

NO. 43782-1

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

STATE OF WASHINGTON, RESPONDENT

v.

TODD WIXON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 12-1-00197-1

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

 1. Did the trial court properly admit evidence of defendant's crimes of dishonesty under ER 609(a) when he was released from confinement in 2005?1

B. STATEMENT OF THE CASE.....1

 1. Procedure.....1

 2. Facts2

C. ARGUMENT.....4

 1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S CRIMES OF DISHONESTY UNDER ER 609(A) WHEN HE WAS RELEASED IN 20054

D. CONCLUSION.....9

Table of Authorities

State Cases

<i>State v. Calegar</i> , 133 Wn.2d 718, 727, 947 P.2d 235 (1997).....	6
<i>State v. Gomez</i> , 75 Wn. App. 880 P.2d 65 (1994)	5
<i>State v. Rivers</i> , 129 Wn.2d 697, 704-705, 921 P.2d 495 (1996).....	5
<i>State v. Russell</i> , 104 Wn. App. 422, 16 P.3d 664 (2001).....	5, 8

Rules and Regulations

ER 609	4, 5, 6, 9
ER 609(a).....	1, 4, 5, 7, 8, 9
ER 609(b)	5, 7

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

1. Did the trial court properly admit evidence of defendant's crimes of dishonesty under ER 609(a) when he was released from confinement in 2005?

B. STATEMENT OF THE CASE.

1. Procedure

On January 17, 2012, the State charged Todd Wixon, defendant, with one count of attempting to elude a pursuing police vehicle, one count of driving under the influence, one count of reckless driving, and one count of resisting arrest. CP 1-2.

A CrR 3.5 hearing was conducted on July 16, 2012, where it was determined that defendant's statement that he consumed alcohol on the night of his arrest was admissible. 1RP 14. Defendant's jury trial began the next day, and he was found guilty as charged on July 24, 2012. 2RP 12; 5RP 102. On August 3, 2012, defendant was sentenced to a total of 818 days in confinement with 203 days of credit, and standard legal financial obligations.¹ CP 63-69; 6RP 12.

¹ The court imposed 12 months of custody to be served consecutively for the convictions of attempting to elude, reckless driving, and resisting arrest. Confinement was suspended for the DUI charge.

Defendant timely filed a Notice of Appeal on August 3, 2012. CP 70.

2. Facts

Catherine and Alexander Earl testified that at approximately 9:24 pm on January 12, 2012, they saw defendant's truck on Highway 512 swerving at other vehicles, stopping on the freeway, and running red lights. 2RP 17, 33. Defendant weaved in and out of lanes without the use of a turn signal and repeatedly sped up and stopped causing other cars to honk and slow down. 2RP 18-20, 34-35, 39. They saw defendant run at least one red light while turning into a gas station and nearly hit a gas pump and flower pot. 2RP 21-22. As defendant entered the gas station, Mrs. Earl called 911 and reported defendant's license plate number. 2RP 23.

Damian Younger testified that he also witnessed defendant driving erratically and dodging traffic. 2RP 42. Defendant repeatedly changed lanes, driving up quickly behind cars and slamming on his brakes so hard he fishtailed. 2RP 47. Younger saw defendant run two red lights while turning into a gas station and watched him park in a way that blocked all four pumps. 2RP 48. Younger also called 911, and saw defendant fishtail out of the gas station. 2RP 48-50.

Officer Jeffrey Maahs testified that he first heard defendant's truck revving and then saw him driving 60-70mph in a 25 mph zone at the 5200

block of South Tacoma Way. 2RP 66-69. Officer Maahs activated the sirens and lights on his fully marked patrol car and pursued defendant. 2RP 69-70. Defendant did not pull over, he continued driving at 60-70mph, running red lights and weaving in and out of lanes without a turn signal. 2RP 70-74. Officer Maahs radioed other patrol cars and discontinued his pursuit pursuant to the policy for public safety. 2RP 75.

Several patrol units responded to Officer's Maah's radio call. 2RP 106, 124; 3RP 20, 42, 63. They conducted a felony stop on defendant at the 1500 block of Fawcett Avenue. 3RP 46. Despite the officer's commands to turn off his engine and exit the vehicle, defendant did not come out right away and when he did, he was holding an object.² 3RP 47-48. Defendant failed to follow the officer's commands to walk backwards and get into the prone position. 3RP 48. Instead, he faced police officers and had to be put into the prone position. 3RP 48. Defendant refused to be handcuffed and struggled with the two police officers who handcuffed him. 3RP 50-51.

Several officers testified that defendant smelled of intoxicants, had slurred speech, and bloodshot watery eyes. 2RP 81, 108; 3RP 29, 65. A bottle of rum was found in defendant's truck. 3RP 64. Defendant consented to field sobriety tests which he failed. 3RP 83.

² The object was a phone charger.

Defendant became very hostile as he was treated by the Tacoma Fire Department for a bruise above his eye. 3RP 27, 84. He screamed obscenities while he was being treated and while he was transported to Allenmore Hospital. 2RP 83, 109-110; 3RP 30. Defendant's verbal abuse continued at Allenmore. 2RP 84; 3RP 32, 86-92. When asked whether he would consent to a blood draw, defendant responded, "fuck no." 2RP 84; 3RP 32, 86-92. Following treatment, defendant was transported to Pierce County Jail. 3RP 94.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S CRIMES OF DISHONESTY UNDER ER 609(A) WHEN HE WAS RELEASED IN 2005.

Evidence of a defendant's crimes of dishonesty are admissible for impeachment purposes under ER 609, which states, in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

A trial court is only required to balance probative value versus prejudicial effect when a conviction is more than ten years old. ER 609(b). However, a crime involving dishonesty is automatically admissible if the date of conviction or of the release, whichever is later, is less than ten years old. ER 609(a); *State v. Russell*, 104 Wn. App. 422, 433-434, 16 P.3d 664 (2001). A trial court is *neither permitted nor required* to balance probative value against unfair prejudice when the date of conviction or release is less than ten years old. *State v. Russell*, 104 Wn. App. 422, 434, 16 P.3d 664 (2001)(emphasis added).

The trial court's decision to admit a defendant's prior convictions for crimes of dishonesty under ER 609 is reviewed for an abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-705, 921 P.2d 495 (1996). A trial court's failure to balance enumerated factors on the record is not reversible error unless the defendant can show that had the error not occurred, the outcome of the trial would have been materially affected. *State v. Gomez*, 75 Wn. App. 880 P.2d 65 (1994). An ER 609(a) error is reviewed under a non-constitutional harmless error standard. *State v.*

Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). An error is not reversible unless the court determines with a reasonable probability that but for the error, the outcome of trial would have differed. *Id.* at 727.

Here, the trial court properly admitted evidence of defendant's prior convictions for his crimes of dishonesty under ER 609. Defendant claims that more than ten years had elapsed since the confinement for his crimes of dishonesty had concluded, and that the trial court improperly admitted the evidence for failing to conduct a balancing test. Brief of Appellant at 9. Defendant's claim fails as less than ten years had elapsed since his release from confinement in 2005. Thus, the trial court properly found that the evidence was automatically admissible under ER 609(a).

Defendant was convicted in 1979 of possession of stolen property, taking a motor vehicle without permission, burglary, and murder in the first degree. 4RP 15. He served 26 years in confinement for those convictions and was released in 2005. 4RP 14. At trial, the State sought to admit evidence of defendant's crimes of dishonesty under ER 609. 4RP 15. Although defense counsel argued that the court should apply the balancing test, the court declined to do so and admitted the evidence stating the following:

"I'm not even talking about what he was convicted of, what he served time about. I'm talking about the law is that it is tolled while he's in prison and that's 26 years that it was tolled and didn't start running again until 2005, and we're in 2012. And so under 609, those crimes of dishonesty are still

applicable... somebody could say, you know, you didn't even go through -- Judge Fleming, you didn't go through the balancing act. And that's what I'm suggesting is that there is no reason to. It is run of the mill, it is the reason that the rule was enacted."

4RP 12-13.

The court declined, however, to admit evidence of defendant's burglary conviction after determining that it may not qualify as a crime of dishonesty. 4RP 16-17. Only evidence of defendant's convictions for possession of stolen property and taking a motor vehicle without permission, which have been recognized as crimes of dishonesty, were admitted. 4RP 15-17.

The trial court properly admitted the evidence of defendant's crimes of dishonesty under ER 609(a). Defendant was sentenced to five years, set to run concurrently, for each of his crimes of dishonesty in 1979. CP 88. Defense counsel claims that defendant's confinement for those convictions therefore concluded in 1984, beyond the 10 year period for ER 609(a). Brief of Appellant at 11. Defendant's claim fails as ER 609(b) explicitly states that a time period of 10 years must elapse from time of conviction or *release* from conviction, whichever is the later date. (emphasis added). The plain language of the rule only refers explicitly to the date of conviction or release from confinement and makes no reference to when a portion of a sentence may or may not have ended. ER 609(b). That is conjecture on defendant's part as to when the sentences for a

portion of a crime may have ended, and is not the wording of the rule. The rule does not say when a portion of a sentence may have ended. It states when a defendant is released from confinement. Defendant was not released until 2005. As the convictions were for crimes of dishonesty and he was released only seven years prior to the date of this trial, the evidence was automatically admissible under ER 609(a) without the need to conduct a balancing test. The court has explicitly held that when the time period is less than ten years, the court is *neither permitted nor required* to conduct such a balancing test. *State v. Russell*, 104 Wn. App. 422, 16 P.3d 664 (2001) (emphasis added).

Further, while the State does not concede that the trial court erred in refusing to conduct a balancing test, any error would have been harmless. As the evidence at trial was overwhelming, there is nothing to suggest that but for the trial court's decision not to apply the balancing test, the outcome of the trial would have differed. Three witnesses as well as several police officers testified to defendant's dangerously erratic driving. 2RP 18-20, 34-35, 39, 42, 47-48, 66-74, 106, 124; 3RP 20, 42, 63. Multiple officers witnessed defendant's failure to comply during the felony stop and belligerent behavior. 2RP 83-84, 107-110, 125; 3RP 30-32, 47-52, 86-92. Defendant also failed every sobriety test, and several officers testified that he smelled of intoxicants, had bloodshot watery eyes, and slurred speech. 2RP 81, 108; 3RP 29, 65, 83.

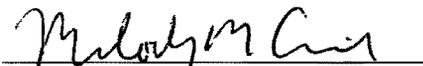
As defendant was released from confinement for his crimes of dishonesty in 2005, the evidence was automatically admissible under ER 609(a) without a need to conduct a balancing test. As such, this Court should dismiss defendant's claim and affirm his conviction.

D. CONCLUSION.

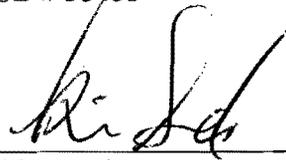
The trial court properly admitted evidence of defendant's convictions for his crimes of dishonesty under ER 609. As defendant was released from confinement in 2005, those convictions clearly fell within 10 years of this trial, and were thus automatically admissible without a need to conduct a balancing test. For the reasons argued above, the State respectfully requests that this Court uphold defendant's conviction.

DATED: March 19, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453



Robin Sand
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of 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.

3/14/13 Heaven Kahn
Date Signature

PIERCE COUNTY PROSECUTOR

March 19, 2013 - 12:46 PM

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