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ORIGINAL

NO. 66817-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FINDLEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF FACTS</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	5
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF UNCHARGED INCIDENTS OF THEFT AS PART OF A COMMON SCHEME OR PLAN UNDER ER 404(b) .....	5
a. Relevant Facts .....	6
b. Trial Court's Findings And Conclusions.....	6
c. The Trial Court Did Not Err In Its Interpretation Or Application Of ER 404(b).....	8
d. The Trial Court Did Not Abuse Its Discretion By Allowing Evidence Of The Uncharged Incidents.....	12
D. <u>CONCLUSION</u> .....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

*State v. Carleton*, 82 Wn. App. 680,  
919 P.2d 128 (1996)..... 8, 9

*State v. DeVincentis*, 150 Wn.2d 11,  
74 P.3d 119 (2003)..... 11

*State v. Gogolin*, 45 Wn. App. 640,  
727 P.2d 683 (1986)..... 9

*State v. Johnson*, 124 Wn.2d 57,  
873 P.2d 514 (1994)..... 14

*State v. Kilgore*, 147 Wn.2d 288,  
53 P.3d 974 (2002)..... 8, 9

*State v. Lough*, 125 Wn.2d 847,  
889 P.2d 487 (1995)..... 8, 11, 12

*State v. Pirtle*, 127 Wn.2d 628,  
904 P.2d 245 (1995)..... 9

*State v. Rehak*, 67 Wn. App. 157,  
834 P.2d 651 (1992)..... 12

*State v. Stein*, 140 Wn. App. 43,  
165 P.3d 16 (2007)..... 10

Rules and Regulations

Washington State:

ER 403 ..... 10

ER 404 ..... 1, 2, 5, 6, 8, 9, 11, 13

**A. ISSUE PRESENTED**

Evidence of prior bad acts is generally inadmissible to prove the character of a person and a propensity to act in conformity therewith, but may be admissible to show a common scheme or plan if: 1) the prior acts are proved by a preponderance of the evidence; 2) admitted for the purpose of showing a common scheme or plan; 3) relevant to prove an element of the crime charged; and 4) more probative than prejudicial. Following a pretrial hearing, the court granted the State's motion to offer evidence of nineteen uncharged incidents of alleged theft committed by the defendant under the common scheme or plan exception to ER 404(b) because the acts had been proven by a preponderance, were admissible for the purpose of proving a common scheme or plan by Findley to steal money from inmates in the King County Jail work release program, were relevant to rebut Findley's claim of mistake, and the evidence was more probative than prejudicial. The trial court also minimized the prejudicial effect by giving a limiting instruction to the jury. Did the trial court interpret and apply ER 404(b) correctly?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS**

The State proceeded to trial against William Findley on twenty counts of theft in the second degree, alleged to have been committed against victims who were inmates in the work release program of the King County Jail. CP 33-37. After a pretrial hearing, the trial court granted the State's motion to present evidence of nineteen uncharged incidents of alleged theft by Findley from inmates in the work release program of the King County Jail, under the common scheme or plan exception to ER 404(b). 1RP 13-15.<sup>1</sup> The jury convicted Findley of all twenty charges. CP 157-59. The trial court sentenced Findley within the standard range on all twenty counts: 22 months in prison, to be served concurrently. CP 232.

**2. SUBSTANTIVE FACTS**

Between October 1, 2006, and September 30, 2007, William Findley was an employee of the King County Department of Adult

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<sup>1</sup> The Verbatim Report of Proceedings consists of three volumes. The State has adopted the following reference system: 1RP (10/13/10, 10/18/10, 10/19/10), 2RP (10/20/10, 10/26/10), and 3RP (10/21/10, 2/11/11).

and Juvenile Detention. He was assigned to work release bookkeeping. 3RP 64. Findley's work responsibilities included answering calls from inmates in the work release program regarding their finances, retrieving payroll checks, cash, and window receipts from a locked box in the King County Jail and entering them into the computer system, preparing promissory notes for inmates who were leaving the work release program owing a balance to the King County Department of Adult and Juvenile Detention, and mailing checks to working inmates on behalf of their employers. 3RP 69-70, 76-77, 80-81, 93, 113. Findley handled all of the work release inmate transactions, except for when he was sick or on vacation. 3RP 134.

In July 2007, a complaint was made by a work release inmate to Findley, who reported it to Findley's supervisor, Barbara Cabuco. The inmate claimed that he had sent in a check for \$439 and it was not deposited in his account. 1RP 116. Cabuco instructed Findley, and then another employee, to investigate the claim. 1RP 116-18. Investigation revealed that the inmate had indeed submitted a check for \$439 and did not receive credit for that check in his account. 1RP 126. Cabuco believed that Findley had taken the \$439, as he was the bookkeeper on the day that the

money was received but not credited. 1RP 127. Cabuco reviewed other transactions for the two months immediately preceding that incident. 1RP 127. Cabuco found other similar transactions, which she reported to her supervisor, Pat Presson. 1RP 127-28.

Presson is the finance manager for the Department of Adult and Juvenile Detention. 2RP 34-35. After hearing of Cabuco's concern and reviewing the various forms used to document the receipt of money from inmates and to credit their accounts, Presson concluded that there was money missing. 2RP 36-37. Presson forwarded the concerns to her supervisor, and both the state auditor's office and the internal investigations unit of the Department of Adult and Juvenile Detention became involved. 2RP 37-38. Findley was placed on administrative leave, and eventually fired. 1RP 135; 2RP 38. No problems were discovered in any transactions conducted when Findley was on vacation and another employee substituted for him. 1RP 135.

Captain Lisaye Ishikawa of the internal investigations unit of the King County Department of Adult and Juvenile Detention began the investigation of Findley. 2RP 94. The investigation expanded to cover 2006-2007 and other transactions. 2RP 95-96. Ishikawa went to Findley's desk after placing him on administrative leave and



discovered several un-deposited checks in his desk. 2RP 96-97.  
The investigation was transferred to Sergeant Michael Maude when  
Ishikawa left the internal investigations unit. 2RP 97-98.

Sergeant Michael Maude handled the bulk of the internal  
investigation into the alleged thefts committed by Findley.  
2RP 40-42. Sergeant Maude testified about the discrepancies that  
were discovered in the review of transactions conducted by Findley  
between October 1, 2006, and September 30, 2007, resulting in the  
twenty counts of theft in the second degree the State pursued  
against Findley at trial. 2RP 40-90, 98-124.

Findley, who testified in his own defense, denied taking any  
money. 3RP 119. Findley argued that any discrepancy was the  
result of confusion, or of Findley being overwhelmed or unequal to  
the demands of his job. 2RP 157.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ADMITTED  
EVIDENCE OF UNCHARGED INCIDENTS OF  
THEFT AS PART OF A COMMON SCHEME OR  
PLAN UNDER ER 404(b).**

Prior to trial, the State moved to admit evidence of nineteen  
transactions involving work release inmates submitting funds they



did not receive credit for, handled by Findley from October 2006 to September 2007. The State sought to admit this evidence as demonstrative of a common scheme or plan under ER 404(b). After the pretrial hearing, the trial court granted the State's motion. Findley argues that the trial court abused its discretion by allowing the testimony of Sergeant Maude regarding these uncharged incidents in his trial. This argument should be rejected because the trial court reasonably concluded the evidence was relevant, weighed the probative value of the evidence against the prejudicial effect on the jury, and gave the jury a limiting instruction.

**a. Relevant Facts.**

At the pretrial hearing, the State proffered the expected testimony of Sergeant Maude, who had investigated the charged as well as uncharged incidents at issue in this trial. 1RP 9-13. This proffer was made in the form of the State's trial brief, specifically in pages nine through sixteen. 1RP 14; CP 29-37.

**b. Trial Court's Findings And Conclusions.**

Following the pretrial hearing, the trial court made oral findings, outlining the requirements under ER 404(b) and the

evidence the State would be allowed to present in its case-in-chief regarding the uncharged incidents. 1RP 13-15.

The court found that the existence of the uncharged incidents perpetrated by Findley involving work release inmates' accounts was probative of a common scheme or plan. 1RP 14. The trial court then ruled that, on balance, the probative value outweighed the prejudicial effect. 1RP 14-15. The court also found that the evidence may, in fact, be probative for the defense theory. 1RP 14-15.

Acknowledging that the evidence of the uncharged incidents may have a prejudicial effect upon the jury, the court provided a limiting instruction to the jury, telling them that the evidence of the uncharged transactions was admitted only for a limited purpose, and that it could be considered by the jury only for the purpose of whether there was a common scheme or plan, and in determining the absence of mistake or accident in the charged counts. 1RP 77-78; 2RP 112-13. This limiting instruction was given three times: it was read aloud prior to opening statements, again before Sergeant Maude's testimony, and it was also included in the court's written instructions to the jury. CP 168.

**c. The Trial Court Did Not Err In Its Interpretation Or Application Of ER 404(b).**

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, including showing a common scheme or plan. ER 404(b); see *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). When the State wishes to admit evidence of uncharged crimes, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred,<sup>2</sup> (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is relevant to that purpose, and (4) balance the probative value of the evidence against its prejudicial effect. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

When a trial court fails to conduct the complete ER 404(b) analysis on the record, its admission may be upheld as harmless error where a sufficient record exists for the reviewing court to determine that, had the trial court properly conducted the analysis, it would have admitted it. See *State v. Carleton*, 82 Wn. App. 680,

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<sup>2</sup> Findley does not allege that the acts were not proven by a preponderance, although the trial court did not make that finding explicitly.

686, 919 P.2d 128 (1996). A trial court's failure to conduct the complete ER 404(b) analysis on the record does not make admissible evidence inadmissible. See *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). A trial court may determine that uncharged crimes probably occurred based solely on the State's offer of proof. *Kilgore*, 147 Wn.2d at 295, 53 P.3d 974. Where a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings. See *State v. Pirtle*, 127 Wn.2d 628, 650, 904 P.2d 245 (1995).

Here, the State sought to admit evidence of the nineteen uncharged incidents as proof of a common scheme or plan by Findley, as well as absence of mistake. 1RP 9, 14; CP 29-37. Findley's defense at trial was that of mistake. 1RP 9, 11. The court identified what it relied on for the State's proffer in this case, namely the State's trial brief from pages nine to sixteen, which listed the charged and uncharged acts, before beginning its analysis. 1RP 14. Although the court did not explicitly state that it found by a preponderance of the evidence that Findley was the actor in the nineteen uncharged counts, it implied as much by referring to the

State's offer of proof. The record is sufficient to show that the trial court found by a preponderance of the evidence that Findley was responsible for the nineteen uncharged transactions. See *State v. Stein*, 140 Wn. App. 43, 165 P.3d 16 (2007).

The court found that the evidence in the nineteen uncharged transactions was probative of common scheme or plan, and that it all seemed to be very similar, with minor differences. 1RP 14.

The court then conducted the required balancing test under ER 403, and evaluated whether the probative value outweighed the prejudicial effect in terms of unfair prejudice, confusion of issues, misleading the jury, waste of time, and cumulative effect. 1RP 14.

The court found that the probative value of the 19 uncharged incidents outweighed the prejudicial effect, and that the evidence was certainly probative of a common scheme or plan. 1RP 14.

The court further found that given Findley's defense, the evidence of the nineteen uncharged counts was potentially probative of Findley's theory of the case. 1RP 14-15. The court found that admission of the evidence of the nineteen uncharged incidents would not be a waste of time, that it could be cumulative at some point, but, given the short time it would take to present, the evidence was not unfairly prejudicial, and would not confuse the

issues. 1RP 15. Having made those findings, the court ruled the evidence of the uncharged nineteen transactions was admissible.

1RP 15.

A common scheme or plan may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. *Lough*, 125 Wn.2d at 852. For purposes of ER 404(b), a common scheme or plan exists where: 1) several crimes constitute consistent parts of a plan in which each crime is but a piece of the larger plan, or 2) one person devises a plan and uses it repeatedly to perpetuate separate but very similar crimes. *Id.* at 855. Proof of such a plan is admissible if the prior acts are: 1) proved by a preponderance of the evidence, 2) admitted for the purpose of proving a common plan or scheme, 3) relevant to prove an element of the crime charged or to rebut a defense, and 4) more probative than prejudicial. *Id.* at 852.

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

exists 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). A trial court's finding by a preponderance of the evidence that the misconduct actually occurred will be affirmed if supported by substantial evidence in the record. *Lough*, 125 Wn.2d at 864.

**d. The Trial Court Did Not Abuse Its Discretion By Allowing Evidence Of The Uncharged Incidents.**

Here, a reasonable person would take the position adopted by the trial court. The proffer, contained in the State's trial brief, showed clearly that the uncharged transactions were virtually indistinguishable from the charged acts, and the court found that the evidence would be probative of a common scheme or plan.

The finding by a preponderance of the evidence that the misconduct occurred is supported by substantial evidence in the record. Sergeant Maude testified at length as to the general "check for cash scheme," and went through the charged incidents as well as the uncharged ones in his testimony. 2RP 40-90, 98-124; 3RP 4-25.

The trial court conducted the required analysis, properly concluding that: 1) the State had proven the prior misconduct by a preponderance of the evidence, given the proffer listing the expected testimony based on Sergeant Maude's investigation into the uncharged counts as compared to the charged ones; 2) the jury could reasonably find the existence of a common scheme or plan orchestrated by Findley to not credit deposits to inmates' accounts and keep the money, described as a "check for cash" scheme; 3) the prior bad acts were relevant to proving the fact of Findley's intent due to the overall planning and steps required for such a scheme; and 4) the uncharged counts were probative because the evidence showed that the prior misconduct was substantially similar to the charged offenses, against similar victims and under similar circumstances, tending to disprove Findley's claim of mistake.

1RP 13-15.

Because the trial court did not abuse its discretion in concluding that evidence of Findley's prior uncharged acts of theft were admissible under the common scheme or plan exception to ER 404(b), and because the court minimized the prejudicial effect of the evidence by thrice giving an appropriate limiting instruction to

the jury, which the jury is presumed to have followed<sup>3</sup>, Findley's convictions for theft in the second degree should be affirmed.

**D. CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm all of Findley's convictions.

DATED this 7<sup>th</sup> day of December, 2011.

Respectfully submitted,

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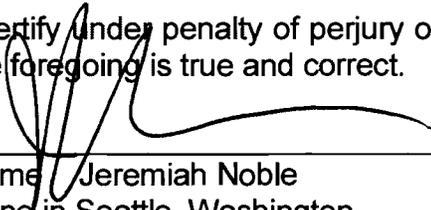
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<sup>3</sup> *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

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 William Henry Fligeltaub, the attorney for the appellant, at 1001 4<sup>th</sup> Avenue Fl 44, Seattle, WA 98154-1119, containing a copy of the Brief of Respondent in STATE V. WILLIAM EDWARD FINDLEY, Cause No. 66817-0-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 Jeremiah Noble  
Done in Seattle, Washington

12.7.2011  
Date