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COURT OF APPEALS
DIVISION II

NO. 41815-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN HENNIGAN,

Appellant.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENT OF ERROR

Improper admission of irrelevant and unfairly prejudicial evidence deprived appellant of a fair trial.

Issue pertaining to assignment of error

Appellant was charged with identity theft and forgery relating to a single transaction. Over defense objection, the court admitted evidence regarding numerous other fraudulent transactions on the victim's accounts, even though there was no connection between appellant and these transactions. Where this irrelevant evidence encouraged the jury to be swayed by sympathy for the victim, did its improper admission deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On March 9, 2010, the Pierce County Prosecuting Attorney charged appellant Benjamin Hennigan with second degree identity theft and forgery. CP 1-2; RCW 9.35.020(3); RCW 9A.60.020(1)(a)(b). The information was later amended to correct the dates of the alleged offenses. CP 11-12. The case proceeded to jury trial before the Honorable Linda CJ Lee, and the jury returned guilty verdicts. CP 71-72. The court imposed

high-end standard range sentences, and Hennigan filed this timely appeal. CP 81, 91.

2. Substantive Facts

a. **Investigation of the charged offenses**

On April 6, 2009, John Malich parked his truck in the parking garage at Stadium High School. 2RP¹ 51-52. He was running late, and he inadvertently left his wallet, checkbook, and briefcase in his locked truck as he rushed to get to a meeting. 2RP 52-53. When he returned to his truck a couple hours later, he found his truck had been broken into and all his personal items were stolen. 2RP 53. Malich contacted his bank and credit card companies to report the theft and close his accounts. He then called the police. 2RP 55.

Two days later, a check was forged on Malich's account at a Les Schwab store in Puyallup. 2RP 60. Malich's name and address were on the check, it was drawn on his account, and it was signed in his name. 2RP 60-61. Malich did not write the check and did not authorize anyone else to write it. 2RP 61. When Malich received a call telling him the check had been written and returned for lack of funds, he reported it to the police. 2RP 58, 70.

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: 1RP—1/31/11; 2RP—2/1/11, 3RP—2/2/11, 4RP—2/3/11, 5RP—2/7/11; 6RP—2/8/11, 7RP—2/18/11.

Tacoma Police Detective Randi Goetz investigated the check. She obtained the sales documents from Les Schwab describing the work done and listing the vehicle license plate number. 3RP 95-97. Goetz ran the license plate number and learned that the vehicle was registered to Benjamin Hennigan. 3RP 97-98. Michael James, the clerk who conducted the sale, told Goetz he recalled the transaction. 3RP 95-96. Two months after the transaction took place, Goetz prepared a montage containing a photograph of Hennigan. 3RP 98, 124. Hennigan's photo was in the center of the top row of photos, and when James saw it, he said that had to be the man who passed the check. 3RP 109-10.

Hennigan was charged with identity theft and forgery based on the check written to Les Schwab. CP 11-12. Handwriting analysis conducted by two experts was unable to conclude that Hennigan had written the check, however. 4RP 231-33, 264.

b. Investigation of other fraudulent transactions

After Malich's truck was broken into, police learned of several other transactions using his stolen credit and debit cards and checks. 3RP 87, 94. The investigation into these transactions did not lead to any suspects, and there was no evidence Hennigan was involved in any of them. 3RP 114.

Prior to trial, defense counsel moved to exclude evidence of the transactions not connected to Hennigan. He argued that these other transactions were irrelevant because they did not establish the res gestae of the charged crimes, and admission of that evidence would be unduly prejudicial. 1RP 18-19.

The State argued that the jury needed to learn about the whole investigation, in which the detective went from place to place trying to find a suspect, so that it could understand the context of the case. 1RP 20. It acknowledged that there was no information Hennigan was involved in the other transactions but argued that omitting them would leave the jury with a false sense of what happened when Malich's financial information was stolen. 1RP 21.

Defense counsel responded that evidence of the other transactions did not prove Hennigan's state of mind, and Malich's state of mind was not relevant to the charges. Presenting evidence of crimes not related to Hennigan would simply inflame the jury and evoke sympathy for Malich. The evidence was irrelevant and should be excluded. 1RP 21-22. Counsel asked the court to limit the jury's consideration to evidence relating to the Les Schwab check. 1RP 22.

The court found that information regarding the other transactions was relevant to how the police investigation proceeded. 1RP 23. Because

no one was alleging that Hennigan was involved in those transactions, the court concluded that the burden of unfair prejudice had not been met. It denied the defense motion to exclude the evidence. 1RP 24. At defense counsel's request, the court gave a limiting instruction at the close of evidence, telling the jury that evidence of the other transactions was admitted only for the purpose of understanding the investigation in this case. CP 55.

At trial Malich testified that when he called his credit card company to close his accounts, he learned transactions were already being processed. 2RP 55. He subsequently learned that charges had been made at a car wash, an Auto Zone, a Bartell Drugstore, and a Safeway in Tacoma. 2RP 56-57. There were also checks written on his account to a Best Buy and a pizza place, in addition to the Les Schwab check. 2RP 59. Malich was concerned that he would be blamed for things he did not do, and he contacted these establishments to explain that his credit cards and checks had been stolen. 2RP 57, 65.

Detective Goetz testified that Malich gave her information about his credit cards being used, and she followed up on it. 3RP 87. She investigated transactions at McDonalds, Bartell Drugstore, Safeway, AM/PM, Auto Zone, and Splash-N-Dash Car Wash. 3RP 90-91. These transactions all occurred on April 6, the day the items were stolen from

Malich's truck. 3RP 92. Over defense objection Goetz testified that it is very typical to see transactions occur right after financial information is stolen. 3RP 93. Goetz testified that she heard from Malich a couple of weeks later that fraudulent checks had started surfacing. His checks had been used at a Best Buy and a Les Schwab in Puyallup. 3RP 94. In all, Goetz investigated eight transactions. 3RP 138.

Goetz testified that nothing panned out in these other transactions, and she did not identify a suspect. 3RP 91, 114. Over defense objection, she testified that it is very possible that more than one person could be conducting these fraudulent transactions. In her experience, these kinds of crimes often involve a ring of criminals that spreads out the cards and financial instruments as fast as possible because they know the accounts will be closed. 3RP 114-15. She said these criminals know what stores do not check whether accounts have been closed, and they target those locations. 3RP 116.

C. ARGUMENT

THE TRIAL COURT DENIED HENNIGAN A FAIR TRIAL BY ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE ABOUT OTHER FRAUDULENT TRANSACTIONS.

Both the state and federal constitutions guarantee criminal defendants a fair trial. U.S. Const. Amend. V; Wash. Const. art. 1 § 3; see

State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). The erroneous admission of irrelevant and unfairly prejudicial evidence deprives the defendant of a fair trial and requires reversal. State v. Bowman, 8 Wn. App. 148, 152, 504 P.2d 1148 (1972).

Only relevant evidence is admissible. ER 402; State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. This Court reviews the decision to admit evidence for an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

In this case, the trial court improperly admitted irrelevant evidence of fraudulent transactions unrelated to the charged offenses. Hennigan was charged with identity theft and forgery involving a check written to a Les Schwab store on April 8, 2009. CP 11-12. In addition to evidence of the transaction at Les Schwab, the State was permitted to present evidence that Malich’s credit cards and checks were used in numerous other transactions after they were stolen from his truck. Because evidence of

the other uncharged fraudulent transactions did not relate to any fact of consequence in the case against Hennigan, admission of that evidence was error. See Bowman, 8 Wn. App. at 151.

In Bowman, the defendant was arrested following execution of a search warrant at a house where he was present, when he was found to have a small amount of LSD in his pocket. Pursuant to the warrant, police seized a large quantity of drugs and drug paraphernalia, but the defendant was not charged in connection with that evidence. The defendant moved in limine to prevent the State from displaying the drugs or paraphernalia to the jury, but the motion was denied. At trial, the State's witness displayed a large plastic baggie containing all the drug evidence and testified that it had been seized during the search. Bowman, 8 Wn. App. at 151.

On appeal this Court held that it was error to have injected into the trial any reference to drug evidence which had no bearing on the crime with which the defendant was charged. Id. Here, as in Bowman, although the police gathered information regarding numerous fraudulent transactions on Malich's accounts, Hennigan was not charged in connection with those transactions. That information had no bearing on the charges against Hennigan, and it was error to admit any evidence regarding the uncharged transactions.

The trial court reasoned, however, that the other transactions were relevant to how the police investigation proceeded. The court was wrong. While police officers may be permitted to testify about the course of an investigation, such evidence is relevant only if it explains how police connected the defendant to the charged offense. See State v. Thomas, 150 Wn.2d 821, 862, 83 P.3d 970 (2004)(testimony admitted to explain how suspicion shifted to defendant in course of investigation); Edwards, 131 Wn. App. at 614-15 (error to admit statement offered to place investigation into context where the reason officer began investigation was not relevant to any issue in controversy); State v. Post, 59 Wn.App. 389, 392, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596 (1992) (officer's testimony about phone call to police admissible to explain why police investigation focused on defendant).

Here, the detective testified that her investigation of the other fraudulent transactions never panned out. 3RP 114. The other transactions did not lead her to discover the charged offenses or lead her to any suspect, let alone Hennigan. While the transactions were all related in that they all involved items stolen from Malich's truck, Hennigan was not charged with stealing anything from Malich's truck, and the investigation of the other transactions did not lead police to suspect Hennigan in the charged offenses. Contrary to the trial court's reasoning, the mere fact

that the detective was describing an investigation does not make the testimony relevant. Investigation of the Les Schwab check was relevant and properly admitted. But the jury just did not need to know about the numerous fraudulent transactions on Malich's accounts in order to understand the circumstances of the charged offenses.

And not only did the court allow testimony about the separate fraudulent transactions, it allowed the detective to testify that such transactions are often committed by crime rings that spread the financial instruments out as fast as possible to achieve the maximum number of transactions. 3RP 115. Information about the other transactions, or how identity theft rings operate, was irrelevant and inadmissible.

Even if there is some minimal relevance to the other fraudulent transactions, the evidence should have been excluded under ER 403. Evidence which has the tendency to unfairly prejudice the defense, confuse the issues, or mislead the jury should be excluded. ER 403. In a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

In opposing the defense motion to exclude evidence of the other transactions, the State made its motive for presenting that evidence clear.

The State wanted the jury to know the full extent of what Malich suffered as a result of the theft of items from his truck. IRP 20-21. Because Hennigan was not charged with any other transactions, the only purpose served by evidence of the investigation into other fraudulent transactions was to evoke sympathy for Malich and inflame the jury's passions against anyone charged with causing him to suffer. Malich's testimony that he went from establishment to establishment trying to clear his name further played on the jury's sympathies. Evidence is unfairly prejudicial under ER 403 if it appeals to the jury's sympathies and encourages an emotional response, rather than a rational decision. Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994); State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

In addition, the detective's testimony that transactions such as she testified to are often the work of rings of criminals, left the jury to speculate that Hennigan was tied to a crime ring and had the propensity to commit the kind of crimes charged in this case. This evidence was unfairly prejudicial and should have been excluded. See State v. Maule, 35 Wn. App. 287, 293-94, 667 P.2d 96 (1983) (where defendant was charged with rape of daughter and step daughter, testimony that majority of cases at sexual assault center involved male parent figure was improper

as it invited jury to conclude defendant was guilty based on speculation and conjecture disguised as expert testimony).

The trial court's error in admitting this unfairly prejudicial evidence was not harmless. An evidentiary error is harmless only if it is reasonably probable the error did not materially affect the jury's verdict. State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006).

There were significant holes in the State's evidence against Hennigan. The handwriting experts could not say that Hennigan wrote the Les Schwab check, agreeing that the results were inconclusive. 4RP 231-33, 264. There were also problems with James's identification of Hennigan. The montage he was shown placed Hennigan's photograph right in the center of the top row, and it was brighter than the other photographs. 3RP 109-10, 123. James was not shown the montage until two months after the transaction took place. 3RP 124. During the intervening time, James had handled transactions with roughly 2800 to 4000 other customers by his estimate. 3RP 183. As James testified, nothing stood out in his mind about the person who conducted the transaction, and he remembered vehicles better than people. 3RP 183. After seeing him at the defense table in the courtroom, James was sure Hennigan was the person he dealt with, although he had been less than positive regarding the montage identification. 3RP 190-91, 193. Since

there was no video footage of the transaction, the jury could not see for itself whether he was right. 3RP 128. The detective did not attempt to verify that Hennigan's car had the new wheels and tires purchased at Les Schwab. 3RP 129-30. And an eyewitness testified that someone else had borrowed Hennigan's car in early April 2009, and it did not have new tires when it was returned. 5RP 369-70, 385.

The prosecutor emphasized the multiple transactions in her closing argument. She told the jury that immediately after Malich's truck was broken into, thieves began using his personal and financial information to make purchases throughout the area. 5RP 410. Malich was able to close his accounts, but not before all these fraudulent transactions had occurred. 5RP 410. With the prosecutor's appeals to sympathy for Malich, the court's instruction to consider evidence of the other transactions only as it relates to the investigation in this case could not "unring the bell." See United States v. Dunn, 307 F.2d 883, 886 (5th Cir. 1962)("one cannot unring a bell,' 'after the thrust of the saber it is difficult to say forget the wound,' and finally 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'").

Given the weaknesses with the State's case and the State's appeal to the jury's sympathies for Malich, it is reasonably likely that the improper admission of irrelevant evidence about the uncharged fraudulent

transactions affected the jury's verdict. The court's error deprived Hennigan of a fair trial, and reversal is required. See Bowman, 8 Wn. App. at 152.

D. CONCLUSION

The improper admission of irrelevant and unfairly prejudicial evidence denied Hennigan a fair trial, and his convictions must be reversed.

DATED this 29th day of July, 2011.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I deposited in the US Mail properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v Benjamin Hennigan*, Cause No. 41815-1-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Benjamin Hennigan, DOC# 830617
C-A-59
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 29, 2011

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STATE OF WASHINGTON
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