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NO. 51239-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

YVGENIY RODYGIN,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Yvgeniy Rodygin and Annette Brown shared an apartment during their engagement in 2016. They shared many household items, and Mr. Rodygin often drove Ms. Brown's car with her permission.

One day, after an argument, Mr. Rodygin drove off in Ms. Brown's car and she reported it stolen. Soon afterwards, Mr. Rodygin approached a police officer to ask for assistance with returning the car to Ms. Brown.

Mr. Rodygin was charged with possession of a stolen motor vehicle. At trial, the court excluded any reference to uncharged allegations of theft or other bad acts; however, Ms. Brown testified over objection that along with her car, all of her belongings were taken from her home, as well.

Mr. Rodygin moved for a mistrial because no curative instruction would be sufficient to cure the taint caused by this testimony. The court denied the mistrial motion and Mr. Rodygin was convicted as charged.

This Court should reverse the conviction, so Mr. Rodygin can receive a new trial before a jury untainted by this excluded propensity evidence.

B. ASSIGNMENTS OF ERROR

1. In violation of ER 404(b) and contrary to its pre-trial order, the trial court admitted propensity evidence.

2. The trial court denied Mr. Rodygin's mistrial motion, even though the jury heard unproved, excluded ER 404(b) allegations of theft against him.

3. The trial court erroneously denied Mr. Rodygin's motion for a new trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In violation of the trial court's pre-trial ER 404(b) order and over defense objection, did the court err when it permitted the complainant to introduce previous allegations, when such evidence was unfairly prejudicial and not sufficiently probative to justify admission?

2. A trial court should grant a mistrial where it finds a serious trial irregularity has occurred, and where the prejudice to the defendant can only be cured by a new trial. Where the complaining witness testified about allegations of uncharged theft that the court had previously excluded due to their prejudicial content, did the irregularity

affect the outcome of the trial? Did the court err by denying Mr. Rodygin's motion for a mistrial?

D. STATEMENT OF THE CASE

Yvgeniy Rodygin and Annette Brown were romantically involved for several months during 2016, eventually becoming engaged and sharing an apartment. RP 129. By Christmastime, the relationship had begun to fracture; Ms. Brown characterized the union at this point as "kind of on again/off again." RP 129.

During the "off" times, Mr. Rodygin would stay at his mother's home, and then the couple would reconcile and he would live at Ms. Brown's apartment. RP 139. This pattern repeated a number of times. Id. On January 8, 2018, after a particularly bitter argument, Ms. Brown asked Mr. Rodygin to leave the apartment. Id. at 130. When he refused, Ms. Brown did. Id. When she came home the following day, she noticed her car was missing. Id.

When the couple lived together steadily, Mr. Rodygin would often use Ms. Brown's car, but now that the couple was in the process of breaking up, Ms. Brown stated Mr. Rodygin no longer had permission to use the car. Id. at 130-31. Ms. Brown reported her car

stolen with the Seattle Police Department, and called Mr. Rodygin and told him to bring the car home, or to turn himself in. RP 135-37.

Mr. Rodygin, then in Oregon with the car, promised to return the car to her. RP 137. He began driving north toward Seattle, when he stopped in La Center for gas. RP 141, 148. Seeing a police officer at the gas pumps, Mr. Rodygin approached the officer and said he needed help; he then handed the officer his cell phone, where Ms. Brown remained on the open line. RP 141; 148-49. Mr. Rodygin asked the Ridgefield Police Officer to speak with Ms. Brown on the phone. Id. Ms. Brown told the officer that Mr. Rodygin was driving her car, which she had reported stolen. Id. After the officer verified Ms. Brown's account, the officer placed Mr. Rodygin under arrest and seized the car keys. RP 150-51.

Mr. Rodygin was charged with possession of a stolen motor vehicle. CP 6. He participated in the prosecuting attorney's diversion program, for which he signed a statement of admission explaining why he had his girlfriend's car that day. RP 157-58. He did not complete the diversion program. RP 165.

Before trial, Mr. Rodygin moved to exclude any reference to uncharged allegations against him under ER 404(b). CP 8; RP 6-7.

The parties and court agreed that Ms. Brown’s testimony would be limited, as follows: “Argument, refusal to leave the home, and then when she gets home, the car being gone, all that is relevant and admissible.” RP 7-8. The court specifically excluded uncharged allegations regarding any other conduct of Mr. Rodygin, including uncharged property theft. CP 8; RP 7-8.¹ The court specifically directed the prosecuting attorney to instruct the complaining witness of the court’s order. RP 8 (“So instruct your witnesses, Ms. McCredie.”).

Despite the court’s pre-trial order and over defense objection, Ms. Brown testified at trial that she came back to her house on January 9th to find – not only that Mr. Rodygin had taken her car – but that “all of my stuff was gone in my house.” RP 131. Mr. Rodygin promptly objected, but the objection was overruled. Id. The defense immediately moved for a mistrial, arguing this testimony violated the court’s pre-trial order, tainted the jury, and a curative instruction would not be sufficient to cure the taint. RP 133-34.

¹ Mr. Rodygin’s written motions in limine moved to exclude, pursuant to ER 404(b), his drug use, drug possession, unlawful imprisonment, theft of other property, assault, and interfering with domestic violence reporting. CP 8 (emphasis added). The court granted this motion. RP 7-8.

The State agreed the complainant's testimony violated the court's order, but the court denied Mr. Rodygin's motion for a mistrial. RP 133-34. The court issued a curative instruction and proceeded with the trial. RP 135.

Mr. Rodygin was convicted of possession of a stolen motor vehicle. RP 31-32. The court denied Mr. Rodygin's motion for a new trial, based on the denial of the mistrial. RP 224-25.

E. ARGUMENT

1. The trial court erred when it admitted excluded, prejudicial evidence in violation of ER 404(b).

Even though the trial court had excluded evidence of uncharged bad acts before trial, the complaining witness testified, over defense objection, to uncharged theft-related crimes. RP 131.

a. Evidence Rule 404(b) prohibits the admission of propensity evidence.

The reason for the exclusion of prior bad acts is clear – such evidence is inherently and substantially prejudicial. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (citing State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995)).

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.

ER 404(b).

Where the only relevance of the other acts is to show a propensity to commit similar bad acts, the erroneous admission of prior bad acts may result in reversal. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character, and showing a person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Before admitting such evidence, a trial court must first find the prior act occurred, and then: (1) identify the purpose for introducing such evidence; (2) determine whether the evidence is relevant to an element of the current charge; and (3) find that the probative value of the evidence outweighs its inherently prejudicial value. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). If other bad acts are presented for admission, the evidence must not only fit a specific exception to ER 404(b), but must also be "relevant and necessary to prove an essential ingredient of the crime charged." State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981). In

doubtful cases, such evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The admissibility of ER 404(b) evidence is reviewed for an abuse of discretion. Id.

b. The trial court abused its discretion when it permitted a reference to uncharged thefts at Ms. Brown's home.

Here, over objection, the trial court admitted the complaining witness's reference to returning home to find "all of my stuff" missing, at the same time that Mr. Rodygin took the vehicle. RP 131. By pre-trial motion, Mr. Rodygin had moved to exclude any reference to uncharged bad acts, including theft of other property. CP 8. The court granted the defense motion and directed the prosecuting attorney to instruct State witnesses accordingly. RP 8. The court abused its discretion when it overruled the defense objection to the excluded testimony, permitting the jury to consider it. RP 131.

Ms. Brown's testimony concerning stolen personal property lacked foundation and substantial probative value; moreover, the inherent prejudice derived from that testimony compelled its exclusion. ER 403; ER 404(b). Ms. Brown's comment was highly prejudicial, as the uncharged thefts to which she referred were inextricably linked to

Mr. Rodygin's borrowing of the car, the timing of which was undisputed.²

Ms. Brown's allegation encouraged the jury to speculate about the connection between Mr. Rodygin's taking of the car and the missing personal property. She testified: "I had already known that he had taken the car because we had text messages throughout the night, but all of my stuff was gone in my house." RP 131.³ The proximity of Ms. Brown's uncharged allegations of property theft and the sole charged count related to the vehicle increased the prejudicial effect exponentially.

Mr. Rodygin's objection to Ms. Brown's testimony concerning uncharged crimes should have been sustained. RP 131. The court abused its discretion in admitting this evidence, because the facts do not meet the requirements of ER 404(b) and the decision is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997); State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119

² Mr. Rodygin argued at trial that he did not have the *mens rea* under the statute, since he claimed it was a shared vehicle. RP 192-94.

(2003) (trial court's decision to admit ER 404(b) evidence reviewed for an abuse of discretion).

c. Erroneous admission of the 404(b) evidence affected the outcome of the trial, requiring reversal.

An appellate court should reverse on ER 404(b) grounds if it determines within reasonable probabilities the outcome of the trial would have been different had the error not occurred. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Tharp, 96 Wn.2d at 599. The admission of Ms. Brown's reference to uncharged thefts was not harmless because without this evidence, the outcome of the trial likely would have been different.

The reference to uncharged property crimes on the same night essentially told the jury that Mr. Rodygin was a criminal, regardless of any misunderstanding about this shared car. This is evidence the jury was unlikely to forget, particularly since the court overruled the defense objection. RP 131.⁴

³ When asked how Ms. Brown knew it was Mr. Rodygin who had taken the car, she stated, "He told me." RP 131.

⁴ The court overruled Mr. Rodygin's objection, which served to endorse the improper reference to these uncharged allegations.

The admission of the reference to the uncharged thefts, over objection, was irrelevant, highly prejudicial, and it inevitably affected the verdict; Mr. Rodygin's conviction should be reversed and remanded for a new trial without the erroneous admission of propensity evidence. Gresham, 173 Wn.2d at 420; Freeburg, 105 Wn. App. at 501, 507.

2. The erroneous admission of excluded ER 404(b) allegations denied Mr. Rodygin a fair trial and warranted a mistrial.

The State's introduction of the prejudicial, excluded uncharged allegations represented a serious trial irregularity that could only be cured by declaring a mistrial.

- a. A mistrial is appropriate where a serious trial irregularity occurs that prejudices the outcome of a trial.

A mistrial is appropriate where a trial irregularity so prejudices a defendant "that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). An error is deemed prejudicial if it affects the outcome of the trial. Id.; State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

To determine whether the irregular occurrence affected the trial's outcome, a reviewing court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence, and (3)

whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008).

- b. The complaining witness's testimony violated the court's pre-trial orders, amounting to a serious trial irregularity that prejudiced the outcome of the trial, warranting a mistrial.

Despite the court's pre-trial order excluding uncharged prior thefts, the complaining witness testified in violation of the order.

Immediately after the complaining witness violated the court's order, counsel for Mr. Rodygin asked for a recess and moved for a mistrial. RP 132. Defense counsel argued that this excluded testimony was highly prejudicial and that a curative instruction would not be sufficient to cure the violation. Id. ("it may be a bell that is unable to be unrung"). Defense counsel argued that the jury may infer that if other items were taken from the complaining witness's home, "that this isn't simply a mistake over permission" to borrow the vehicle. Id.

The court denied the motion for mistrial, instructing the jury to disregard Ms. Brown's statement about the property thefts. The court stated: "You don't know what that – if that has anything to do with this case or Mr. Rodygin, so please disregard that." RP 135.

All factors favored a mistrial here. The violation of the court's order was serious and permitted the jury to speculate as to what else Mr. Rodygin might have taken from Ms. Brown.

In addition, the Court considers whether the trial court properly instructed the jury to disregard the irregularity. Weber, 99 Wn.2d at 165. Although juries are presumed to follow court instructions, and while the trial court did instruct the jury here, the instruction was inadequate to cure the prejudice of the taint resulting from the complaining witness's improper testimony. Escalona, 49 Wn. App. at 255; Babcock; 145 Wn. App. at 164.

In Escalona, the defendant was charged with assault in the second degree. 49 Wn. App. at 254. A prosecution witness testified, in violation of a pre-trial order, that Escalona already had a record and had stabbed someone. Id. The trial court instructed the jury to disregard the improper statement and denied the defense motion for a mistrial. Id. at 253. This Court applied the three-part Weber test and reversed the conviction, holding the irregularity was very serious, the improperly-admitted statement was not cumulative of other evidence at trial, and that a curative instruction would have been inadequate. Id. at 255-56.

Here, as in Escalona, the erroneously admitted evidence was, by its similarity to the charges, highly prejudicial. See Babcock, 145 Wn. App. at 165. Even where a jury is properly instructed, no instruction can “remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164-66 (quoting State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) (“We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.”)).

This Court has found curative instructions, such as that given here, to be inadequate to remove the prejudice caused by such error. See Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164-66. Where the court simply instructs a jury to disregard the substance of “inherently prejudicial” evidence it has just heard, as here, this Court has determined such an instruction unlikely to “remove the prejudicial impression” left by such improperly-admitted evidence. Escalona, 49 Wn. App. at 255.

- c. The remedy for the erroneous denial of a mistrial motion is reversal.

The State conceded and the trial court found the complaining witness's testimony violated the agreed pre-trial order to exclude uncharged criminal acts under ER 404(b). RP 133-34. Yet the court denied Mr. Rodygin's mistrial motion, even though the jury had heard excluded allegations of property thefts at Ms. Brown's home at the same time that Mr. Rodygin had driven off in her car. RP 131.

The introduction of the prior uncharged allegations against Mr. Rodygin undoubtedly affected the verdict. In this trial where the sole count involved a car which Mr. Rodygin had arguable permission to drive, the jury heard unsupported allegations of uncharged thefts of other personal property – even hints of an alleged residential burglary – from this excluded material. RP 131. No curative instruction could remedy the harm caused by the jury's exposure to these excluded allegations. ER 404(b); Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164.

These excluded acts were irrelevant and highly prejudicial, inevitably affecting the verdict; thus, Mr. Rodygin's conviction should be reversed and remanded for a new trial without the excluded material.

Weber, 99 Wn.2d 164-65; Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164.

F. CONCLUSION

For the foregoing reasons, Mr. Rodygin respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 16th day of July, 2018.

Respectfully submitted,

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