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DIVISION II

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COA NO. 39361-1-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY DEPUTY
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DRAPER,

Appellant.

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

The Honorable Richard Bosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erroneously admitted evidence of misconduct under ER 402, ER 403 and ER 404(b).
2. The court erred in failing to grant appellant's motion for mistrial.
3. The court erred in failing to give a limiting instruction for evidence admitted under ER 404(b).
4. Appellant received ineffective assistance of counsel.
5. Cumulative error violated appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Over defense counsel's objection, the court admitted police testimony that appellant had a felony warrant out for his arrest on an unrelated matter when police contacted him. The court also allowed the officer to testify appellant was traveling incognito at the time. Did the court commit reversible error in admitting this evidence under ER 404(b) where (1) the evidence was not admissible under the res gestae exception to ER 404(b); (2) the evidence was irrelevant and unduly prejudicial under ER 402, ER 403, and ER 404(b); (3) the court did not make required findings on the record before admitting the evidence; and (4) the jury

probably viewed the ER 404(b) as evidence of appellant's propensity to commit other crimes in the absence of a limiting instruction?

2. Did the court commit reversible error in failing to fulfill its obligation to give a limiting instruction for evidence of prior misconduct admitted under ER 404(b), where such instruction was needed to prevent the jury from considering appellant's prior misconduct as evidence of his propensity to commit crime?

3. Was defense counsel ineffective in failing to request a proper limiting instruction to guide the jury's consideration of evidence of prior misconduct?

4. Did cumulative error, in the form of wrongly admitted ER 404(b) evidence, lack of a limiting instruction for this evidence, and ineffective assistance of counsel deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Michael Draper with one count of possessing a stolen firearm and one count of unlawful possession of a firearm based on a prior conviction. CP 101-02. These two counts were based on possession of a single gun. CP 69, 73. A jury convicted on both counts. CP 59-60. The court sentenced Draper to 60 months confinement for unlawful possession and 96 months for possession of a stolen firearm, to

run consecutively to each other and consecutively to an exceptional sentence imposed in another cause number at the same hearing.¹ CP 14, 19. This appeal follows. CP 2-13.

2. Trial

Thomas Anderson took a vacation in July 2008. 1RP 56. Upon returning home on July 6, he discovered his house was broken into and his gun missing. 1RP 56. His truck was also missing. 1RP 56. Anderson was not home when his possessions were taken. 1RP 61.

Before trial, the State moved to admit testimony that police later contacted Draper because he had a warrant out for his arrest on an unrelated offense. 1RP 25-26. The court overruled defense counsel's objection and allowed admission of this testimony. 1RP 26-28.

Deputy Adkisson of the Lewis County Sherriff's Office testified at trial that he contacted Draper on September 18, 2008. 1RP 31-32. The deputy told the jury that the Sherriff's office, as a collective whole, had been looking for Draper due to an outstanding warrant. 1RP 33. They were actively pursuing Draper. 1RP 33. They had information as to particular vehicles Draper was traveling in. 1RP 33. On September 18, the deputy saw one of these vehicles in which, according to the deputy,

¹ Draper's total term of confinement, with the two sentences running consecutively, ended up being 213 months. CP 19; 2RP 24-25.

Draper was "traveling in incognito." 1RP 33. The deputy saw Draper inside, announced there was a felony warrant out for his arrest, and ordered him to step away from the vehicle. 1RP 34-35. Draper ran. 1RP 40. A chase ensued. 1RP 40-41. The deputy saw a gun fall from Draper's waistband after a struggle. 1RP 43. Draper was eventually chased down, handcuffed, and arrested. 1RP 47. The deputy then retrieved the gun that had fallen from Draper's waistband. 1RP 48-49.

Before trial, the State sought to admit testimony that Anderson saw Draper in his truck on July 13. 1RP 18-19. The State proffered this testimony "to show knowledge that Mr. Draper knew the weapon he had he knew it was in fact stolen." 1RP 19.

Defense counsel objected on grounds of ER 404(b), arguing prejudice outweighed probative value because the gun and the truck were not linked. 1RP 19-20. Anderson did not know when the two items were stolen or if they were stolen together. 1RP 20. The jury, meanwhile, would be left with the impression that "if [Draper] did that, he must have done this." 1RP 19.

The court allowed Anderson to testify he saw Draper in his stolen truck: "The inference is certainly there, that if he's in the stolen truck and he also happens to have it on him, I assume, connected by the testimony of Deputy Adkisson, a gun, which turns out to be Mr. Draper's (sic) gun, that

the gun was taken that same time the truck was stolen. It seems to me that it certainly is part of the *res gestae*, part and parcel in the same incident, the same crime, so you can present it." 1RP 20.

Anderson testified he saw Draper sitting in his stolen truck near a swimming area a week after returning from vacation. 1RP 58-59. Anderson confronted Draper and saw some of his belongings in the truck. 1RP 58. Draper told Anderson the truck was his. 1RP 59. Anderson told Draper he "had him," at which point Draper drove away. 1RP 59. Anderson did not see a gun inside the truck or on Draper. 1RP 61.

The parties stipulated Draper had previously been convicted of an unnamed felony. 1RP 66. Draper did not testify.

C. ARGUMENT

1. THE COURT'S WRONGFUL ADMISSION OF BAD ACT EVIDENCE UNDER ER 404(b) UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

The jury heard evidence that a felony warrant was out for Draper's arrest on an unrelated matter and that he was traveling incognito. Reversal of the conviction for possessing a stolen firearm is required because (1) the trial court did not make required findings on the record before admitting this evidence; (2) the evidence was inadmissible under the *res gestae* exception to ER 404(b) as well as ER 402 due to lack of relevance and ER 403 due to undue prejudice; and (3) the jury probably viewed the

outstanding warrant as evidence of Draper's propensity to commit the crime charged in the absence of a limiting instruction.

a. Standard of Review

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. Id.; State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Its decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

b. The Court Admitted ER404(b) Evidence That Made Draper Look Like A Diehard Criminal.

The State sought to admit evidence that there was a warrant out for Draper's arrest. 1RP 25. It wanted to show the reason for the initial contact between the police officer and Draper on the day in question. 1RP 25. The State claimed under a res gestae theory that it was "just part of the story of the case" and that if the State did not tell the jury about the warrant, "then the jury's wondering why the police officer is harassing this poor guy without any reason, and that could have an adverse effect to the State." 1RP 26.

Defense counsel objected that it did not matter why the officer initially contacted Draper. 1RP 26. This evidence was irrelevant and should be kept out because it was prejudicial. 1RP 26-27. The jury would be inflamed and left to infer "he already had a warrant out for his arrest. He was running already." 1RP 26. Defense counsel suggested the officer could testify Draper fled when the officer went to contact him without reference to the warrant. 1RP 26.

The trial court recognized admission of the warrant evidence would leave the jury wondering what the warrant was for because they were not going to be told what it was for. 1RP 26-27. The court nevertheless maintained the prosecutor's point was "well taken" because

the jury was "liable to go off on a tangent and say, why was this officer after this guy for no reason, if we don't explain it to them. I think the State is entitled to tell the jury the reason he was making contact is because he knew there was a warrant for Mr. Draper's arrest and he was attempting to effectuate service of that warrant and take him into custody when all of this started." 1RP 27.

Defense counsel responded the prejudice was too great and that the officer should only be allowed to testify that Draper took off upon being contacted. 1RP 27. The court ruled the officer could testify there was a warrant out for Draper's arrest. 1RP 28. The judge was "very concerned" about people who are "concerned about police officers, and "plus given the state of case law in Washington now where officers are not entitled to even ask somebody's name just on a mere contact." 1RP 28. The jury would not be told the basis for the warrant. 1RP 28.

Armed with the trial court's ruling, the State first elicited officer testimony that Draper had an outstanding warrant out for his arrest. 1RP 32-33. The officer then testified Draper was traveling "incognito" in a van on the day in question. 1RP 33. The officer's "incognito" comment drew defense counsel's objection, which was promptly overruled. 1RP 33-34.

The officer further testified he told Draper that there was a "felony" warrant out for him. 1RP 35. Defense counsel again objected

and asked to be heard outside the jury's presence. 1RP 35. Counsel first noted the judge's sighs upon hearing the objection "implies to the jury that I've done something improper." 1RP 35. Counsel then argued the officer's "incognito" testimony as well as the fact that the warrant was for a felony went beyond the scope of the court's pre-trial ruling. 1RP 36. This additional evidence implied Draper was "on the lam." 1RP 36.

The State asserted this evidence went to the officer's "state of mind" regarding "why he did what he did next." 1RP 36. The court asked what defense counsel wanted. 1RP 36. Counsel moved for a mistrial "or at least a limiting instruction." 1RP 36.

The court denied the motion for mistrial because the testimony was admitted for the purpose of establishing a basis for the initial contact between the officer and Draper. 1RP 37. The court said this evidence was "part and parcel of what happened here." 1RP 37.

The court also refused to give a limiting instruction because it was unnecessary, given that the prosecutor in opening statement established the reason for the initial contact was because there was an outstanding warrant. 1RP 37. The court also doubted the jury understood the distinction between a felony and misdemeanor warrant. 1RP 37.

Defense counsel disagreed, maintaining the jury knew a felony is the most serious type of crime. 1RP 37. When asked what he proposed in

the way of a limiting instruction, counsel asked that officer testimony regarding the warrant, the incognito comment, and the van be disregarded. 1RP 37-38. The prosecutor claimed all this evidence went to the officer's "state of mind" and argued against any type of limiting instruction because such instruction "points the jury in the wrong direction for the defense, which at this point is just a tangential [sic], offhand remark by the officer. If you start giving instructions on it, it's going to point it out even more." 1RP 38. According to the prosecutor, the officer' testimony was in complete accord with the trial court's pre-trial ruling and there was no reason to strike the testimony "or limit it in any way." 1RP 38.

Defense counsel responded "if we're going to let the officer get away with what was his state of mind, then we've done away with 404(b)" and the court may as well let the officer testify to everything that he believed Draper did. 1RP 39. Counsel reiterated the traveling incognito comment implied Draper was up to something "sinister." 1RP 39.

The court overruled defense counsel's objections and denied the mistrial motion as being without basis. 1RP 39. The court further ruled "I'm not giving a limiting instruction. I see no need or necessity for a limiting instruction." 1RP 39. Back in front of the jury, the trial court overruled defense counsel's objection. 1RP 39.

- c. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If It Is Unduly Prejudicial.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 402 prohibits admission of irrelevant evidence.² ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.³

ER 404(b), meanwhile, prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.⁴ "ER 404(b) forbids such inference because it depends on the

² ER 402 provides: " All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

³ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

⁴ ER 404 provides in relevant part: " (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336. Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) prohibits admission of evidence simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) provides evidence of other crimes, wrongs, or acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Wade, 98 Wn. App. at 334.

"ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). That is,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62.

Relevant evidence is defined in ER 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362.

Propensity evidence may be logically relevant but it is not legally relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). Although propensity evidence is logically relevant, the risk that a jury uncertain of guilt will convict anyway because a bad person deserves punishment "creates a prejudicial effect that outweighs ordinary relevance." Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Further, even relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Id. at 361-62. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

d. The Court Erred In Allowing The Jury To Hear Officer Testimony That There Was A Felony Warrant Out For Draper's Arrest And That Draper Was "Incognito" When Contacted By Police.

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. One of these purposes is proof of res gestae. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Res gestae evidence completes the story of the crime by proving the immediate context of happenings near in time and place. Id. To qualify as res gestae, "[t]he other acts should be inseparable parts of the whole deed or criminal scheme." Id. The State sought to admit the outstanding warrant evidence under a res gestae theory and the court admitted it on that basis.

Res gestae evidence must meet the requirements of ER 404(b) to be admissible. Mutchler, 53 Wn. App. at 901. When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175. This analysis must be conducted on the record. Id.

The trial court here failed to balance the probative value of the arrest warrant against its potential for unfair prejudice on the record. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court did not specify how the evidence was relevant to prove an element of the crime charged or to rebut a defense. Nor did the court balance any supposed probative value against its prejudicial effect.

Even if the court had conducted a balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed whatever marginal probative value it retained. Evidence that Draper had an outstanding arrest warrant does not qualify as *res gestae* because it is not an inseparable part of the charged gun possession offenses. Mutchler, 53 Wn. App. at 901. Draper's other crime giving rise to the arrest warrant, which the jury was left to speculate about, was not "a link in the chain of an unbroken sequence of events surrounding the charged offense." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). The arrest warrant was based on Draper's failure to appear for a court hearing on an unrelated offense. CP 108. Draper's bail jump was not part of the "same transaction" as the charged offenses involving the stolen firearm. Mutchler, 53 Wn. App. at 901-02. The jury

would have still heard the entire legally relevant story surrounding those charges in the absence of evidence that Draper had done something to justify an arrest warrant.

Defense counsel's objection should have been sustained. Under ER 404(b), evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). The fact that Draper had an outstanding arrest warrant for bail jumping did not make it any more probable that he knowingly and unlawfully possessed a stolen firearm. The nexus between the charged crimes and the warrant is missing.

In State v. Thrift, the trial court erred in permitting an officer to testify he arrested defendant on the basis of a bench warrant for another alleged crime. State v. Thrift, 4 Wn. App. 192, 194-95, 480 P.2d 222 (1971). Testimony that he arrested the defendant on a matter unrelated to the charged crime was improper because the evidence was not necessary to prove an element of the charged offense. Id.

Here, the State was required to prove Draper knowingly possessed a stolen firearm and unlawfully possessed a firearm due to a prior felony conviction. Officer testimony that Draper had a felony warrant out for his arrest on an unrelated matter was irrelevant and unnecessary to prove any element of those charge. As in Thrift, the evidence of an arrest warrant did not tend to prove or disprove any issue of consequence to the case.

The State sought to admit the arrest warrant evidence on the basis that it showed the officer's state of mind and completed the story for the jury and the trial court accepted this rationale. Appellate courts, however, have consistently rejected attempts to place prejudicial evidence before the jury under the guise of explaining why an officer began investigation.

State v. Edward, 131 Wn. App. 611, 128 P.3d 631 (2006) is instructive. In that case, the defendant was charged with delivery of a controlled substance. Id. at 613. The State insisted the detective's testimony that a confidential informant told him the defendant was dealing crack cocaine was admissible to explain the motivation for police investigation. Id. at 614. The appellate court determined the issue of why the officer started an investigation was not an issue in controversy and was therefore irrelevant. Id. at 614-15. The issue was who sold the cocaine. Id. at 615. The detective's state of mind was simply not relevant to whether the defendant committed the crimes charged. Id.

The same holds true here. The State in Draper's case maintained evidence of an outstanding warrant was admissible to show the officer's state of mind under a *res gestae* theory; i.e., why the officer was investigating Draper. But, as Edward makes clear, the officer's state of mind in relation to why he contacted Draper has no bearing on whether Draper unlawfully possessed a stolen gun. This was not an issue in the case. See State v. Sanford, 128 Wn. App. 280, 285-87, 115 P.3d 368 (2005) (reversible error to admit mug shot evidence under ER 404(b) where identity not at issue); Powell, 126 Wn.2d at 261-62 (trial court erred in admitting ER 404(b) evidence to prove intent where intent not at issue).

The trial court expressed concern the State's case would be adversely affected because jurors would want to know why the officer contacted Draper and would hold lack of explanation against the State if they were not told. This is an indefensible basis for justifying admission of ER 404(b) evidence — a rule designed to protect defendants from unfair prejudice while allowing evidence that is necessary to prove an element of the State's case.

The trial court misconceived the rationale behind ER 404(b). See 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 804.16 at 520 (5th ed. 2007) ("Over the years, most of the attention has been focused on the various ways in which evidence of prior misconduct

is *admissible despite* the restrictions in Rule 404(b) . . . Nevertheless, it should be remembered that the general thrust of Rule 404(b) is that other crimes, wrongs, or acts are *inadmissible* to suggest a person's general propensities."). ER 404(b) is meant to be a narrow door that allows admission of bad act evidence only under limited circumstances. The trial court wrongly treated ER 404(b) as a wide open door. ER 404(b) is not a license to inject all manner of prejudicial evidence into a case.

If the trial court deems it necessary for the officer to relate historical facts about the case related to the impetus for investigation, it is sufficient for the officer to report he acted upon "information received." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (rejecting admission of police dispatch evidence to "show the officer's state of mind in explaining why he acted as he did," and preemptively counter defense counsel's anticipated closing argument that the police investigation was incompetent).

Even if the evidence was relevant and had a proper purpose, it was still unfairly prejudicial under ER 404(b). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence of an outstanding warrant had no probative value. But the officer's testimony essentially told the jury that Draper was already a

criminal before being apprehended for the gun possession offenses and had committed a prior felony that justified his arrest. Given the legal irrelevancy of this evidence, its significance in the minds of jurors naturally bent towards treating it as evidence of Draper's propensity for crime.

Admission of evidence of "independent and unrelated crimes, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment, should be surrounded with definite safeguards." State v. Goebel, 36 Wn.2d 367, 378, 218 P.2d 300 (1950). Those safeguards include demonstration of how evidence of other misconduct is relevant to any material issue before the jury and an explanation to the jury of the purpose for which it is admitted. Id.

Those safeguards were not honored here. Why the officer contacted Draper was not a material issue before the jury. The court compounded the evidentiary error by flat out refusing to give a limiting instruction. The testimony therefore allowed the jury to impermissibly infer Draper had criminal propensities.

Allowing officer testimony that Draper was traveling "incognito" at the time of police contact amplified the evidentiary error related to the

warrant evidence.⁵ Evidence of flight, such as hiding from authorities, is ER 404(b) evidence. State v. Freeburg, 105 Wn. App. 492, 497-98, 502, 20 P.3d 984 (2001). Evidence of flight is admissible only if it allows for a reasonable inference of consciousness of guilt of the charged crime, and even then evidence of flight tends to be of marginal probative value. Id. at 498. Whether Draper sought to avoid police detection on the bail jumping charge, for which an arrest warrant had issued, was not relevant to any material issue before the jury on the gun possession charges. This evidence was inadmissible under ER 404(b) because it did not make the alleged fact that Draper possessed a stolen gun more probable. Powell, 126 Wn.2d at 259. It was unnecessary "to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. At the same time, the prejudicial effect of this evidence outweighed any probative value because it portrayed Draper as a fugitive from justice on an unrelated charge.

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). The trial court here did not properly analyze the ER 404(b) issue and his evidentiary decision is not entitled to

⁵ The officer made this remark in connection with Draper's behavior up until the time the officer made contact with him in the van. The propriety of Draper's subsequent flight through the woods after being contacted is not at issue.

deference. Foxhoven, 161 Wn.2d at 174. In any event, the court abuses its discretion in failing to adhere to the requirements of an evidentiary rule. Id. Under either de novo standard or an abuse of discretion standard, the court erred in admitting this evidence.

e. It Is Reasonably Probable Wrongful Admission Of ER 404(b) Evidence Affected The Outcome.

Reversal of the possession of stolen firearm conviction is required because there is a reasonable probability that juror consideration of ER 404(b) evidence tainted deliberation on whether the State proved Draper possessed the firearm knowing it was stolen — an element of the State's case that rested on debatable evidence.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The 404(b) evidence specified above fits squarely into this category. The evidence was unfairly prejudicial because it was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States v. Roark, 753 F.2d 991, 994 (1979)).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be

punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of other acts of misconduct "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Id.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. Neal, 144 Wn.2d at 611. Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the overwhelming evidence as a whole, and in no way affected the outcome. Id.; Sanford, 128 Wn. App. at 287-88; State v. Oswald, 62 Wn.2d 118, 122, 381 P.2d 617 (1963). The prosecutor did not consider the ER 404(b) evidence trivial, as shown by the fact he fought so hard for its admission and then strenuously objected to any sort of limiting instruction.

Moreover, evidence that Draper knew the gun was stolen is not overwhelming. Draper's defense to the stolen firearm charge was that he did not know the firearm was stolen. 1RP 93. The State's proof on the issue of knowledge was ambiguous. One inference is that Draper knew the gun was stolen. Another inference is that Draper did not know the gun was stolen because there was no evidence as to how Draper came into possession of that gun.

The evidence showed Draper was in possession of a truck stolen from Anderson, Anderson told Draper the truck was his, Draper had a gun in his possession more than two months later, the gun belonged to Anderson, and Draper ran when confronted by the police. The State argued Draper must have known the gun was stolen because he knew the truck was stolen. The inference drawn by the prosecutor was that the gun and truck were stolen at the same time, but the State presented no evidence at trial as to how Draper came into possession of either. Anderson saw Draper in his stolen truck one week after his house had been burgled and more than two months before Draper was apprehended by the police officer and charged with the firearm offenses. No facts emerged as to whether Draper was at all involved in that burglary. In closing argument, the prosecutor summed up his argument that Draper's knew he had a stolen gun simply by saying "[p]eople don't carry guns without knowing where they came from." 1RP 89. This hardly qualifies as irrefutable reasoning in attempting to convince jurors of guilt beyond a reasonable doubt.

The fact that Draper knew the truck was stolen does not necessarily show he knew the gun was stolen. Anderson did not see his gun in his truck and did not inform Draper his gun was stolen as well. The fact that Draper drove away upon being confronted by Anderson about the

stolen truck does not make it more likely that he knew the gun was stolen. The State did not show Draper was the one who stole the truck or the gun from Anderson's house. A reasonable juror could conclude Draper may have innocently come into possession of these items absent evidence to the contrary.

The prosecutor stressed Draper ran after being contacted by police. 1RP 87. But Draper may have fled for reasons that had nothing with knowing the firearm was stolen. Draper may have wanted to avoid apprehension because he knew he was not supposed to have a gun, even one that he did not know was stolen, based on his prior felony conviction. The warrant and related "incognito" evidence may have tipped the scale in favor of the State here, with the jury reasoning Draper must have known the gun was stolen because criminals steal guns and Draper had criminal propensities.

Res gestae evidence is meant to give the jury the complete picture surrounding a crime, but the manner in which the evidence was admitted in this case presented a distorted picture to the jury. The jury was not told the basis for the warrant. The jury was left to assume the warrant was for the stolen truck, which was not in fact true. Such a misplaced assumption would have encouraged jurors to infer Draper knew the gun was stolen because a court had already determined Draper was the one who had

stolen the truck from Anderson's residence. Evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process." State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000), remanded on other grounds, 142 Wn.2d 1007, 13 P.3d 1065 (2000), on remand, 106 Wn. App. 138, 22 P.3d 300 (2001), aff'd, 147 Wn.2d 238, 53 P.3d 26 (2002).

Furthermore, the jury did not know Draper had been separately charged with possessing Anderson's stolen truck and was due to be imminently tried for that offense. CP 112. ER 404(b) evidence regarding the stolen truck may have tempted jurors to punish Draper not only because he was a criminal type but because they inferred he was escaping punishment for possessing the stolen truck.

The prejudicial effect of the evidentiary error was compounded by the court's refusal to give a limiting instruction. Aaron, 57 Wn. App. at 281; Thomas v. French, 99 Wn. 2d 95, 105, 659 P.2d 1097 (1983) ("The prejudicial value of the letter in the present case is evident on its face. Without a limiting instruction, the jury was free to accept the contents of the letter as true.").

In State v. Willis, an officer inadvertently testified he took the defendant into custody based on an arrest warrant for a crime unrelated to the one charged. State v. Willis, 67 Wn.2d 681, 688, 409 P.2d 669 (1966). The Court found this evidence did not require a new trial only because

defense counsel refused the trial court's offer to instruct the jury to disregard the officer's testimony and the defendant, in taking the stand, admitted he had previously been convicted of two felonies. Id. at 688-89.

Draper's case is different. Defense counsel requested the trial court to instruct jurors to disregard officer testimony related to the outstanding arrest warrant and "incognito" comment. The trial court refused to do so, leaving jurors free to consider this evidence for any purpose they saw fit. Jurors are naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Because a jury is naturally inclined to treat evidence of other bad acts as evidence of criminal propensity, the admission of this evidence tainted the jury's deliberation

The prejudicial effect of this evidence was in no way diminished by court instruction. There was no limiting instruction. The trial court refused to give one for the warrant and incognito evidence. Draper's case stands in contrast to those where ER 404(b) errors were found harmless because the trial court instructed the jury to disregard. See, e.g., Thrift, 4 Wn. App. at 195-96; State v. Essex, 57 Wn. App. 411, 416, 788 P.2d 589 (1990). The fact that the trial judge let out an audible sigh in front of the jury when defense counsel objected did not help matters, as it implied to the jury that counsel's concerns were misplaced.

The evidence was not briefly referenced or inadvertent. After winning his pre-trial motion over defense objection, the prosecutor cited the fact in his opening statement. 1RP 24, 37-38. The evidence was then repeated during the officer's testimony over defense objection, invoking the judge's sigh and removal of the jury while the issue was argued.

Because the evidentiary errors in this case prejudiced Draper's right to a fair trial as set forth above, the court erred in failing to grant Draper's motion for mistrial. A trial court abuses its discretion when it fails to order a mistrial after jurors hear prejudicial evidence that denies a defendant his right to a fair trial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (abuse of discretion not to grant a mistrial where jury heard evidence of prior crime in violation of pre-trial order).

The admission of the ER 404(b) evidence unfairly prejudiced Draper because it allowed the jury to infer Draper had criminal propensities. Draper's conviction for possession of a stolen firearm should be reversed because error in admitting the improper testimony was not harmless.

2. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE.

Even if admission of the ER 404(b) evidence was proper, the court still erred in failing to give a limiting instruction. Reversal of the

conviction for possession of a stolen firearm is required for this independent reason.

Regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." Saltarelli, 98 Wn.2d at 362. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." Bacotgarcia, 59 Wn. App. at 822. For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362. "Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others." Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002). The purpose of a limiting instruction is to prevent the jury from basing its verdict on a "once a criminal, always a criminal" reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

ER 105 provides "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Defense counsel requested a limiting instruction. The prosecutor argued juror consideration of the evidence should not be limited in any way. While defense counsel did not propose an exact limiting instruction, the trial court made it clear he would not give a limiting instruction of any sort. Under these circumstances, proposing an exact limiting instruction would have been futile. The court erred in outright refusing to give a limiting instruction.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). "Once the trial court strikes the balance in favor of admission and states tenable grounds, the court should give limiting instructions to direct the jury to disregard the propensity aspect of the evidence" and focus solely on its permissible evidentiary effect. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 18 n.2, 21, 74 P.3d 119 (2003). The Supreme Court recently reiterated, "a limiting instruction

must be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. Foxhoven, 161 Wn.2d at 175 (emphasis added).

The prosecutor's protest that a limiting instruction should not be given because it would emphasize the evidence is disingenuous and self-contradictory. Faced with the prospect of a limiting instruction that would have appropriately channeled the jury's consideration of this evidence instead of allowing its prejudicial effect to fester, the prosecutor suddenly sought to portray himself as only interested in protecting Draper from the very evidence he adamantly maintained was entirely proper. It was not the prosecutor's call to make. Nor was it up to the trial court. Defense counsel requested a limiting instruction and the trial court was required to give one.

The court erred in failing to fulfill its obligation to issue a limiting instruction. The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of another unnamed but serious crime as evidence of Draper's propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822.

There is a reasonable probability the outcome of the trial would have been different had the limiting instruction been given because, as set

forth above, the properly admitted evidence against Draper was not overwhelming and improperly admitted character evidence allowed the jury to convict Draper of being a bad person who had a propensity to commit crime. Cf. Freeburg, 105 Wn. App. at 502 (in prosecution for homicide, erroneous admission of evidence that defendant possessed gun at time of arrest required new trial where gun possession was unrelated to crime charged; in the absence of limiting instruction, jurors could well have regarded evidence that defendant had a gun when arrested as tending to show he was a "bad man" who committed the homicide). A new trial on the possession of stolen firearm charge is required.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A PROPER LIMITING INSTRUCTION.

If this Court finds defense counsel waived the limiting instruction error related to the warrant and incognito evidence by failing to propose a proper limiting instruction when asked to do so, then counsel's failure constitutes ineffective assistance of counsel. Counsel was also ineffective in failing to request a limiting instruction for (1) ER 404(b) evidence consisting of Anderson's testimony related to Draper's possession of the stolen truck; and (2) stipulated evidence that Draper had been convicted of a previous felony. Reversal of the possession of stolen firearm charge is required.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from

considering Draper's other criminal acts as evidence of his propensity to commit crime. Defense counsel requested but did not propose an exact limiting instruction for the warrant/incognito evidence. He did not request a limiting instruction for the stolen truck evidence or the previous felony evidence to which he stipulated. There was no legitimate reason not to propose proper limiting instructions given the prejudicial nature of this evidence. Allowing the jury to convict Draper on the basis of bad character did nothing to advance his defense.

Draper had the right to limiting instructions on all this evidence, including the stipulated prior conviction evidence. State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006); Donald, 68 Wn. App. 543. Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. Evidence that Draper possessed Anderson's stolen truck was not the type of evidence the jury could be expected to forget or naturally minimize. This evidence

formed a central piece of the State's case and the prosecutor emphasized it in closing argument to show Draper knew he possessed a stolen gun. 1RP 86-87, 94-95. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence.

Defense counsel unsuccessfully objected to the stolen truck evidence before trial under ER 404(b). In arguing the prejudicial effect of this evidence outweighed its probative value, counsel accurately recognized the jury, upon hearing the stolen truck evidence, would be left with the impression that "if [Draper] did that, he must have done this." 1RP 19. That is, counsel recognized the danger that the jury would treat evidence of Draper's possession of the stolen truck as evidence of his propensity to commit the crime charged. Having lost the battle to prevent jury from hearing this evidence, it was incumbent upon counsel to prevent the jury from using that evidence for the improper purpose he had already identified.

The "reemphasis" theory is also inapplicable to the stipulated evidence that Draper had a previous felony. The existence of a prior felony was an element of the State's case for the unlawful possession of firearm charge. CP 69. The jury could not be expected to ignore or minimize this evidence because it constituted an element of that crime.

Moreover, the stipulation itself was not only read to the jury but admitted as an exhibit and sent back to the jury room during deliberations. 1RP 66.

Prejudice created by evidence of a prior conviction is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). The need for a limiting instruction on the stipulated felony was especially acute because Draper faced two separate counts based on possession of a single gun. A limiting instruction would have told the jury it could only consider evidence of a prior conviction as relevant to whether the State proved an element of the unlawful possession count. In the absence of such instruction, the jury was free to consider the prior conviction as evidence of criminal propensity that could be applied to whether Draper knew the gun was stolen in relation to the separate possession of stolen firearm count.

Nor was there a legitimate reason not to propose a limiting instruction for the warrant and incognito testimony. Defense counsel did not remain silent on the theory that he did not want the jury to place undue emphasis on this evidence. Counsel twice objected in front of the jury when the officer testified to these matters. The trial judge audibly sighed when counsel asked to be heard outside the presence of the jury. The jury was removed from the courtroom while the issue was hashed out and then brought back, whereupon they were told defense counsel's objection was

overruled. For these reasons alone the jury could not be expected to shrug off that evidence

But that was not all. Counsel requested a limiting instruction outside the presence of the jury. When asked what exactly he proposed in the way of a limiting instruction, counsel requested the judge to instruct the jury to disregard the officer's testimony related to the warrant and Draper's incognito status. This shows counsel was not afraid of reemphasizing the evidence by way of reminding them of it through court instruction. Counsel recognized the importance of this evidence and its prejudicial effect on the jury. But again, having lost the battle to have the jury instructed to disregard the evidence, it was counsel's responsibility to ensure the jury did not use that evidence for an improper propensity purpose. "[J]urors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). To presume otherwise is to "inevitably conclude that a trial by jury is a farce." Id. (citation omitted). In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to propose a proper limiting instruction.

There is a reasonable probability the outcome of the trial would have been different had limiting instructions been given because, in the absence of such instruction, the jury was allowed to consider evidence of other crimes as evidence of Draper's propensity to commit the crime

charged. See section C. 2., supra. Reversal of Draper's conviction for possession of a stolen firearm is therefore required.

4. CUMULATIVE ERROR VIOLATED DRAPER'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.⁶ State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors

⁶ The right to a fair trial also implicates article 1, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As discussed above, an accumulation of errors affected the outcome of Draper's trial. These errors include (1) improper admission of evidence regarding the outstanding warrant under ER 402, ER 403, and ER 404(b); (2) improper admission of evidence regarding Draper traveling "incognito" under ER 402, ER 403, and ER 404(b); (3) the trial court's failure to give a limiting instruction; and (4) ineffective assistance in failing to request a proper limiting instruction. Reversal of the conviction for possessing a stolen firearm is required.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction for possessing a stolen firearm and remand for a new trial on that count.

DATED this 30th day of October 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39361-1-II
)	
MICHAEL DRAPER,)	
)	
Appellant.)	

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STATE OF WASHINGTON
2009 OCT 30 PM 4:46

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] LORI SMITH
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

- [X] MICHAEL DRAPER
DOC NO. 831922
WASHINGTON CORRECTIONS CENTER
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x *Patrick Mayovsky*

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