

NO. 49003-0

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

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW J. PERRON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S SUMMARY OF ARGUMENT

A jury of twelve citizens found the Appellant guilty of Burglary in the Second Degree after being convinced beyond a reasonable doubt that he in fact committed that crime on October 10, 2015, at the Walmart in Aberdeen. While this was the date of violation, three dates were actually at issue in the case: 1) March 8, 2014: the day he was trespassed from Walmart for attempting to shoplift a speaker with Ashely Young, 2) October 10, 2015: the day he successfully shoplifted a speaker at the same Walmart but fled from the scene unidentified at the time, and 3) November 2, 2015: the day he was again present at the same Walmart during an unrelated shoplifting, recognized from the October 10 incident, and identified as having been trespassed on March 8. It was not until this time that law enforcement connected the incidents together and realized that the October shoplift was in fact a burglary.

The defense's theories at trial involved both knowledge and identity—that he was never notified of the loss of his right to be in Walmart and that he was not the burglary suspect from October. He presented Ashley Young, his accomplice from the March shoplifting, as an alibi witness for the latter theory. On appeal, he attacks the State's use of a

number of facts from the March incident to assist in proving the identity and knowledge elements for the crime in question—issues he himself made the focus of the trial.

RESPONDENT’S COUNTER STATEMENT OF THE CASE

The Appellant, Matthew Perron, was charged by Information filed in Grays Harbor County Superior Court on November 10, 2015, with Burglary in the Second Degree on October 10, 2015. Clerk’s Papers (CP) 1. The crime was based upon his unlawfully entering or remaining in the Aberdeen Walmart with the intent to commit theft. *Id.* Prior to trial, the parties filed briefs addressing the potential use at trial of facts from the March and November contacts at the same Walmart. CP 3-12. The Appellant argued that the use of any information surrounding the March trespass would be “irrelevant and highly prejudicial” despite also contending that he had not been notified of his trespass from Walmart. CP 5. Additionally, after noting that his presence in Walmart in November would constitute the crime of criminal trespass if the State’s theory that he had been trespassed from Walmart in March were to be believed, the Appellant sought to have the State restricted from discussing the November contact altogether. *Id.* Lastly, the Appellant noted that he would be calling Ashley Young as an alibi witness. CP 6. In its brief, the

State went through essentially the same analysis of ER 401, 403, and 404 that the Appellant now reproduces on appeal. CP 8-12.

These issues were heard by the court on April 5, 2017, before trial began. Pretrial Verbatim Report of Proceedings (PtrVRP) 2-13. The State made a record that it had already instructed its witnesses not to suggest in any way that the Appellant's presence at Walmart in November was criminal in nature, but the court agreed with the State that it was permitted to present testimony of the November contact for purposes of explaining when the Appellant was identified by Walmart loss prevention as the suspect from the burglary in October. PtrVRP 11. As to the March incident, the court ruled that since the Appellant was denying that he knew of his loss of the right to be in Walmart and denying that he was the one who committed the crime, the March contact was admissible. PtrVRP 9-11. The court found that the evidence was relevant to prove the material elements of the crime. PtrVRP 10-11. Citing the State's briefing of ER 403, the court also ruled that unfair prejudice did not substantially outweigh the probative value of the evidence. PtrVRP 10. After summarizing the facts of the March incident—to include the attempted theft of a speaker from the same store, the trespass notice, and the fact that alibi witness Ashley Young was there—the court also appeared to

consider the contact to be *res gestae* evidence, stating, “its just part of what happened.” PtrVRP 10-11.

The case proceeded to trial later that day, at which time the jury heard testimony from four witnesses for the State: Walmart Asset Protection Associates Brandy Hinesly and Abigayle Frias, Aberdeen Police Officer Gary Sexton, and Aberdeen Police Corporal Steve Timmons. Verbatim Report of Proceedings (VRP) 2. The jury also heard testimony from the Defendant himself and his alleged “alibi” witness, Ashley Young. VRP 3.

After describing her job duties, experience, and Walmart trespass notices in general, Asset Protection Associate Brandy Hinesly discussed her observations on March 8, 2014. VRP 15-18. While doing surveillance on foot in the electronics section of the Aberdeen Walmart, she observed a male select a speaker and then walk to the apparel section, where he tore it out of the packaging and put it down his pants. VRP 18-20. A female accompanied the Appellant and was picking the packaging up off of the floor as he dropped it. VRP 20. Ms. Hinesly later identified this male as the Appellant, Matthew Perron, and the female as his girlfriend, Ashley. VRP 21-23. She stated that the two were stopped by law enforcement after he tried to run out of the store and that they were brought to her office,

where the Appellant was uncooperative and would not speak with her as she tried to go through the formal trespass process with him. VRP 21, 23. She identified a photo that she had taken of the Appellant as part of this process, which was admitted into evidence. VRP 22. Ms. Hinesly described how this photo along with the store's record of the incident would be kept in a file in the security office behind two locks which only asset protection associates like herself had access to. VRP 17-18. She indicated that she, her coworker, two officers, the Appellant, and Ashley were present during the trespass process. VRP 23-24. Ms. Hinesly identified the trespass document which had been explained to the Appellant. VRP 24. Ms. Hinesly also testified that Ashley was trespassed as well. *Id.*

Asset Protection Associate Abigayle Frias then testified about the October 10 and November 3 contacts at the Aberdeen Walmart. VRP 30-36. She stated that on October 10, 2015, she was conducting surveillance on the floor and following one male in particular when she observed that male go to the electronics section, select a speaker, and then wander to a different part of the store before running out the doors without paying for the speaker. VRP 30-32. Ms. Frias indicated that she had followed the male for 15 to 30 minutes, at one point coming within reaching distance of

him. VRP 30, 32. She stated that she never actually made contact with the male and therefore was not able to get his name that day. VRP 34. Later during her testimony, Ms. Frias went through the surveillance video of the incident with the jury (VRP 41-50), although, as the Appellant conceded in his pre-trial briefing, “[t]he identity of the suspect is not clear from the video.” CP 4. Ms. Frias then testified that she saw the male again in November of 2015 while conducting surveillance on the floor of the same Walmart and called police. VRP 35-36. She identified the Appellant as the man from both the October speaker theft and the November sighting in the same store. VRP 36.

Officer Gary Sexton testified about his witnessing the Appellant being trespassed from the Aberdeen Walmart on March 8, 2014, and identified his signature on the same trespass notice Ms. Hinesly had identified before the document was admitted into evidence. VRP 64-65. While he admitted to not having a good memory of the incident, he testified that he would only sign a trespass notice if he were a witness to it or trespassed the person himself. VRP 66-67.

Corporal Steve Timmons testified about his being called to the Aberdeen Walmart on November 3, 2015, to identify someone for loss prevention staff. VRP 69. The corporal stated that upon arrival at Walmart

he was able to positively identify the individual as the Appellant, Matt Perron, whom he had known for almost 15 years. VRP 68-69. Corporal Timmons also identified the Appellant in the courtroom. VRP 69.

Ashley Young testified that she was with her boyfriend, the Appellant, at Walmart on March 8, 2014, and that while both of them were taken into a room with two police officers and a loss prevention associate, she claimed that neither one of them were trespassed from the store. VRP 74-78. She referenced being arrested as an accomplice for theft and having to go to court for the incident. VRP 77, 79. Ms. Young then testified that she was also with the Appellant on October 10, 2015, telling an elaborate story about her pregnancy, her birthday on October 14, her move to Leavenworth two weeks later, and journal entries to this effect, all to emphasize that she and the Appellant were allegedly together in Tacoma from October 9 through October 12. VRP 79-82. She claimed that the longest they were apart was only for ten minutes to use the bathroom. VRP 80. On cross examination, the State impeached Ms. Young with her conviction for theft stemming from the March 8, 2014, Walmart incident, as well as a 2013 conviction for false statement. VRP 83-84. She was presented with her trespass notice from the March 8, 2014, incident, but denied ever seeing it and denied that the signature on it belonged to her.

VRP 86. Ms. Young admitted that, despite allegedly knowing that the Appellant, her long-term boyfriend and the father of her child, had an alibi for day of the crime, she did not come forward and tell anyone. VRP 85-86. She also admitted that she refused to give a statement when contacted by Corporal Timmons, saying to him only, “I was with him twenty-four-seven the whole month of October.” VRP 87.

The Appellant also testified that during the March 8, 2014, incident, he was never notified that he could not return to Walmart. VRP 92-93. He claimed that while in the room he had been “roughed up by the police like always” and that “[t]hey were throwing [him] around up against the walls.” VRP 92. He was then asked about October 10, 2015, at which point he denied being the person in the Walmart surveillance video and parroted the details, dates, locations, and times that Ms. Young had just testified to as part of his alleged alibi. VRP 93-95. The State again began by impeaching the witness with the March 8, 2014, theft conviction and exploring any bias the Appellant might have against Walmart or law enforcement due to the incident. VRP 96. Rather than admitting any sort of grudge against these entities, the Appellant defiantly stated that he was “absolutely pleased” and “one hundred percent” happy about the March contact and conviction. *Id.* The Appellant was also impeached with three

false statement convictions and one for possession of a stolen vehicle. VRP 97. He finished by admitting that he was at Walmart on November 3, 2015. *Id.*

For rebuttal, the State recalled Officer Sexton, who identified Ms. Young's trespass notice and his signature on it before it was admitted into evidence. VRP 102-03. Officer Sexton was asked if the contact with the Appellant became physical and the officer stated that it had not because a use of force report would have been filled out if it had. VRP 103-04.

In closing, the State broke down the issues one by one, first addressing identity: "Who was this person that was there on October 10th?" VRP 116. In summarizing the evidence which proved that the Appellant was the one who committed the crime, the State reviewed Ms. Frias' identification of him, the surveillance video from October, and finally the similarities between the March incident in which he was positively identified and the October incident when he got away. VRP 116-17. From there, the State addressed the notice of his trespass from Walmart and the simplicity of this element, essentially asking jurors not to get caught up in the details that the Appellant had emphasized during the trial. VRP 117-18. Third, the State reviewed the evidence relevant to proving whether he was there to commit a crime. VRP 118-19. The State

finished its closing by pointing to inconsistencies between the evidence and the testimony of the Appellant's witnesses, asking jurors to consider the biases and motives of the Appellant and Ms. Young. VRP 119-20. The Appellant addressed both identity and notice in his closing argument just as he had throughout the trial. VRP 121-26.

After deliberating for thirty minutes, twelve citizens found the Appellant guilty of the crime of Burglary in the Second Degree. VRP 131.

STANDARD OF REVIEW

A trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect under ER 403 will be overturned only for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994) (citing *State v. Rice*, 110 Wn.2d 577, 598–600, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200 (1989); *State v. Harris*, 106 Wn.2d 784, 791, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592 (1987)). Similarly, a trial court's decision to admit or exclude evidence under ER 404(b) will not be reversed on appeal absent an abuse of discretion. *State v. McCreven* 170 Wn. App. 444, 458, 284 P.3d 793, *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2012). Discretion is abused only when no reasonable person would have decided the issue as the trial court did. *Russell*, 125 Wn.2d at

78 (citing *Rice*, 110 Wn.2d at 600). The trial court is vested with wide discretion in determining if the danger of unfair prejudice outweighs its probative value (*State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, 936 (1984), *review denied*, 102 Wn.2d 1002 (1984)) but even where evidence is improperly admitted, the trial court's error is harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The trial court did not abuse its discretion by admitting testimony related to the March incident because doing so did not create *unfair* prejudice which was *substantially* outweighed the probative value of that evidence.**

Relevant evidence under ER 401 is any evidence which 1) has *any* tendency to make more probable or less probable 2) any fact that is of some consequence to the case in the context of other facts. Put another way, relevant evidence is both probative and material. *State v. Harris*, 97 Wn.App. 865, 868, 989 P.2d 553 (1999). “Material means that there is some logical nexus between the evidence and the factual issues the jury must resolve.” *Id.* at 869. Further, “[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is

always relevant and admissible.” *Id.* at 872. ER 402 creates a presumption that relevant evidence is admissible, subject to constitutional, legislative, or judicially created exceptions.

However, under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, among other things. This rule entails a balancing process since nearly all evidence is both probative and prejudicial to some degree—that is, almost all evidence is offered by a party with the purpose of inducing the jury to reach one decision or another. Therefore, the question is never as simple as whether the evidence is prejudicial. Instead, the question is whether there is **unfair** prejudice and whether the amount of that unfair prejudice **substantially** outweighs the probative value of the evidence. The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. *McCreven* 170 Wn. App. at 457. In making its determination, the court should consider the availability of other means of proof. *Id.* ER 403 is utilized as an extraordinary remedy and the party seeking exclusion has the burden of showing that the probative value is substantially outweighed by unfair prejudice. *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994). When the balance is even, the evidence should

be admitted. *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 722 P.2d 826 (1986), *affirmed*, 109 Wn.2d 235, 744 P.2d 605 (1987). ER 403 does not provide a basis for objecting simply because the evidence is “too good” or “too powerful.” *State v. Gould*, 58 Wn. App. 175, 791 P.2d 569 (1990).

In making his arguments here on appeal, the Appellant almost exclusively emphasizes his challenges at trial to the trespass notice, omitting the fact that he just as forcefully attacked the identity of the burglar. He thereby creates a “straw man” argument and ignores the primary reason for which the State used the March incident: to establish his identity and disprove the alibi that he and Ms. Young advanced. In March, the Appellant didn’t attempt a theft of services from a restaurant on the other side of the county—he attempted to steal a portable speaker from the electronics department at the Aberdeen Walmart and, using a similar tactic, successfully stole a portable speaker from the electronics department at the Aberdeen Walmart in October 2015. These two incidents involved the same item from the same department in the same store in the same city. This sort of evidence is clearly relevant in that it has a tendency to make more probable a fact that was of consequence to the case in the context of other facts—that the male from the March 2014 incident was the same individual as the male from the October 2015

incident. It is material in that there is a logical nexus between these facts and the issues that the jury had to resolve, and “[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.” *Harris*, 97 Wn. App. at 872. The Appellant stresses, both in trial and on appeal, that the State was required to prove that he was not permitted to be in the store. Even on direct, there was extensive testimony from both himself and his alibi witness about the facts surrounding the March trespassing, Ms. Young having even mentioned herself in the Appellant’s direct examination that a theft was alleged against both her and the Appellant. VRP 77-78, 88-90. He had to have been aware that jurors could easily infer that the trespass occurred due to some other crime, wrong, or act.¹ The admissible evidence already implied prejudicial facts, but none of this prejudice was “unfair” and, even if it was, given the Appellant’s defenses it did not “substantially” outweigh the extremely probative nature of the evidence such as would be required for suppression under the “extraordinary remedy” of ER 403.

¹ Indeed, both the Appellant and Ms. Young admitted to being convicted for the events in March, which was admissible impeachment evidence for both of them and also admissible as to Ms. Young in order to explore her biases and prejudices.

2. The trial court did not abuse its discretion by admitting testimony related to the March incident because that evidence was relevant to prove the elements of the crime and to disprove the Appellant's theory of the case, especially with regard to the specifically recognized, acceptable purpose of proving identity.

Evidence of prior bad acts is presumptively inadmissible under ER 404(b) (*State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)) and a trial court should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). ER 404(b) reads as follows:

Other Crimes, Wrongs, or Acts. 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.

(emphasis added). The list of exceptions to the rule listed therein is not exhaustive, but rather demonstrative. *Bockman*, 37 Wn. App. at 490. Our courts have long recognized other exceptions for modus operandi or common scheme or plan, for evidence that is relevant and necessary to prove an essential ingredient of the crime charged, and for *res gestae*—criminal acts which are part of the whole deed. *Id.* (See also 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence ch. 5,

at 237-39 (2009–10) (citing *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Before admitting evidence under 404(b), the trial court must find by a preponderance of the evidence that the misconduct occurred, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value of the evidence against its prejudicial effect. *McCreven*, 170 Wn. App. at 458. The rule is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. *State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011, 287 P.3d 594 (2012).

The Appellant made identity a central issue in his trial and ER 404(b) specifically admits relevant evidence for this purpose. The 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 other facts—that the male from one was the same individual as the male from the other. Additionally, ER 404(b) permits admission of evidence to prove motive and is a rule applicable to all

witnesses, not just a defendant. Since the Appellant's alibi witness, Ashley Young, was involved in the March 2014 incident and eventually convicted for that involvement, the State was entitled to explore any bias or motives she had in essentially testifying against law enforcement and Walmart staff. Furthermore, it is clear from a review of the testimony of all six witnesses as well as from the closing arguments of both counsel that the events of March and November were so connected to the October crime that proof of them was necessary for a complete description of the crime charged, constituted proof of the history of the crime charged, and were "necessary to be placed before the jury in order that it have the entire story of what transpired." *Tharp*, 96 Wn.2d at 594. As the court stated in

Bockman:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.

37 Wash. App. at 490–91.

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CONCLUSION

The Appellant received a fair trial at the conclusion of which twelve jurors quickly saw through his poorly devised defenses and found him guilty as charged. This Court should uphold the conviction.

DATED this 19th day of February, 2017.

Respectfully Submitted,

BY: s/ Lindsey A. Millar
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW J. PERRON,

Appellant.

No.: 49003-0-II

DECLARATION OF EMAIL

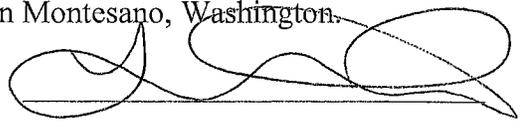
DECLARATION

I, Lindsey A. Millar, hereby declare as follows:

On the 21st day of February, 2017, I emailed a copy of the Brief of Respondent to Bret Roberts by sending to his email at bret.roberts.law.office@gmail.com.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 21 day of February, 2017, in Montesano, Washington.



GRAYS HARBOR COUNTY PROSECUTOR

February 22, 2017 - 2:41 PM

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