FILED
Court of Appeals
Division II
State of Washington
2/15/2019 1:12 PM

NO. 52231-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LYONS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE BOLT CUTTERS TAKEN FROM THE TRUCK AND ADMITTED INTO EVIDENCE AND TESTIMONY REGARDING ATTEMPTED BURGLARY AS ALLEGED IN THE DISMISSED COUNT HAD NO PROBATIVE VALUE AND ONLY SERVED TO PREJUDICE THE JURY

The prosecution initially alleged that Mr. Lyons committed attempted second degree burglary in Count IV of the information. Clerk's Papers (CP) 1-4. Count IV involved an alleged attempted to enter a shop yard at Dietrich Trucking. CP 4. The trial court granted the defense motion to dismiss Count IV because the evidence did prove the required element that the yard be fully enclosed by a fence. 3RP at 322-23, 324.

Before the State moved to dismiss, however, extensive evidence was admitted regarding the alleged attempted burglary, which was prejudicial in the light it painted the defendant. 2RP at 256. Deputy Mauermann testified regarding a cut padlock on a gate entrance to Dietrich Trucking. 2RP at 256-58. The court admitted evidence of bolt cutters found by police during a search of the truck. 2RP at 226-27.

Following the court's dismissal of Count IV, the court allowed the

jury to consider all of the evidence regarding the attempted burglary charge. 2RP at 227. Because this evidence would have been properly excluded, or at least sanitized, if Count IV had been dismissed prior to trial, the only realistic remedy was mistrial.

a. Because the evidence should have been excluded as uncharged misconduct under ER 404(b) that was unfairly prejudicial, the court should have declared a mistrial

Propensity evidence is not permitted in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." ***State v. Gresham***, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404(b) is intended to prevent application by jurors of the common assumption "that 'since he did it once, he did it again.'" ***State v. Bacotgarcia***, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). "This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis omitted). This 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." *Id.* "In no case . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." ***State v. Saltarelli***, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Evidence of other misconduct may be admissible for purposes other than propensity, but, before a trial court admits evidence of other misconduct under ER 404(b)[1], it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. ***State v. DeVincentis***, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Under ER 404(b), evidence of a defendant's other acts is not admissible to show the defendant's propensities because admission of that evidence is so prejudicial it denies the defendant his right to a fair trial. See

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[1]ER 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

State v. Herzog, 73 Wn. App. 34, 48-50, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994). Allowing the prosecution to introduce otherwise irrelevant evidence to show the defendant was generally "bad" invites the jury to make an inappropriate decision based on character evidence and not on actual evidence of the commission of the crime. ***Herzog***, 73 Wn. App. at 49. Introduction of an illegal act inevitably shifts the jurors' attention to the defendant's propensity for illegal conduct, thus stripping away the normal presumption of innocence. ***State v. Bowen***, 48 Wn. App. 187, 196, 738 P.2d 316 (1987). Evidence of other illegal acts is highly prejudicial because jurors may vote to convict not because they find the defendant guilty of the charged offense beyond a reasonable doubt, but because they believe the defendant should be punished for a series of illegal acts. ***Bowen***, 48 Wn. App. at 195.

The court erred in not declaring a mistrial (and in addition, trial counsel was prejudicially ineffective by not moving for mistrial), because evidence of the bolt cutters, cut padlock, and testimony regarding the dismissed count involving Dietrich Trucking was irrelevant and likely unfairly prejudiced the jury against Mr. Lyons.

Generally, all relevant evidence is admissible. ER 402. And evidence

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absence of mistake or accident.

is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." ER 401. Even if the evidence is relevant, a trial court may still exclude it if the danger of undue prejudice substantially outweighs its probative value. ER 403; ***State v. Norlin***, 134 Wn.2d 583-84, 951 P.2d 1131 (1998). Relevant evidence is inadmissible when the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

In order to determine whether evidence is admissible under ER 404(b), the trial court must identify the purpose for which the evidence is to be admitted. ***Saltarelli***, 98 Wn.2d at 362. The evidence from the attempted burglary did not help establish the identity of the perpetrator. Mr. Lyons admitted being in the area of the burglary at B & M Logging and conceded that he committed second degree criminal trespass. 3RP at 401-02.

In addition, to be admissible for purposes of establishing identity, the separate crimes must be so distinct as to be signature crimes and so unique as to be clearly the handiwork of one person. ***Bowen***, 48 Wn. App. at 193. Evidence of this type is appropriate only when the different incidents are so

unique as to show a signature of the defendant. ***State v. Hall***, 40 Wn. App. 162, 166, 697 P.2d 597 (1985). There is nothing about the use of bolt cutters in the attempted burglary at Dietrich Trucking that is so unique as to constitute a signature crime. Rather, the evidence only showed, perhaps, that Mr. Lyons was predisposed to have committed the burglary at B & M because an attempt was made to enter the yard at Dietrich Trucking. This is precisely the inference that is impermissible; that the jury was allowed to draw this inference was prejudicial error that denied Mr. Lyons a fair trial.

Even if the evidence was admissible under ER 404(b), it should have been excluded under the ER 403 balancing at the fourth step. See ***State v. Fisher***, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); ***State v. Trickler***, 106 Wn. App. 727, 733-34, 25 P.3d 445 (2001) (reversing where evidence relating to misconduct as to other victims was admitted as *res gestae* due to prejudice and ability to separate the evidence).

Here, any probative value was marginal because the alleged attempted burglary and the bolt cutters and cut padlock did not relate to any of the elements of the burglary regarding B & M Logging, particularly where the State did not allege that bolt cutters were used to enter the building.

b. A new trial is necessary because the improperly admitted evidence probably affected the outcome

An erroneous evidentiary ruling requires reversal if it is reasonably probable that the error affected the outcome. ***State v. Gower***, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). The analysis is concerned with the effect of the erroneously admitted evidence; it "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." Id. It is reasonably probable the evidence regarding the attempted burglary at Dietrich Trucking affected the outcome. The matter should be remanded for a new trial.

c. Counsel was ineffective because he failed to move for mistrial following dismissal of Count IV

Alternatively, as argued in the opening brief, trial counsel was ineffective by failing to move for mistrial following admission of evidence involving the dismissed charge and Mr. Lyons was prejudiced by his counsel's failure to do so.

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B. CONCLUSION

Based on the forgoing, as well as the previously submitted brief of the appellant, Mr. Lyons respectfully requests that his convictions be reversed.

DATED: February 15, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 15, 2019, that this Appellant's Reply Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, and to Erin Jany, Lewis County's Prosecuting Attorney, copies were mailed by U.S. mail, postage prepaid, to the Appellant, Derrick Lyons at the following:

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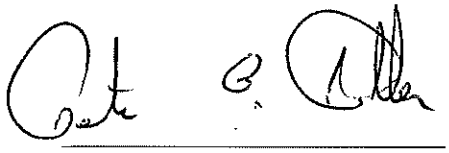
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 15, 2019.



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February 15, 2019 - 1:12 PM

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Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Derrick L. Lyons, Appellant
Superior Court Case Number:	17-1-00898-7

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