



Case No. 66817-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION 1

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STATE OF WASHINGTON, Respondent-Plaintiff

v.

WILLIAM FINDLEY, Appellant-Defendant

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

THE HONORABLE JIM ROGERS

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APPELLANT'S REPLY BRIEF

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## **I. INTRODUCTION**

Contrary to the State's argument in its response, the trial court did err in its interpretation and application of **ER 404(b)**, did abuse its discretion in admitting alleged evidence of 19 other purported uncharged instances of Theft in Second Degree [**RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**] and did commit reversible error during the prosecution and conviction of William Findley, Appellant-Defendant, for 20 charged counts of Theft in the Second Degree [**RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**].

## **II. STATEMENT OF CASE AND FACTS**

Findley incorporates the Statement of Case and Facts in Appellant's Amended Brief (pp. 5 – 8).

Findley supplements that initial Statement of Case and Facts as follows: contrary to the State's assertion in its brief (Br. Resp. p. 4), the trial court rejected the State's proffer that no similar mistakes had occurred when Findley was not at work

or after he had started his administrative leave. (RP 10/18/2010 at pp. 75 - 76,). (To the extent that this Court wants a motion to strike that averment from the State's brief and appellate record, Findley makes that motion at this time.)

### III. ARGUMENT

**The trial court committed reversible error by admitting under ER 404(b) purported evidence of 19 other uncharged incidents of alleged theft as part of a common scheme or plan or absence of mistake.**

An appellate court reviews the correct interpretation of an evidentiary rule *de novo* as a question of law. *State v. Devinentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the trial court interpreted the rule correctly, the trial court's decision to admit or exclude evidence is reviewed by the appellate court for an abuse of discretion. *Id.*

**ER 404(b)** provides as follows:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action inconformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State concurs with Findley in the outline of the correct analysis for a trial court to determine the admissibility of evidence under **ER 404(b)**. (Br. Resp at p. 8)

The pivotal disagreement between Findley and the State centers on the trial court's erroneous conclusion that the probative value of admitting evidence of the other 19 uncharged incidents of alleged theft outweighed the prejudicial impact on Findley for the charged 20 counts of theft.

The State urges the Court to succumb to the same argument that trapped the trial court to abuse its discretion and commit reversible error. The State prosecuted Findley for the 20 instances the State claimed constituted theft under the theory that each of the 20 counts was united by a common scheme or plan and that the proof of one count was bound inextricably to the other 19 charged counts. Despite that theory uniting the 20 charged counts, the State maintained to the trial court that the

State needed evidence of the other purported 19 incidents to rebut Findley's anticipated defense of mistake, accident or confusion.

Before exercising its discretion to admit evidence of prior bad acts, the trial court should weigh the necessity for the admission against the prejudice that it may engender in the minds of the jury. **State v. Googlin**, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). Evidence of prior misconduct is likely to be highly prejudicial and should be admitted only for a proper purpose *and then only when its probative value clearly outweighs its prejudicial effect*. **State v. Carleton**, 82 Wn. App. 680, 684-85, 919 P.2d 128 (1996) (emphasis added).

The trial court committed reversible error in admitting the evidence of these other alleged crimes. **ER 403** demands the trial court balance the probative value of the evidence against the unfair prejudicial effect the evidence may have upon the finder-of-fact. **State v. Saltarelli**, 98 Wn.2d 358, 362 – 366, 655 P.2d 697 (1982). “Because substantial prejudicial effect is inherent in

**ER 404(b)** evidence, uncharged offenses are admissible only if they have substantial probative value. *State v. Lough*, 125 Wn.2d 847, 863. 889 P.2d 487 (1995).

**ER 403** restrains a trial court as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

The results of an analysis under **ER 404(b)** are dependant largely on the unique facts of the case. *State v. Lough, supra*, 125 Wn.2d at 856. The introduction of the other 19 alleged instances was not only a patent common-sense example of unfair prejudice but also a violation of the legal intertwining between **ER 403** and **ER 404(b)**.

Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). According to the State's theory, the 20 charged counts were interlocked with each other. Given the obvious prejudicial value of 19 other uncharged purported instances, the evidentiary

necessity or value of those other times was doubtful at least and harmful for certain to Findley.

A trial court must determine whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors.

*State v. Saltarelli, supra, 98 Wn.2d at 361.*

The uncharged incidents had no probative value. The sole purpose of the uncharged incidents was to inflame or incite the jury. None of the *uncharged* incidents made the “checks-for-cash” scheme underlying any or all of the 20 charged counts more probable than any of the 19 *charged* counts bolstered the remaining other *charged* count.

The inescapable practical consequence of the admission of the 19 other uncharged alleged incidents was unfair prejudice to Findley contrary to **ER 404(b)**, **ER 403** and case law. Undue prejudice is the harm resulting from a fact trier’s being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that

calm and logical reasoning is abandoned. **Black's Law Dictionary** 1299 (Bryan A. Garner ed. 9<sup>th</sup> ed. West 2009).

The trial court abused its discretion by admitting the alleged evidence of the 19 purported additional uncharged instances that Findley allegedly had committed Theft in the Second Degree. The trial court's decision was manifestly unreasonable.

**State v. Stein**, 140 Wn. App. 43, 65, 165 P.3d 16 (2007).

Within reasonable probabilities, the outcome for Findley would have been different had the evidence of the 19 uncharged incidents not been admitted. **State v. Cunningham**, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). **See also State v. Carleton, supra**, 82 Wn. App. At 686-87.

The State contends the trial court's oral and written limiting instructions staunched the legal and evidentiary hemorrhaging for Findley that resulted from admission of the 19 uncharged incidents. (Br. Resp. at 7, 13) The State relies upon a case such as **State v. Johnson**, 124 Wn.2d 57, 77, 873 P.2d 514

(1994), which pronounced as follows: “[a] jury is presumed to follow the court’s instructions.” Given the trial court in Findley’s case erred in admitting the evidence, the presumption is meaningless. For Findley one or a dozen limiting instructions would not, and did not, save him from the presumption of guilt created by the evidence of the other 19 uncharged incidents of alleged theft.

Under the unique circumstances of Findley’s case, the appellate court cannot conclude beyond a reasonable doubt the admission of the alleged evidence of the other 19 purported instances was harmless error. *State v. Evans*, 154 Wn.2d 438, 453-454, 114 P.3d 627 (2005). *See also State v. Smith, supra*, 106 Wn.2d at 780 (error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected).

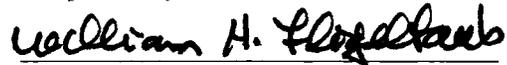
## V. CONCLUSION

The trial court erred in admitting evidence of the 19 uncharged instances of alleged misconduct. The trial court’s

error was not harmless. Because of the trial court's error, Findley's convictions of the 20 counts of Theft in the Second Degree should be overturned and the case remanded for a new trial.

Dated this 6<sup>th</sup> day of January 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "William H. Fligeltaub". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of January 2012 I caused a true and correct copy of the

Appellant's Amended Brief to be served on the following in the manner indicated below:

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