

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

APPELLANT'S REPLY

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A. INTRODUCTION

The issue before the Court is whether evidence that the trial court admitted over the defendant's objection was admissible for a purpose other than propensity; and if admissible for a purpose other than propensity, whether it was more probative than prejudicial. Evidence of details of the March 8 attempted theft that resulted in issuance of the trespass order was extremely prejudicial from the standpoint of propensity and negligibly probative as to whether Mr. Perron actually received the notice. The trial court also failed to instruct the jury regarding the proper purpose for the evidence, so the jury was free to infer criminal character and propensity.

B. ARGUMENT

Simply put, "an individual's prior crimes, wrongs, or acts are inadmissible to determine the individual's character or propensities." *State v. Wilson*, 144 Wn.App. 166, 176 (2008).

When determining whether the evidence of prior crimes, wrongs, or acts was properly admitted, the court must first determine whether the evidence is logically relevant to prove an essential element of the crime charged, rather than to show the defendant had a propensity to act in a certain manner. Second, the court must determine whether the evidence of these acts is legally relevant; that is, whether the probative value of the evidence substantially outweighs its prejudicial effect. Third, if the evidence is admitted, **the court must instruct the jury**

as to the limited purpose for which it may be considered.

Id. At 177 (citing *State v. Saltarelli*, 98 Wn.2d 358, 362-63 (1982)) (emphasis added). The Washington Supreme Court wrote, “[w]e have expressed the test as ‘whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.’” *Id.* (citing *State v. Goebel*, 40 Wn.2d 18, 21 (1952)). The details of the March 8 theft, prior to Mr. Perron’s alleged presence in the loss prevention office, were not necessary to prove an essential ingredient of burglary. Instead the details functioned as prejudicial propensity evidence because they were admitted without any guidance from the trial court to the jury about how the evidence should be used during the jury’s deliberations.

The Defense Did Not Open the Door to the Propensity Evidence

The trial court ruled that the fact that Mr. Perron denied receiving a written trespassing admonition “[made] everything that happened on March 8, admissible.” PtrVRP 9. The trial court supported its decision to allow the evidence with a discussion of a hypothetical argument that Mr. Perron *might* make:

I can certainly conceive of circumstances in this case where Mr. Perron *might argue* that even if he did receive this notice of trespass, that there was no basis for it, that WalMart acted arbitrarily in telling him that he couldn’t be there. And, so, I think the State should be allowed to prove what occurred on March 8th,

that Mr. Perron was in the store, that there was at least an attempted theft of speakers, that he was taken into custody, and that during that process he was notified that he could no longer come into the WalMart store, and that he was with Ashley young. I don't even that's a rebuttal issue, I think it's just part of what happened. I think that what happened on March 8, 2014, is relevant material to the elements of the crime for which Mr. Perron is on trial today.

PtrVRP 10-11. (emphasis added).

The foregoing comments by the trial court all but concede that the details of the March 8 incident were relevant only if Mr. Perron were to claim that WalMart lacked a lawful basis to issue the trespassing admonishment. That argument was not made in defense of Mr. Perron. Instead, he argued that he was never given the written notice. (VRP 70-71). Because Mr. Perron did not argue that the trespass notice was baseless or arbitrary, there was no reason to admit the details of the March 8 incident. Moreover, the trial court did not instruct the jury for the proper purpose of the evidence. These errors during this short trial raise due process concerns that Mr. Perron was convicted because of the jury's perception that he was a serial offender with a propensity to steal from WalMart.

The Evidence was not Relevant to Establish Identity

The State's Response claims that the details of the March 8 speaker theft were relevant to contradict Mr. Perron's claim that it was not him in the

surveillance video. The State wrote, “[t]he similarities between the March contact and the October contact had a tendency to make more probable a fact that was of consequence to the case in the context of the other facts” (State’s Response, p. 16). The State is essentially arguing that the prior incident makes it more likely that Mr. Perron was involved in the subsequent incident; and that is a patently obvious propensity argument. Two incidents are not so similar and unique to constitute an identity-establishing modus operandi that would make the evidence admissible as an exception to ER 404(b).

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.”

State v. Thang, 145 Wn.2d 630, 643 (2002) (citing *State v. Russell*, 125 Wn.2d 24, 66-67 (1994)).

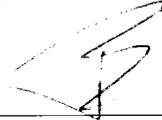
The State’s loss prevention witness Brandy Hinesly conclusively demonstrated that Mr. Perron’s conduct was not unique enough to establish a distinct modus operandi for identity purposes. She testified that things in the electronics area were commonly stolen. (VRP 19). She also testified that Mr. Perron and Ms. Young stood out to her because they were wearing

backpacks--something that she looks for to detect possible thieves. (VRP 18). The evidence adduced at trial revealed that there was nothing at all unique or distinctive about Mr. Perron's alleged approach to the theft. As such, the evidence of the March 8 incident was not probative to identity, especially when juxtaposed with the extreme prejudice flowing its nature as propensity evidence.

H. CONCLUSION

This Court should reverse Mr. Perron's conviction and remand for a new trial with an order that the alleged conduct of March 8, 2014, not be admitted at trial. That evidence was not necessary to establish the fact that a trespassing order was issued; and the trial court abdicated its responsibility to carefully balance the prejudicial effect of the evidence with its minimal probative value. The trial court's rationale for admitting the evidence was as a rebuttal to a defense that Mr. Perron did not present at trial. Furthermore, the trial court failed to instruct the jury regarding how it could consider the evidence; so the jury was free to see it as the propensity evidence it truly was. The conviction should be reversed and the matter remanded for a new trial.

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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.

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A copy was mailed to Mr. Perron, DOC# 78225 at Coyote Ridge Corrections Center at PO Box 769, Connell, WA 99326.

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 March 23, 2017.



Bret Roberts, WSBA 40628
Attorney for Matthew Perron

JEFFERSON ASSOCIATED COUNSEL
March 23, 2017 - 1:51 PM
Transmittal Letter

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