

No: 49003-0
Gray's Harbor County Superior Court No: 15-1-00450-9

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW J. PERRON,

Petitioner.

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

The Honorable David Edwards, Superior Court Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

During this appeal, the Court will be considering whether it is appropriate to admit evidence of an attempted theft which resulted in the issuance of a trespassing order, where the defendant is accused of burglary in a subsequent incident at the same business when he allegedly stole property while excluded from the business by the trespass order. During the Court's consideration of this case, it will review two relatively short transcripts. The first is sixteen-page pretrial hearing transcript which will be referred to as "PtrVRP." The trial transcript, comprised of 138 pages, will be referred to as "VRP."

B. ASSIGNMENT OF ERROR

Mr. Perron assigns error to the trial court's admission of evidence of attempted theft during a prior incident at WalMart wherein a trespass order was issued.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court Err by Admitting Evidence of Details of the March 8, 2014, Wal-Mart Incident as Elements of the Charged Offense under ER 401 and ER 403?
2. Is the Evidence Admissible under ER 404(b) for Other Reasons?

D. SUMMARY OF ARGUMENT

The Court should reverse Mr. Perron's conviction because the trial court improperly admitted prejudicial evidence of to prior alleged misconduct in Wal-Mart. The existence of the trespassing order, not the underlying basis for it, was probative for purposes of ascertaining whether Mr. Perron entered unlawfully. The purpose for issuance of the trespassing order had negligible probative value because Mr. Perron did not assert a public premises defense, or elicit testimony that Wal-Mart was somehow not authorized to exclude him from its store. The evidence served no purpose except to establish Mr. Perron's propensity to commit theft from Wal-Mart, and unfairly prejudiced his trial.

E. STATEMENT OF THE CASE

Matthew Perron was identified and arrested by Officer Timmons of City of Aberdeen Police Department on November 3, 2015, after Wal-Mart loss prevention employee Abigayle Frias reported that a suspect from a prior theft which allegedly occurred on October 10, 2015, was back at the store. (VRP 33-35). Mr. Perron was alleged to have escaped the store after stealing a speaker on October 10, 2015.

During law enforcement's investigation of Mr. Perron for the October 10, 2015, theft of the speaker, Wal-Mart employees alleged that he had been previously issued a trespass exclusion order from an attempted

theft of a speaker on March 8, 2014. (VRP 18, 21-24). The trespass exclusion order was issued by Brandy Hinesly, a Wal-Mart loss prevention employee; and witnessed by Officer Sexton of the Aberdeen Police Department. (VRP 21-24, 64). The State eventually charged Mr. Perron with Second Degree Burglary and he proceeded to trial.

Prior to trial, the defense moved, in limine, to exclude reference to details of the attempted speaker theft from March 8, 2014, after which Mr. Perron was allegedly trespassed from Wal-Mart. (PtrVRP 8). The defense argued that the only the *existence* of the trespassing admonishment—not the details justifying its issuance—was relevant. (PtrVRP 8-9). The State countered that the evidence was admissible on the basis of “modus operandi” and “common scheme or plan.” (PtrVRP 6). The State further appeared to argue that the evidence was relevant to establishing identity, arguing that, “[the evidence] makes it more likely that it was, in fact, the same person.” (PtrVRP 6).

The trial court orally denied the defense motion in limine, ruling that Mr. Perron’s denial that he received a written trespass notice made “everything that happened on March 8, admissible.” (PtrVRP 10). The trial court indicated that it thought that the events of March 8 of 2014 were relevant “to the elements of the crime” for which Mr. Perron was on trial. (PtrVRP 11). The trial court did not explicitly tether its ruling to any

particular rule. Mr. Perron was convicted after a trial by jury; and timely filed this appeal.

F STANDARD OF REVIEW

"A trial court's evidentiary rulings are reviewed for abuse of discretion." *In re Personal Restraint of Duncan*, 167 Wn.2d 398, 403, 219 P.3d 666, 669 (2009) (citing *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999)). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on 'untenable grounds, or for untenable reasons.'" *Id.* (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). "A decision is based upon untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.*

An appellate court "'reviews decisions to admit evidence under 404(b) for abuse of discretion.'" *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Dennison*, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990)). An appellate court may alternatively consider "whether any reasonable judge would rule as the trial judge did." *Id.* (citing *State v. Nelson*, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987)).

G ARGUMENT

This Court should reverse Mr. Perron's conviction because the trial court erroneously allowed extremely prejudicial evidence regarding a prior

bad act to infringe upon Mr. Perron's right to a fair trial. The trial court orally discussed its reason for admitting the evidence in such a way that suggests it considered only ER401 and ER403. (PtrVRP 10). It indicated that Mr. Perron's denial regarding having received a written trespass notice rendered admissible all the events of the incident in which it was allegedly issued. (PtrVRP 10).

Despite the fact that the parties had both argued the merits of admitting the evidence under ER404(b), the trial court did not explicitly identify any purpose, under that rule, for which the evidence may have been admitted. Regardless of whether the trial court relied upon ER401 and ER403, ER404(b), the details of the event that led up to the issuance of Mr. Perron's trespassing exclusion order should not have been admitted at his trial because it was unfairly prejudicial relative to its minimal probative value. In essence, it's overwhelming effect was that of propensity evidence.

1. Although Arguably Relevant, the Probative Value of Evidence Regarding the March 8, 2014, Conduct that Caused Wal-Mart to Issue Mr. Perron a Trespassing Exclusion Order was Outweighed by its Prejudicial Effect.

“Relevant evidence means 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.” ER 401. “Although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice...” ER 403.

Only the fact of a person’s exclusion—not the underlying basis therefor—is necessary to establish the elements of Second Degree Burglary. *See* 9A.52.030(1) (“A person is guilty of burglary in the second degree if, with the intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building...”). This is so because the mere existence of an exclusion order, in an absence of a challenge to its propriety, is sufficient to establish “unlawful entry.” *See* 9A.52.010(2) (“‘Enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.”). The State itself even argued during closing how elementary the notion of “unlawfully entering or remaining” really is:

...and this instruction is about whether or not someone is there unlawfully, is one sentence long; right? Pretty simple. There is nothing about whether a person chooses to remember that they’ve been notified. There is nothing about the manner in which they must be notified; right? The law doesn’t say it must happen in a particular way.

(VRP 118). If “unlawfully entering or remaining” is really this simple, why go into the details of Mr. Perron’s alleged attempted theft on March 8, 2014? The answer is simple: propensity. The State did not argue during closing argument about the details of the March 8, 2014, incident to establish Mr.

Perron's unlawful entry. It only referred to the incident details to show "modus operandi." (VRP 117).

Propensity could be the only truly meaningful reason for the State to admit the March 8, 2014, incident details because, at trial, Mr. Perron did not challenge the authority of Wal-Mart to issue him a trespass order. Nor did he not elicit any testimony which claimed the issuance of the trespass exclusion order was unjustified or otherwise unlawful. Mr. Perron did not claim that his alleged entry on October 10, 2015, was justified by the public premises defense or good faith mistake. His only "challenge" to the trespassing order itself was that he was never told that he was excluded from Wal-Mart and was never issued a written trespassing exclusion order. (VRP 92-92). That testimony could be rebutted by presenting testimony from State's witnesses detailing issuance of the order in the loss-prevention office.

Regarding Mr. Perron's alleged entry on October 10, 2015, he claimed he was not at Wal-Mart that day and did not commit a crime therein. (VRP 93-94). His girlfriend, Ashley Young also provided an alibi defense, testifying that he was with her in Tacoma with her on October 10, 2015, when he was allegedly burglarizing the Aberdeen Wal-Mart. (VRP 79-81). This claim was not rebutted or undercut by the March 8, 2014, incident, except from the standpoint that it established a propensity to commit wrongdoing and criminal character which diminished credibility.

The underlying facts allegedly supporting issuance of the trespassing exclusion order were minimally-probative, at best, for rebutting Mr. Perron's claim that he was not told on March 8, 2014, that he was excluded from the Wal-Mart. The March 8, 2014, allegations which justified Wal-Mart's trespassing exclusion order, however, were extremely prejudicial because they suggested a criminal character and a propensity to commit theft.

Mr. Perron was trespassed on March 8, 2014, because he was alleged to have attempted to steal a speaker. (VRP 18-20). The loss prevention employee who witnessed the alleged theft on March 8, 2014, Brandy Hinesly, described that Mr. Perron was in an electronics area where things are "very commonly" stolen with a female who, like him, was wearing a backpack. (VRP 19). Ms. Hinesly testified that Mr. Perron selected a speaker and, while moving through other sections of the store, removed it from the packaging and put it down his pants. (VRP 19-20). She further testified that he contacted law enforcement who eventually apprehended Mr. Perron and his female companion, Ashley Young, and took them to the loss prevention office. (VRP 21-22). Once in that office, Ms. Hinesly described the process whereby she allegedly issued the trespassing exclusion order in the presence of Mr. Perron, Ashley Young, and an Aberdeen police officer. (VRP 21-23).

The issuance of the trespassing exclusion order was established through testimony of Brandy Hinesly, the Wal-Mart employee, and Officer Sexton of the Aberdeen Police Department. Both of these witnesses were could have coherently testified about their interaction with Mr. Perron in the loss prevention office independent of testimony regarding details of his alleged attempted theft. The State argued as much, because, “[t]here is nothing about the manner in which they must be notified [of the trespassing exclusion]; right? The law doesn’t say it must happen in a particular way.” (VRP 118). If believed by the jury, the testimony of the two witnesses regarding the issuance of the exclusion order itself could have, without any reference to the alleged attempted theft, rebutted Mr. Perron’s claim that he was not issued a trespass exclusion order.

Instead, the State was allowed to elicit detailed testimony about Mr. Perron’s prior attempted speaker theft. It was allowed to suggest both Mr. Perron and his girlfriend/witness Ashely Young, had “criminal character,” through admission of the prior misconduct of March 8, 2014. The trial court erred in admitting the evidence under the general rules regarding relevance because it was minimally probative, and significantly prejudicial as it was a prior bad act under ER404(b).

2. Evidence Regarding the Alleged Conduct that Caused Wal-Mart to Issue Mr. Perron a Trespassing Exclusion Order was Inadmissible Under ER404(b).

Under ER 404(b), regardless of its probative value, evidence may not be admitted “to prove the character of the accused in order to show that he acted in conformity therewith.” “ER 404(b) must be read in conjunction with ER 402 and 403.” *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Evidence of prior bad acts must meet two criteria to be admissible. *State v. Saltarelli*, 98 Wash.2d 358, 362, 655 P.2d 697 (1982). First, it must be “logically relevant to a material issue before the jury.” *Id.* In other words, the test is “whether the evidence as to the other offense[s] is relevant and necessary to prove an essential ingredient of the crime charged.” *Id.* Second, if the evidence is relevant, its probative value must outweigh its potential for prejudice. *Id.* If evidence of prior bad acts 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 purposes.” *Id.*

The very nature of ER 404(b) evidence erodes the presumption of innocence “because it shows the defendant to be a ‘bad person.’” R. Lempert & S. Saltzburg, 61 Wash. L. Rev. 1213 (1986). The government’s evidence of other crimes “erodes the presumption of innocence.” *Id.* at fn2. “Jurors no longer view the defendant in a neutral

way. They assume that a defendant who has been in trouble with the law before is more likely to be guilty now.” *Id.* If the decision whether to admit prior bad acts is doubtful, “the scale must tip in favor of the defendant and the exclusion of the evidence.” *Smith* at 106 Wn.2d at 776.

Mr. Perron’s presumption of innocence was unfairly stripped from him by the admission of the extremely-prejudicial prior attempted theft. If believed by the jury, it would reveal that he, and his witness Ashley Young, had previously attempted to steal from the same Wal-Mart store. As noted above, the jury would likely no longer see either witness in a “neutral way,” solely by virtue of the prior attempted theft from March 8, 2014. The evidence essentially was an invitation for the jury to convict on the basis of a series of immoral acts, rather than the lone act for which Mr. Perron was being tried. The State’s closing argument capitalized on this similarity:

Let’s also consider the item that was taken, right, compared from March to October. From the same department, the same type of item, a speaker, and then the fact that he wandered through the store before eventually going toward the door; right? Same MO, if you want to call it that. So how likely is it that it is the same person? That is for you to decide.

(VRP 117).

The trial court did not admit the evidence of the March 8, 2014, incident on the basis of modus operandi. (PtrVRP 10). The single similar

incident from March was inadequate to establish modus operandi under ER 404(b). “Evidence of unique modus operandi is relevant when the focus of the inquiry is the identity of the perpetrator, not whether the charged crime occurred. As we have recently established, when identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature.” *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) (citing *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002)).

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant to the current charge, “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.

Thang, at 643 (internal citations omitted). The State elicited testimony from Brandy Hinesly, the loss prevention employee of Wal-Mart, which directly refuted that the alleged conduct was sufficient to establish a unique “modus operandi.” She testified that Mr. Perron and Ms. Young “were both wearing backpacks, and they were in an area that is *very commonly* (sic) *thefted...*” (VRP 19) (emphasis added). Her observation of the subjects began because they engaged in behavior that “lots of people who act suspiciously might

do.” (VRP 18). The alleged conduct on March 8, 2014, was not so unique as to constitute a distinct *modus operandi* to be relevant for identity purposes in this case. The evidence was simply prejudicial character evidence establishing a propensity for criminal activity.

3. Although Mr. Perrson Believes he Will Prevail on Appeal, He Asks this Court not to Award the State Costs on Appeal if it Prevails.

The appellate court has discretion not to impose appellate costs on a defendant who is unsuccessful on appeal, pursuant to the recoupment statute, RCW 10.73.160(1). *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The court can direct that costs not be awarded in its decision terminating review. *State v. Nolan*, 161 Wn.2d 620, 626, 8 P.3d 300 (2007).

Costs should not be imposed where the appellant lacks the ability to pay. *Sinclair*, at 389-390. The fact that an order of indigency has been entered creates a presumption that indigency continues throughout the appellate review. *Sinclair*, at 393 (citing RAP 15.2(f)). Mr. Perron has been determined to be indigent and counsel was appointed on this basis. Should the State seek costs in its Response, appellate counsel for Mr. Perron will offer more robust argument about the inappropriateness of imposing costs in this case. Until such time as the State requests costs, such argument is an unnecessary waste of this Court’s valuable time.

H. CONCLUSION

This Court should reverse Mr. Perron's conviction and remand for a new trial with an order that the conduct of March 8, 2014, not be admitted at trial. Whether on the basis of relevance and prejudicial effect under the general rules of evidence, or under ER 404(b), the prior bad act should not have been admitted at trial. That evidence was not necessary to establish the fact that a trespassing order was issued. Its admission at trial was prejudicial.

Respectfully Submitted this 18 day of November, 2016.

LAW OFFICE OF BRET ROBERTS, PLLC.



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PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed Matthew Perron's Brief of Appellant electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the same through the Court's filing portal to:

Katherine Lee Svoboda
Grays Harbor County Prosecutor's Office
ksvoboda@co.grays-harbor.wa.us

I was unable to put a copy in the mail to send to the defendant before 5:00 p.m. on Friday, November 18, 2016, so I will mail him a copy on Saturday, November 19, 2016, and provide separate certificate of service on Mr. Perron at Olympic Correction Center at 11235 Hoh Mainline, Forks, WA 98331.

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

Signed at Port Townsend, Washington, on November 18, 2016.



Bret Roberts, WSBA 40628
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No: 49003-0
Gray's Harbor County Superior Court No: 15-1-00450-9

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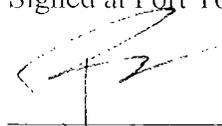
PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I mailed a copy of Appellant's Opening Brief to Matthew Perron at Olympic Correction Center at 11235 Hoh Mainline, Forks, WA 98331.

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

Signed at Port Townsend, Washington, on November 17, 2016.



Bret Roberts, WSBA 40628
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November 19, 2016 - 11:13 AM

Transmittal Letter

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