

NO. 40911-9-II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

BY 

STATE OF WASHINGTON, RESPONDENT

v.

DAVID GLENN HOLCOMB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 09-1-04702-4

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in admitting relevant and probative evidence of defendant's prior conviction regarding a similar crime and of his co-defendant's plea of guilty to demonstrate intent in the instant case?

B. STATEMENT OF THE CASE.

1. Procedure

On October 20, 2009, the State charged David Holcomb ("defendant") with burglary in the second degree. CP 1. The State amended the charges on March 17, 2010, adding two counts of bail jumping per amended information. CP 14-15. 1RP¹ 3-5.

On July 17, 2010, at the commencement of trial, the State sought a preliminary ruling as to the admissibility of evidence of defendant's prior crime of burglary in the second degree as a crime of dishonesty for impeachment purposes under ER 609 should defendant testify. RP 5. The court specifically allowed the fact of the conviction itself but not the details of the crime. *Id.*

Defendant testified before the jury on July 22, 2010. RP 153-86. In response to his testimony, the State moved on July 23, 2010, to admit

¹ Defendant's re-arraignment was compiled in a separate numbered volume from the rest of the report of proceedings and is referenced as 1RP to distinguish it.

further details of his prior conviction and information regarding his co-defendant's plea of guilty to burglary. RP 190-202. After hearing argument from both parties, the court allowed the State to question defendant regarding those facts. *Id.*

The jury found defendant guilty of burglary in the second degree and bail jumping as charged in count II on July 24, 2010. CP 78; RP 287-88, 307-08. The jury found him not guilty of bail jumping as charged in count III. RP 297-88, 307-08; CP 79.

The court sentenced defendant to a standard range sentence of 22 months confinement on June 28, 2010. CP 83-94. Defendant filed a timely notice of appeal. CP 80.

2. Facts²

Christopher Muir, a security officer at the Chinook Landing Marina, testified that he observed an old blue pickup truck in a parking lot near the marina in the afternoon of October 19, 2009. RP 52. Near the truck, he saw three men standing, looking inside and around three empty buildings. RP 53. He testified that he saw no other cars in the area. RP 60. After observing them for a brief period, he contacted the tribal police. RP 56.

² Consistent with defendant's brief and in accordance with RAP 10.3(a)(4), facts pertaining to the charges of bail jumping have been excluded as they bear no relevance to the matter on appeal.

Puyallup Tribal Officer Ryan Sales arrived at the parking lot at approximately 4:58 pm. RP 15. He saw the blue truck improperly parked in the lot. RP 16. At trial, he testified that he waited for an additional officer to arrive before proceeding. RP 16-17. He observed signs around the property that stated “No trespassing,” “Private property,” and “Keep out.” RP 23.

Puyallup Tribal Officer Douglas Johns testified that he arrived at the scene shortly after Officer Sales. RP 73-74. He saw the truck parked in the lot but saw nobody nearby. RP 74-75. He testified that the building had “Keep out” and “No trespassing” signs posted on its front. RP 77.

Shortly after he began investigating, Officer Johns heard metallic noises come from one of the abandoned buildings. RP 76. Officer Sales testified that he heard what he identified as people moving around inside the building. RP 44-45. He also heard a metallic sound as well. RP 47.

Officer Johns decided to investigate an uncovered hole in the side of the building while Officer Sales pounded on the building and announced their presence. RP 28; RP 77-78. Officer Johns crawled through the hole to investigate. RP 77-78; 97. Inside the building, Officer Johns saw two men, one of which was the defendant. RP 77-78; 94-95. Officer Johns testified that the building contained a substantial amount of metal which could have value as scrap metal. RP 79. He specifically saw a bucket full of metal pieces. RP 78. He ordered the men out of the building and withdrew from the hole. RP 77-78.

Defendant and two other men came out of the building. RP 28-29. Officer Sales testified that he handcuffed defendant. *Id.* The officers took defendants to the jail and booked them. RP 165.

At trial, defendant testified in his own defense. RP 153-86. He stated that his father had told him of the machines in the abandoned building. RP 154. Per his testimony, neither he nor his associates intended to take anything from the building. RP 166. They only intended to look at the machinery. RP 164.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED EVIDENCE REGARDING DEFENDANT'S PRIOR BAD ACT OR HIS CO-DEFENDANT'S PLEA OF GUILTY.

The admission or exclusion of relevant evidence falls within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 843 P.2d 651 (1992). The appellate court will not reverse the trial court's decision absent an abuse of discretion, which occurs only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

ER 404(b) provides:

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

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The court can admit bad acts if the evidence logically relates to a material issue before the jury and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), *citing State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence meets the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994).

- a. Specific elements of defendant's prior burglary conviction were properly allowed pursuant to ER 404(b).

The court may allow evidence of prior crimes to show a defendant's intent³. ER 404(b). In *State v. Medrano*, cited by the State at trial, a residential burglar testified at trial that he could not have had the requisite intent to commit a crime. 80 Wn. App. 108, 906 P.2d 982 (1995). The court in *Medrano* allowed evidence of defendant's prior convictions for burglary and theft to demonstrate intent and rebut his claim. *Id.* at 111. Considering the probative value of the evidence, the Court of Appeals held that "as a matter of logical probability, convictions (or pleas) of guilty to other crimes requiring intent make it less likely that [the defendant] could not form the requisite intent for the current burglary." *Medrano*, 80 Wn. App. At 113. Furthermore, the court found that admitting evidence of a prior conviction did not prejudice *Medrano* since the defendant had previously mentioned the prior crime at trial. *Id.* at 113-14.

³ Here, defendant pleaded guilty to the prior charge of burglary styled in the form of an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). The Court of Appeals has previously held that an *Alford* plea does not necessarily demonstrate intent for purposes of collateral estoppel in cases involving insurance indemnification. *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 550, 794 P.2d 521 (1990), citing *Safeco Ins. Co. v. McGrath*, 42 Wn. App. 58, 708 P.2d 657 (1985). The *Doty* court held that the plea constituted an admission but was not conclusive. *Doty*, 58 Wn. App. at 551. Here, the court acknowledged that defendant utilized an *Alford* plea and allowed defense counsel the opportunity to question defendant regarding the meaning and intention of the plea, finding it a means to minimize the prejudice against defendant. RP 202.

Here, the court had previously ruled that the fact of defendant's prior burglary charge as a crime of dishonesty was admissible under ER 609. RP 5-6. That ruling has not been challenged on appeal. Furthermore, defendant testified as to his prior guilty plea during his initial testimony. RP 175-76. Thus, prior to State's ER 404(b) motion, the jury knew that defendant had previously pleaded guilty to burglary in the second degree.

During defendant's testimony, defense counsel asked defendant if he had any intention of taking anything from the building; he testified that he did not. RP 166. As with *Medrano*, defendant specifically testified that he did not have the intent to commit theft, a requisite element of the crime charged. Furthermore, the prior offense involved stealing scrap metal, similar to the crime charged here. RP 200; 208. Thus, given the similarity between the previous crime and the current charge with specific regard to intent, the admission of prior bad acts demonstrated more than mere propensity. Since defendant testified that he did not have the requisite intent required for burglary, evidence of his prior crime also served to rebut his assertion.

After the State's ER 404(b) motion, the State questioned defendant during cross-examination as to the details of his prior conviction of burglary:

Q: Now, we talked a little bit yesterday, and you admitted that in 2005 you had also pled guilty to attempted burglary in the second degree?

A: Yes, ma'am.

Q: And you were aware at the time that you entered your plea that that crime involves intent to commit – that you unlawfully enter a building and it involves an intent to commit a crime against property or person inside?

A: Yes, ma'am.

Q: The same intent involved in this case?

A: Yes, ma'am.

Q: And that incident back in 2005 also involved an allegation of intent to take metal?

A: Yes, ma'am.

RP 207-08. The prosecutor inquired no further into defendant's prior conviction of burglary. During closing argument, the prosecutor specified the purposes for which the jury can consider defendant's prior conviction:

You can also consider it in determining what the defendant's intent was. The defendant acknowledged that it is an offense, a crime, that involves the same intent as the one charged in this case, the burglary in the second degree. It's going to be up to you to determine how much weight you put in that previous conviction. But those are the two purposes that you can consider it for. You don't have to crawl up inside his mind in order to determine what the intent was.

RP 244. The prosecutor did not dwell on defendant's prior bad act nor did she inquire beyond the question of intent and the fact that the prior crime involved stealing metal. RP 207-08; 244.

When admitting evidence of bad acts, the court must look at more than whether or not the evidence meets the requirements of ER 404(b). “If the evidence is admissible for one of these purposes, a trial judge must determine whether the danger of undue prejudice from its admission outweighs the probative value of the evidence.” *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). The court must determine whether the evidence would unduly prejudice defendant. ER 403. Here, the court had already ruled on allowing the fact of defendant’s prior conviction for purposes of impeachment; inquiring as to specific details of the prior burglary offense did not unduly prejudice him since the jury already knew that he had the prior conviction. Additionally, as in *Medrano*, admission of the prior act did not unfairly prejudice defendant any more than his testimony regarding the prior crime had already done. Since the details of the prior burglary conviction did not unduly prejudice defendant, the trial court did not abuse its discretion in admitting defendant’s prior bad act.

Defendant now argues that by the holding of *State v. Wade*, the trial court erred in admitting evidence of his prior burglary. 98 Wn. App. 328, 989 P.2d 576 (1999). In *Wade*, the trial court allowed the State to adduce evidence of the defendant’s prior two charges of drug dealing as part of the State’s case-in-chief to demonstrate intent to distribute. *Id.* at 333. This was found to be improper, however, because “Wade offered no defense; nor did he claim mistake, inadvertent possession, or misidentification.” *Id.* at 336. Further, the *Wade* court recognized that the

facts of the prior offenses did not correlate with the immediate offense. *Id.* at 337. Thus, the admission in *Wade* served only as propensity evidence. Unlike *Wade*, defendant testified specifically as to his lack of intent, an issue to which the prior bad act specifically addressed; he did so prior to the State pursuing its ER 404(b) motion.

ER 404(b) provides guidance for when a criminal defendant's prior bad acts, convictions, or guilty pleas can be admitted at trial. In this case, the trial court properly admitted defendant's similar crime to demonstrate intent in the current case. The court acted consistently with ER 404(b) and *Medrano*, properly admitting the evidence.

- b. The court's admission of co-defendant's plea of guilty does not constitute a prior bad act under ER 404(b) and thus defendant did not properly raise the issue on appeal.

Defendant argues that the court improperly allowed the State to inquire as to his co-defendant's plea of guilty during cross-examination. App. Br. at 9. Specifically, defendant argues that the court allowed evidence of his co-defendant's guilty plea "to prove intent under ER 404(b)." *Id.* A co-defendant's plea of guilty is not an ER 404(b) issue as it is not a prior bad act of the defendant nor is it an uncharged offense. At trial, the prosecutor argued that "he raised the inference in front of the jury that he, in fact, did know the other individuals' intent, that none of them had any use for it by saying 'we.' We had no use for it." RP 197. Further, "this statement by the codefendant goes directly to impeach Mr.

Holcomb's attempting to speak for those codefendants by saying we didn't have any use for it.” *Id.* The court, accepting the State’s argument that defendant “opened the door” to the evidence, allowed it for cross-examination. RP 198.

A criminal defendant can “open the door” to a normally prohibited evidentiary issue. When a party introduces evidence that would have been inadmissible when presented by the opposing party, it “opens the door” to that evidence for purposes of explanation or contradiction. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006), *citing State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). “A trial court’s decision to allow cross-examination under the open-door rule is reviewed for abuse of discretion.” *Ortega*, 134 Wn. App. at 626.

The Washington Supreme Court explained the “open door” doctrine in *State v. Gefeller*:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), citing *State v. Stevens*, 69 Wn.2d 906, 421 P.2d 360 (1966). In *Gefeller*, the defendant asked a police officer on cross-examination about a lie detector examination given to the defendant. *Gefeller*, 76 Wn.2d at 455. The State addressed the test on redirect. *Id.* “[W]hatever view the courts may hold generally on the subject of lie detectors, the evidence challenged here can hardly be declared error because the matter of a lie detector test was first introduced by defendant on cross-examination.” *Gefeller*, 76 Wn.2d at 454. The court rejected defendant’s claim on appeal that lie detector evidence had been admitted improperly. *Id.*

In *State v. Gallagher*, the court barred the State’s witness from discussing drug paraphernalia found at the scene; the defendant attempted to utilize this bar to imply that no items associated with drugs existed. 112 Wn. App. 601, 609, 51 P.3d 100 (2002). The trial court in *Gallagher*, under the “open door” doctrine, saw defendant’s examination of the witness as an unfair advantage and allowed the State to introduce the previously excluded evidence. *Id.*

At trial, defendant testified in his own defense. RP 153-86. During his testimony, when asked whether or not he intended to take anything from the building, he stated, “No. *We* had no use for it. I mean, what were *we* going to do with machinist stuff. *We* really didn’t know anything about except [sic] that my father was a machinist.” RP 166

(emphasis added). Defendant specifically addressed not only his intent, but the intent of his co-defendants. *Id.* Thus, by testifying as to his co-defendants' intent, he opened the door to evidence in rebuttal relating to their intent.

In response to defendant's testimony, the State moved the court to allow evidence regarding his co-defendant's plea of guilty. RP 190-91. The court heard argument from the State and defense counsel regarding the admission of co-defendant's statement. RP 190-98. The State argued that:

[T]his statement by the codefendant goes directly to impeach [defendant's] attempting to speak for those codefendants by saying we didn't have any use for it. Had he not testified to that, again, much stronger argument for the defense, but he did. He did attempt to speak for the codefendants. He testified that it was his father that told him about the machine shop and going down there and looking at it. We have two other individuals that go in. And then he starts speaking for them, that they had no use for what he testified they saw inside of the shop, and now we have something to impeach that.

RP 197-98. The court allowed the co-defendant's plea of guilty to be brought up on cross-examination for purposes of impeaching defendant's testimony. RP 198-200.

On cross-examination, the prosecutor questioned defendant as to his co-defendant's plea of guilty and to what it meant with respect to intent. Specifically, the prosecutor asked:

Q: Now, when you made that – when you testified yesterday what were we going to do with that, would it surprise you or were you aware that Alan had pled guilty to burglary in the second degree?

A: Yes, I knew that.

...

Q: Would it surprise you to learn that when Alan entered that plea of guilty to burglary in the second degree arising from that incident when the three of you were in that building that he indicated that the intent of being in that building was to take items from inside?

A: It would not surprise me, no.

RP 206-07. The prosecutor limited inquiry to these questions. In closing argument, the prosecutor reminded the jury of this testimony: “In cross-examination he said it wouldn't surprise him that one of the other individuals inside the building with him acknowledged that the intent was to take property from inside that building.” RP 243. Thus, the inquiry was of limited scope and did not exceed the limits of impeaching defendant's testimony.

Defendant testified not only to his intent but to the intent of his co-defendants. By doing so, he opened the door to evidence demonstrating to the contrary. The court properly allowed the State to inquire as to co-defendant's plea of guilty as it directly relates to the assertion made by defendant during trial. The trial court did not abuse its discretion in allowing that evidence at trial.

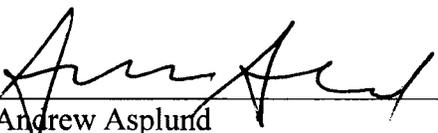
D. CONCLUSION.

The trial court properly considered evidence of defendant's prior guilty plea. In admitting the evidence pursuant to ER 404(b), the court did not abuse its discretion. Furthermore, defendant, by testifying to his intent and that of his co-defendants, opened the door for the State to address his co-defendant's guilty plea. For the reasons argued, the State respectfully requests that the defendant's sentence be affirmed.

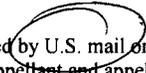
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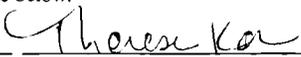
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Certificate of Service:

The undersigned certifies that on this day she delivered  by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/15/11 
Date Signature