. Ballou his *Miranda* rights, and they claimed he agreed to speak to them. 8/29/18RP 90.

Mr. Ballou told the officers that his cousin picked him up in the Camry the previous evening. 8/29/18RP 91. Mr. Ballou also told the

officers that he thought it was strange that the stereo of the car was missing and the ignition was popped; he also believed it was strange that his cousin claimed to have bought the car with a social security check. 9/11/18RP 374. However, the damage inside the car occurred during a previous theft of the same car unrelated to the theft related to Mr. Ballou's arrest. 9/6/18RP 300. Based on this incident, the State charged Mr. Ballou with possession of a stolen vehicle. CP 1.

Before trial, Mr. Ballou asked the court to suppress the statements he made to the police during his custodial arrest, but the court denied his request. 9/11/18RP 389. The State requested to admit evidence concerning a prior conviction Mr. Ballou had where he drove a stolen car with a damaged steering column. 8/29/18RP 57. Mr. Ballou objected, but the court admitted this evidence. 8/29/18RP 58-60; 9/5/18RP 108; 9/6/18RP 290, 300. The jury convicted Mr. Ballou, and he now appeals. 9/11/18RP 508-09.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion upholds the admissibility of Mr. Ballou's post-*Miranda* statements despite the State's faiure to prove that Mr. Ballou knowingly and intelligently waived his *Miranda* rights.

a. The State bears the burden of proving the defendant knowingly and intelligently waived his *Miranda* rights.

The Fifth Amendment of the United States Constitution and article I, section 9, of the Washington Constitution forbid the State from compelling an individual into becoming a witness against himself. U.S. CONST. amend. V; Const. art. I, § 9; *Miranda v. Arizona*, 384 U.S. 436, 461, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). To protect this right, the police must inform individuals whom they subject to custodial interrogation that they have the right to (1) have a lawyer present at any time during the interrogation; and (2) remain silent at any time during the interrogation. *Miranda*, 384 U.S. 444-45. Additionally, the police must inform the individual that the State may use his statements against him. *Id*. at 444-45. The police must deliver these warnings before questioning. *Id*.

Once the State establishes that the police adequately conveyed these warnings to the defendant, it must then prove the defendant knowingly and intelligently waived these rights before it may introduce

the defendant's post-*Miranda* statements at trial. *State v. Mayer*, 184 Wn.2d 548, 556, 362 P.3d 745 (2015). The State bears the burden of proving this with a preponderance of the evidence. *Radcliffe*, 164 Wn.2d at 905-06.

To demonstrate the defendant made the statement knowingly and intelligently, the State must demonstrate the defendant waived his rights "with a *full awareness* of both the nature of the right being abandoned and the consequence of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (emphasis added). Accordingly, a person's use of drugs at the time he made his post-*Miranda* statements bears on a court's assessment of whether the defendant knowingly and intelligently waived his *Miranda* rights. *See State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Indeed, the State must prove the defendant "had the requisite level of comprehension regarding his rights at the time he waived them." *Mayer*, 184 Wn.2d at 556.

This Court assesses whether the defendant knowingly and intelligently waived his *Miranda* rights based on the totality of the circumstances, which examines the accused's background, experience, and conduct. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (internal quotations and citations omitted). "*Miranda*

claims are issues of law [this Court] review[s] de novo." *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185 (2010).

b. In light of the evidence that Mr. Ballou was under the influence during the custodial interrogation, the State failed to demonstrate he knowingly and intelligently waived his *Miranda* rights.

Based on the evidence Mr. Ballou presented concerning his condition of being under the influence at the time the police gave him the *Miranda* warnings, the State failed to demonstrate Mr. Ballou knowingly and intelligently waived his *Miranda* rights.

After being dispatched to an unrelated 911 call, Officer Daniel Johnson saw a white car parked in a church parking lot. 8/29/18RP 83-84. Officer Johnson ran the license plate and discovered the car was stolen. 8/29/18RP 83. When he walked up to the vehicle, he saw Mr. Ballou immobile and asleep on the passenger seat. 8/29/18RP 83-85. Mr. Ballou did not notice Officer Johnson approaching the vehicle. 8/29/18RP 84.

After calling for backup, Officer Johnson removed Mr. Ballou from the vehicle and placed him in handcuffs. 8/29/18RP 84, 86. Officer Johnson told Mr. Ballou he was under arrest and read him his *Miranda* rights. 8/29/18RP 84. Officer Johnson asked Mr. Ballou if he wanted to speak to him, and Mr. Ballou said he did. 8/29/18RP 90. Mr. Ballou told Officer Johnson that Mr. Ballou's cousin, Damon Terry, picked him up

from the Burger Broiler the previous evening and gave him a ride to the church parking lot. 8/29/18RP 91. Mr. Ballou told the officers he thought it was weird that the stereo was missing and the ignition was popped; he also believed it was strange that his cousin claimed to have purchased the car with a social security check. 9/11/18RP 374. Another officer asked Mr. Ballou about a backpack in the backseat, and Mr. Ballou told the officer the backpack was his own, but that not all of the contents were his. 8/29/18RP 93. Inside the backpack was some drug paraphernalia. 8/29/18RP 93.

Mr. Ballou testified at his CrR 3.5 hearing. At the hearing, he testified that he did not remember the officers giving him his *Miranda* warnings because he was under the influence of drugs. 9/11/18RP 377. Mr. Ballou shared that he was "groggy," and "wasn't really thinking anything" during his interaction with the police. 9/11/18RP 377. Mr. Ballou could not even recall the officer reading him his *Miranda* rights. 9/11/18RP 377.

The court admitted Mr. Ballou's post-*Miranda* statements. It found that besides Mr. Ballou being asleep and possessing drug paraphernalia in his backpack, no *evidence* existed that demonstrated Mr. Ballou was under the influence of drugs. CP 149-53, Finding of Fact 17.

But the court erred in arriving at this conclusion. Mr. Ballou testified he was under the influence of drugs at the time of his arrest. Evidence is "something (including *testimony*, documents, and tangible documents) that tends to prove or disprove the existence of an alleged fact…[it is] the collective mass of things, especially *testimony* and exhibits, presented before a tribunal in a given dispute." *Evidence*, Black's Law Dictionary (2nd pocket ed. 2001) (emphases added). Because Mr. Ballou provided affirmative testimony indicating he was under the influence at the time of the custodial interrogation, he provided evidence he was under the influence. The court's conclusion to the contrary is untenable.

The circumstantial evidence also supported Mr. Ballou's testimony that he was under the influence at the time of the custodial interrogation. The court concluded Mr. Ballou could not even remember his conversation with the police officers by the time of the 3.5 hearing, and it also concluded the police officers awakened him from being sound asleep. CP 149-53, Finding 14. Additionally, the police discovered drug paraphernalia in Mr. Ballou's backpack. *Id*.

Furthermore, the State presented no evidence affirmatively indicating Mr. Ballou was sober at the time of the custodial interrogation. The police officers who questioned Mr. Ballou neither testified that he

appeared sober nor did they testify that Mr. Ballou did not appear impaired. As the State bore the burden of proving Mr. Ballou knowingly and intelligently waived his rights, it was incumbent on them to do this, particularly since Mr. Ballou presented evidence he was under the influence. However, it chose not to solicit this information.

Additionally, because the State failed to affirmatively demonstrate that Mr. Ballou's prior convictions somehow equipped him with the ability to knowingly waive *Miranda*, the court erred in entering Finding of Fact 16. Finding of Fact 16 notes Mr. Ballou's previous convictions and concludes, "experience related to arrests for the above offenses would tend to indicate that one is familiar with the arrest process and able to provide a knowing, intelligent, and voluntary waiver of *Miranda*." CP 149-53, Finding of Fact 16. However, the State failed to present any evidence demonstrating these convictions necessarily included encounters with the police where the police gave Mr. Ballou *Miranda* warnings.

Instead, the court simply speculated these prior convictions necessarily included encounters where the police administered *Miranda* warnings. This sort of speculation is incompatible with *Miranda*. 384 U.S. at 468-69. Additionally, a person's prior arrests cannot overcome a person's ability to knowingly waive *Miranda* when they are under the influence of drugs.

This Court should accept review. RAP 13.4(b)(3).

2. This Court should accept review because the Court of Appeals affirmed Mr. Ballou's conviction despite the court's improper admission of prejudicial evidence relating to one of Mr. Ballou's prior convictions.

a. Evidence relating to a person's prior convictions is particularly prejudicial because a danger exists that the jury will place too much weight on the past conviction and use it for an improper purpose.

ER 404(b) categorically bars the admission of evidence of prior bad acts for the purpose of proving a person's character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The rule is designed to prevent the State from suggesting a defendant is guilty because he is a criminal who is likely to commit the crime charged. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

ER 404(b) allows the State to introduce evidence of a defendant's prior convictions, but only subject to careful limitations. While the State may introduce evidence of the defendant's prior convictions for purposes like "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake," this evidence is not admissible simply because it is relevant. ER 404(b); *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Before a trial court admits this evidence, a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2)

identify the purpose for which the evidence sought is introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *Id*. at 853.

A court should only admit evidence relating to a defendant's prior convictions if the evidence is *both* "relevant and necessary to prove an essential ingredient of the crime charged." *State v. Tharp*, 96 Wn.2d 591, 596, 637 P.2d 961 (1981).

A court must carefully weigh the probative value of evidence relating to a person's prior conviction against its prejudicial effect because such evidence is likely to be highly prejudicial. *See State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). This is because a real danger exists that the jury "may well put too great a weight on a past conviction and use the evidence for an improper purpose." *Gunderson*, 181 Wn.2d at 925 (*referencing State v. Brown*, 113 Wn.2d 520, 531, 782 P.2d 1013 (1989)). A trial court's decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. *Gunderson*, 181 Wn.2d at 922. "In doubtful cases, the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

b. The probative value, if any, of Mr. Ballou's prior conviction was vastly outweighed by its prejudicial effect.

The evidence concerning Mr. Ballou's prior conviction was irrelevant. And even if the evidence was minimally relevant, this evidence was vastly outweighed by its danger of unfair prejudice, as it conveyed to the jury that Mr. Ballou was the kind of person who would certainly possess a stolen vehicle because he is a "criminal." Accordingly, the trial court erred in admitting this damning evidence.

At trial, the State sought to admit evidence concerning a prior conviction where Mr. Ballou drove a stolen car with a damaged steering column. 8/29/18RP 57. Because the vehicle at issue here had damage to its ignition, the State argued the evidence of Mr. Ballou's prior conviction was relevant to prove he knew the car at issue in the present case was stolen. 8/29/18RP 57. Mr. Ballou countered that the mere fact the ignition was damaged in the car in the present case did not mean that Mr. Ballou knew the car was stolen at the time he occupied it, as the ignition in the car was damaged in an unrelated theft a year before the police found Mr. Ballou sleeping in the car in question. 8/29/18RP 58-60; 9/6/18RP 290, 300.

The court prompted the State into weighing the relevance of this evidence against is prejudicial effect. 8/29/18RP RP 60-61. The State

argued this evidence was "extremely probative" because it demonstrated Mr. Ballou had "concrete knowledge" the car was stolen. 8/29/18RP 61-62. In regards to the prejudice, the State agreed that if the jury used Mr. Ballou's prior conviction for any other purpose, it would be unfair; however, it claimed any prejudice could be mitigated by instructing the jury that it was not allowed to use this evidence for any other purpose. 8/29/18RP 63. In response, Mr. Ballou argued this evidence was not even probative because the fact that the ignition was damaged in the present case was equivocal, as the damage to the vehicle's ignition occurred long before the police discovered Mr. Ballou asleep in the car; accordingly, the damaged ignition potentially indicated that (1) the car was previously stolen but later recovered; or (2) the car was currently stolen. 8/29/18RP 64-65. And Mr. Ballou maintained this evidence was unfairly prejudicial because it would be difficult for the jury to forego using his prior conviction for the improper purpose of finding him guilty of the current charge. 8/29/18RP 64-65.

The court admitted the evidence of the prior conviction after undergoing ER 404(b)'s four-pronged analysis. First, based on a certified copy of the information and judgment and sentence in Mr. Ballou's previous conviction, the court found by a preponderance of the evidence that the prior act occurred. 9/5/18RP 107. The court identified the purpose

of the evidence as evidence to establish knowledge that Mr. Ballou knew he was in a stolen vehicle. 9/5/18RP 107. Next, the court weighed the probative value of this evidence against its prejudicial effect. 9/5/18RP 108. The court found the probative value was "particularly strong," remarking,

> while there is a danger of prejudice, in balancing it out I have to find that the probative value is not substantially outweighed by the danger of unfair prejudice, so I would allow the evidence of the prior case involving a damaged steering column to be admissible in this particular case under [ER 404(b)].

9/5/18 RP 108.

The court erred in admitting this evidence because its probative value was non-existent and outweighed by the danger of unfair prejudice. This evidence was irrelevant because the State failed to establish that because Mr. Ballou had prior experience with a vehicle with a damaged *steering column*, he would know that a vehicle with a damaged *ignition* was stolen. The steering column[1] and the ignition[2] are separate parts of a vehicle; accordingly, it does not follow that merely because a person knows that a damaged steering column is associated with a stolen vehicle,

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[1] "The column that encloses the connections to the steering gear of a vehicle (such as an automobile)." *Steering column*, Merriam Webster, https://www.merriam-webster.com/dictionary/steering%20column.

[2] "A device that activates an ignition system (as in an automobile)." *Ignition*, Merriam Webster, https://www.merriam-webster.com/dictionary/ignition.

he must also know a damaged ignition indicates that a car may have been stolen.

Accordingly, contrary to the State's theory and the court's ruling, this evidence fails to indicate that Mr. Ballou had "concrete knowledge" that the car at issue was stolen, and so it was not "particularly" probative. This evidence only demonstrates that Mr. Ballou had "concrete knowledge" that the car was stolen if one *assumes* that because Mr. Ballou was previously in a car that carried a specific indication of theft, he must know about other indications of theft, e.g., the damaged ignition in this case. This is a logical leap, and it is not probative of whether Mr. Ballou knew the car was stolen. Accordingly, this evidence was unnecessary for the State to prove an "essential ingredient" of the current crime. *Tharp*, 96 Wn.2d at 596.

Critically, even assuming this evidence was minimally relevant, this evidence was vastly outweighed by the danger of unfair prejudice to Mr. Ballou. Evidence that Mr. Ballou was previously convicted in a case involving a stolen car sent an unequivocal message to the jury that he was the kind of person who would knowingly possess a stolen car—a criminal. Moreover, it sent the message to the jury that Mr. Ballou was a repeat car prowler who had not "learned his lesson" and changed his ways: here he was, once again, facing a conviction relating to a stolen vehicle. This

evidence maligned Mr. Ballou to the jury and undoubtedly presented a dangerous risk of prejudice. It is certain the jury would have used this evidence for inappropriate propensity purposes.

This Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

For the reasons stated in this petition, Mr. Ballou asks this Court to accept review.

DATED this 3rd day of June, 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOSEPH ANTHONY BALLOU, Appellant.	)	No. 79455-8-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Joseph A. Ballou seeks reversal of his conviction for one count of possession of a stolen motor vehicle. He argues that his intoxication prevented his ability to knowingly, intelligently, and voluntarily waive his Miranda[1] rights. He also argues that the trial court erred in admitting prejudicial prior conviction evidence. Because substantial evidence supports the trial court's finding that Ballou's waiver was valid, and the court acted within its discretion in admitting prior conviction evidence, we affirm the admission of his statements and his conviction.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

FACTS

Daniel Perez Lopez was the owner of a 1988 Toyota Camry. The Camry had been stolen from Perez[2] in a previous unrelated incident, and it was returned with its ignition system damaged and its radio missing. Perez had to use a flathead screwdriver to start the car since the first vehicle theft.

On the evening of October 3, 2017, Perez noted that the Camry was parked and locked outside his residence. The following morning, Perez's son noticed that the car was missing. Perez called 911 and reported the car stolen.

Later that afternoon, while conducting an area check, Deputy Daniel Johnson observed a Toyota Camry in the parking lot of a church in Burien. He ran the license plate and discovered that the vehicle had been reported stolen. As Johnson approached the vehicle, he observed a man later identified as Ballou asleep in the front seat. After backup officers arrived, Johnson approached the car and announced "Police." Ballou did not respond, so Johnson opened the passenger door and announced "Police. Get out of the car." Johnson assisted Ballou from the car, handcuffed him, placed him in a patrol vehicle, and read him his Miranda rights.

After Ballou acknowledged that he understood his rights, he began to speak to Johnson. Ballou said that his cousin picked him up in the Toyota Camry from a nearby restaurant at around 10:00 pm the previous evening, gave him a ride to the church parking lot, and left. Ballou then fell asleep in the car. Ballou said he

[2] Utilization of the patrilineal last name (the first of two family names) as a primary identifier is a common naming convention in Latinx and Spanish-language dominant communities. Further, Perez self-identified in this manner during his sworn testimony at trial, which was provided with the assistance of a certified Spanish court interpreter, as such we will follow that practice here.

thought it was odd that his cousin had a car. He also thought it was odd that the ignition was "popped" and the radio was missing. Deputy Tanner Owens, the second officer to arrive on the scene, asked Ballou whether he had been read his rights and whether he wanted to speak. Ballou answered yes to both questions, then gave Owens a brief overview of the same story he told to Johnson.

Johnson observed that the ignition was damaged in a way that made it possible to start the car without a factory key. The radio was missing and the steering column appeared to be held together with tape. There was a bent coat hanger in the back seat and a backpack in the front seat. Ballou acknowledged that the backpack was his. The backpack contained pliers, screwdrivers, and nine different car keys.[3]

The trial court conducted a CrR 3.5 hearing to determine the admissibility of Ballou's statements to police. Ballou testified as follows:

> [DEFENSE COUNSEL]: And do you recall any contact—well, first of all, do you remember Deputy Johnson from your contact with him on August 4th?
> [BALLOU]: I don't.
> [DEFENSE COUNSEL]: So you don't recall him. Do you recall if he gave you [Miranda] warnings?
> [BALLOU]: I don't because I was woken up in the car.
> [DEFENSE COUNSEL]: Okay. So when you woke up, what was your state of mind?
> [BALLOU]: I was groggy. I wasn't really thinking anything.
> [DEFENSE COUNSEL]: Were you under the influence?
> [BALLOU]: Yes.
> [DEFENSE COUNSEL]: Do you recall any contact with Deputy Owens?
> [BALLOU]: I don't.
> [DEFENSE COUNSEL]: Do you recognize him this morning?
> [BALLOU]: I didn't.
> [DEFENSE COUNSEL]: So you don't recall him reading you your [Miranda] warnings?

[3] Evidence of drug paraphernalia was excluded at trial.

[BALLOU]: I don't.

Following the hearing, the trial court entered findings of fact and conclusions of law regarding Ballou's motion to suppress his post-Miranda statements. In pertinent part, the court found:

> 16. Mr. Ballou has an extensive history of interactions with police, including numerous arrests, and the following convictions: Taking a Motor Vehicle Without Permission in the Second Degree (2015, 2013 x2, 2012, 2011); Residential Burglary (2013); Robbery in the First Degree (2009); Vehicle Prowl in the Second Degree (2013, 2012, 2011); Theft in the Third Degree (2013 x2, 2011, 2007); Attempt to Elude (2012); Assault in the Fourth Degree (2010); and Obstruction of Justice (2010). Experience related to arrests for the above offenses would tend to indicate that one is familiar with the arrest process and able to provide a knowing, intelligent, and voluntary waiver of Miranda rights.
>
> …
>
> 17. Mr. Ballou argued that his waiver of his Miranda rights was not knowingly, intelligently and voluntarily given because he had just been awakened and was under the influence of drugs or alcohol. However, no evidence of intoxication was presented other than that he was sound asleep when contacted and the findings of drug use paraphernalia in his backpack. Accordingly, the Court determined that Mr. Ballou's waiver was knowing, intelligent and voluntary.

Based on its findings of fact, the court concluded that Ballou's waiver was knowing, intelligent, and voluntary. Over Ballou's objection, the court also admitted evidence concerning a prior conviction of Ballou in which he drove a stolen car with a damaged steering column.

At trial, Johnson and Owens testified regarding Ballou's statements. Ballou did not testify or present evidence at trial. The jury convicted Ballou as charged, and he now appeals.

ANALYSIS

I. Miranda Waiver

Ballou argues that the trial court erred in admitting his statements to police because he did not make a knowing, voluntary, and intelligent waiver of his Miranda rights. This is so, he contends, because he was under the influence of an unspecified substance and has no recollection of his arrest. We disagree.

"The State bears the burden of showing a knowing, voluntary, and intelligent waiver of Miranda rights." State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). A trial court properly admits a defendant's statements where the court's findings and the record support the court's conclusion that the defendant was informed of his Miranda rights and knowingly and intelligently waived those rights before making the statements. State v. Reuben, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). We examine the totality of the circumstances to determine if the waiver was made voluntarily and with "'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" State v. Bradford, 95 Wn. App. 935, 944, 978 P.2d 534 (1999) (quoting Moran v. Burbaine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). Factors we may consider include "the defendant's physical condition, age, experience, mental abilities, and the conduct of the police." State v. Cushing, 68 Wn. App. 388, 392, 842 P.2d 1035 (1993). Intoxication does not automatically prevent a waiver of Miranda rights, but evidence of intoxication is a factor to be considered in determining the voluntariness of the waiver. Reuben, 62 Wn. App. at 625-26. "We will not disturb a trial court's conclusion that a waiver was voluntarily made if the

trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." Athan, 160 Wn.2d at 380.

Here, substantial evidence supports the trial court's finding that Ballou's waiver was knowing, intelligent, and voluntary. Even if Ballou was under the influence of an unknown substance, there was no evidence that he was significantly impaired. Ballou affirmatively stated that he understood his rights, and his responses to police questions were cogent and detailed. There was no evidence that Ballou had difficulty understanding what was happening or responding to questions. Ballou's later assertion that he had no memory of these events does not prove that his waiver was involuntary at the time he made it. See State v. Reuben, 62 Wn. App. at 625 (defendant's otherwise voluntary statement not tainted by later claim of amnesia). Ballou's waiver was valid under the totality of the circumstances.

Ballou notes that Johnson observed that he "seemed sleepy" and was slow to respond to questions, and that Johnson speculated that Ballou may have used a "downer" such as heroin. But being under the influence of a substance is not necessarily synonymous with intoxication. Moreover, Johnson provided this testimony at trial, after the court had already made its CrR 3.5 ruling.

Ballou, pointing to his own testimony at the CrR 3.5 hearing, further asserts that substantial evidence does not support the trial court's finding that "no evidence of intoxication was presented other than that [Ballou] was sound asleep when contacted and the finding of drug use paraphernalia in his backpack." But the

court's oral ruling, which was expressly incorporated into its findings, noted that Ballou's claim was not corroborated by police testimony. It is apparent that the trial court considered Ballou's claim and found it unpersuasive. Any error in the phrasing of this finding was harmless. "[A]n erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal." State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

II. Admission of ER 404(b) Prior Bad Act Evidence

Ballou argues that the trial court erred in admitting evidence that he had previously been convicted of possession of a stolen motor vehicle with a damaged steering column. We review the trial court's application of a rule to admit or exclude evidence for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Evidence of a defendant's prior bad acts is not admissible to show that the defendant has a propensity to commit crimes, but it may be admissible for some other proper purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); State v. Gunderson, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014). ER 404(b) must be read in conjunction with ER 403. State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). "ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice." Id. at 776 (emphasis omitted). "Before admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being

introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect." State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997). In close cases, prior bad acts evidence should be excluded. State v. Wilson, 144 Wn. App. 166, 176, 181 P.3d 887 (2008).

Here, the State sought to introduce the challenged prior conviction evidence to establish that Ballou knew that the Camry's damaged steering column was indicative of theft. We disagree. After conducting the required ER 404(b) analysis on the record, the trial court ruled that this evidence was admissible to show that Ballou knew the Camry was stolen. In so ruling, the court stated that although there is a danger of prejudice, the probative value of the evidence was "particularly strong" given that knowledge is an element of possessing a stolen vehicle.[4]

Ballou asserts that this evidence was irrelevant because the vehicle in that case was described as having "damage to the steering column" whereas the Camry in this case had a damaged ignition. We agree with the State that such damage is functionally synonymous in older model cars. The fact that similar damage existed in the Camry makes it highly relevant to show Ballou's knowledge that the car was stolen.

He further contends that any probative value was substantially outweighed by its prejudicial effect. We disagree. Although this evidence carried some risk of prejudice, it did not include unnecessary details and was not highly inflammatory. And the court properly gave an oral limiting instruction at the time the evidence

[4] A person commits the crime of possession of a stolen vehicle "if he or she [possesses] a stolen motor vehicle." RCW 9A.56.068. Although the statute does not codify a mens rea element, the State must show that the defendant had actual knowledge the car was stolen. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

was admitted and again in a separate written instruction. Jurors are presumed to follow instructions. State v. Mohamed, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016). The trial court did not abuse its discretion in admitting this evidence.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79455-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

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