

FILED

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Court of Appeals
Division III
State of Washington

No. 316980

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

STEVEN LEE SMITH, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY
THE HONORABLE BRIAN ALTMAN

BRIEF OF APPELLANT

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I. Assignments of Error

- A. The evidence was insufficient to support a conviction for possession of a stolen firearm.
- B. The court erred in admitting evidence of other bad acts under ER 404(b).

Issues Relating To Assignments Of Error

- 1. Was the evidence sufficient to support the conviction for possession of a stolen firearm ?
- 2. Did the court commit reversible error in ruling evidence of other acts was admissible under ER 404(b) where the court did not balance on the record the probative value against the prejudicial effect?

II. Statement of Facts

On February 4, 2013, confidential informant "12-10" contacted Klickitat County Detective Michael Kallio. CP 43. The informant alleged he/she saw three firearms, including a 9mm semi-automatic rifle, at Mr. Smith's home that day. CP 43-44. Detective Kallio applied for and obtained a search warrant for Mr. Smith's home. CP 43-45.

Officers executed the warrant on February 5, 2013. After being advised of his Miranda warnings, Mr. Smith gave the location of guns in and around his home, two of which belonged to family members. RP 187-190;196. Officers obtained a separate search warrant for Mr. Smith's Dodge Durango after he told them a High Point 995 9 mm rifle was in the back of the vehicle. RP 189. He obtained that rifle from two friends by trading fifty dollars and four grams of methamphetamine for it. RP 194. Mr. Smith was charged by information with seven counts of unlawful possession of a firearm in the first degree. CP 1-4.

Shortly before the execution of the search warrant, Detective Kallio became aware that Lt. Barkowski of the Goldendale police department had taken a report of a stolen High Point model rifle on January 2, 2013. RP 84-85;179-180; 195-196. On March 18, 2013, the State amended the information to include possession of a High Point model stolen firearm. RP 11;CP 34-38; 110-113.

Pretrial Rulings

1. ER 404(b) rulings: The State filed a motion in limine to present "other acts" ER 404(b) evidence through the testimony of

witness Charles Lloyd¹ for the purpose of establishing that Mr. Smith had knowledge the High Point 995 rifle was stolen. CP 103-105; RP 55;58. Mr. Lloyd was to testify that shortly after he was released from prison he started working for Mr. Smith. RP 55.

The State's attorney said:

“And we want to keep this related to the gun charges. Mr. Lloyd also has said in his interviews that he was involved in dealing drugs for Mr. Smith and various other things that he has testified to, but the state wishes to keep this fairly narrow for the purposes just of the gun charges.”

RP 55.

“So our argument here is that Mr. Lloyd would explain to the court that the defendant was attempting to fill a fairly large purchase order... for approximately 2,000 guns...for ...someone that he owed money to; he owed a substantial amount of money and he was attempting to fill – to work down that debt by providing guns – And we won't talk about the other things that he was providing – or, the testimony would be – and again, not for the jury – that it was in exchange for – for debts for large amounts of – large quantities of drugs, which were the drugs that he was using to supply the people that he was supplying....The testimony would be limited to the fact that he did have a purchase order he was trying to fill to pay off a debt, and that he was having difficulty paying off the debt.” RP 56-57.

The State also sought testimony from Mr. Lloyd that the person who sold Mr. Smith the High Point rifle had supplied guns to Mr. Smith on previous occasions, and Mr. Smith was aware those

¹ Charles Lloyd has an alias of Charles Foley. For purposes of this brief he will be referred to as Charles Lloyd.

items were stolen. He would further testify that he and Mr. Smith had conversation days before Mr. Smith was arrested, during which Mr. Lloyd allegedly expressed concern that they were driving around with stolen weapons in the vehicle. RP 57.

Lastly,

“...that evidence that he [Mr. Smith] had traded methamphetamine ... and cash for this particular weapon is inextricably entwined, it puts it in context as to how he has received it, as does the statement that he was attempting to fulfill a purchase order for a large amount of guns...”

RP 58.

Defense counsel objected on several bases: First, it was two days before the start of trial, and the defense had not received a copy of the police report about the stolen High Point firearm, or the identity of the rightful owner of the alleged stolen firearm. (RP 63). Second, Mr. Lloyd’s potential testimony about the 2,000 guns was not relevant, considering only seven guns had been retrieved, two of which belonged to others. The probative value was significantly outweighed by the prejudicial impact of the alleged information; Mr. Smith would be portrayed as a “large scale gun dealer” who trafficked in stolen firearms; Mr. Smith was not charged with unlawful trafficking of firearms. RP 65.

Counsel also argued that testimony about the price (\$50 and 4 grams of methamphetamine) that Mr. Smith paid for the allegedly stolen firearm was unfairly prejudicial because it portrayed Mr. Smith as a drug dealer, a crime not before the jury. RP 65. In fact, prior to the start of trial, the State dismissed all drug charges against Mr. Smith, stating, "We wanted to keep the record very clean on this case and not have that additional issue on appeal." RP 54.

The court ruled as follows:

"The proper use of 404(b) is where the state is attempting to get relevant evidence in front of the jury that are admissible for some other purpose that is a relevant purpose which is not propensity evidence. And I believe that's the case here, and I'm granting the state's motion.

The defendant was attempting to fill a large purchase order. That goes directly and has a nexus with the state's theory of the case that the defendant had in his possession several firearms and there was one stolen -- one stolen firearm that he knew was stolen. That he acquired the gun (inaudible) in Count 8 from two individuals -- that goes to the defendant's knowledge and the possible inference by the jury that in fact he knew it was stolen.

That the defendant knew all the guns the defendant purchased in the past from at least one of these individuals had been stolen is admitted for the same reason. This is all through testimony of a witness, obviously, and the jury will make what they want of that...

The conversation in the car also seems to me to be relevant, more probative than prejudicial, and a proper usage of 404(b) to the extent that it is. So those are my rulings.

RP 71-72.

2. Stolen Firearm Report : On the day of trial, the State informed the court it had received the stolen firearm police report the previous day and learned the report did not have an identifying serial number for the High Point rifle. RP 85. The State acknowledged the lack of an identifying serial number created a gap in the evidence, calling it “a shaky part of our evidence.” RP 84-85. Because defense counsel had not received a copy of the report, the court disallowed any reference to the report itself, but allowed the officer to talk about his knowledge. RP 88-89.

The State agreed the officer’s testimony regarding whether the stolen firearm case was open or closed would be limited: the officer could testify the case was closed, but “As to how he knows it’s closed, we can’t talk about that...” RP 85.

Opening Statements

During opening statements, despite the State’s earlier assurances that drug dealing would not be raised at trial, State’s counsel made the following statement:

“He [Mr. Lloyd] will tell you about his dealings with Mr. Smith – They have a history together. He will [tell] you that he dealt drugs for Mr. Smith, drugs provided by Mr. Smith.” RP 172.

Out of the presence of the jury, defense counsel alerted the court the testimony regarding dealing drugs was not part of the court's motion in limine and went beyond the court's ruling. Counsel objected that such testimony was unduly prejudicial and should be analyzed under ER 404(b). RP 204. The court overruled the objection without analysis. RP 205.

Trial Testimony

Lt. Reggie Bartowski of the Goldendale police department testified he took a telephone report on January 2, 2013, regarding a stolen High Point rifle. RP 180. The owner believed the item had been stolen from his car on Christmas Eve, but wanted to confirm he had not left it at his Vancouver home before he made a report. RP 180. The owner did not know the serial number, and the business that sold him the gun no longer had a record of the serial number. RP 182. Lt. Bartowski entered a description of the missing weapon into the police computer database. RP 182.

At trial, the following exchange occurred between State's counsel and Lt. Bartowski:

"Q. Is that case considered open by the Goldendale Police Department at this time?

A. No, it's not.

Q. When was it closed?

A. It was closed on February 7th. There was a search warrant conducted on February – “
RP 182.

Defense counsel objected; the Court sustained the objection.

RP 182.

Officer Songer testified the High Point rifle was a popular weapon used for target practice rather than hunting. RP 236. The officer stated he was not an expert in firearms, but he had seen High Point 9mm rifles at gun shows and in gun shops. RP 237;239.

Charles Lloyd, who had 17 felony convictions, made an agreement with the State to testify against Mr. Smith. In exchange for his testimony, he was to receive a reduced sentence and preclude federal charges for crimes with which he had been charged in a separate cause. RP 247. At trial, Mr. Lloyd testified after he had been released from prison he went to Mr. Smith in hopes of getting money. RP 247.

He testified figured out Mr. Smith “was dabbling in the drugs.” RP 247. He began selling drugs for Mr. Smith shortly before Thanksgiving. RP 250. He learned that Mr. Smith owed his drug dealer money and had an arrangement to supply that individual with guns to pay off the debt. RP 252-53. The court sustained the defense objection regarding owing money to a drug

dealer. RP 253. Mr. Lloyd said Mr. Smith had a \$2,400 debt and was looking to acquire between 1000 and 2000 guns to pay it off. RP 253. Between mid-November and February 5, 2013, he reported he saw over a dozen guns at Mr. Smith's home. RP 252.

He testified that a day or two prior to the arrest, he and Mr. Smith had a conversation about "riding around dirty". He explained this meant they had things in the vehicle they should not have had, including firearms, some of which were stolen. RP 254.

Mr. Smith was found guilty on all counts by a jury trial. CP 173-180. Mr. Smith makes this timely appeal. CP 191.

III. Argument

A. The Evidence Is Insufficient To Support A Conviction For Possession Of A Stolen Firearm.

1. The Court Erred In Admitting The High Point Rifle Into Evidence Because It Could Not Be Identified As Belonging To Someone Else.

A reviewing court will reverse a trial court's admission of evidence only if the court abused its discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court's decision is

based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. A decision is made on untenable grounds if the factual findings are unsupported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Here, the State produced scant and admittedly weak circumstantial evidence the rifle was the same rifle that was reportedly stolen. Under Washington case law, some reasonable identification factor is necessary for the evidence to even be admissible.

In *Morgan*, two defendants were arrested shortly after they used a knife to rob someone of a watch. *State v. Morgan*, 3 Wn.App. 470, 471, 475 P.2d 923 (1970). On a search incident to arrest, both the knife and watch were found on one of the defendants. At trial, the victim, the codefendant, and the arresting officer each identified the items. *Id.* at 471-72. Because three individuals testified about the identification and ownership of the items, the court ruled there was sufficient evidence of identification, and admitted the evidence. *Id.* at 473.

In *State v. Helms*, 77 Wn.2d 89, 459 P.2d 392 (1969), the defendant argued the allegedly stolen items (antifreeze, a car

battery, and a car jack) should not have been admitted into evidence because there was no numerical or other significant identifying mark which would distinguish it from any other similar product placed into the marketplace by the same manufacturer. *Id.* at 92.

There, the court found identity could be established by the testimony of the owner of the goods, especially where the different articles of various brands, kinds, and sizes were stolen and articles similar in make, brand and character to the stolen ones were found in the possession of the accused. *Id.* at 93. (Internal citation omitted). In other words, not only did the owner identify the goods, but also the odd assortment of the goods in the possession of the defendant matched the odd assortment of goods that had been reported stolen.

Identification was found sufficient in a burglary case although there was no identifying mark on the item. *State v. Hayes*, 3 Wn.App. 544, 475 P.2d 885 (1970). There, at trial the owner of the item positively identified it as his and as having been in his room prior to the burglary. Additionally the testifying officer positively identified the item as one he took from the defendant's coat. *Id.*

In *Withers*, the defendant attempted to sell items that had been allegedly pilfered from a ship. *State v. Withers*, 8 Wn.App. 123, 124, 504 P.2d 1151 (1972). The items were identified by the serial numbers checked against the ship's manifest and found to be among the stolen items. *Id.* Articles with no identifying markings, but which were of the same kind as those positively identified, were admitted into evidence. The court stated, "The identity of exhibits may be established even if they have no earmarks to identify them, where articles similar in make, brand, character, and appearance, have been admitted into evidence, and where these admitted items are clearly linked to the possession of the accused. *Id.* at 128 (Internal citation omitted). Evidence not so connected with the stolen cargo was withdrawn by the State. In other words, there was sufficient objective identification of the majority of the stolen items by serial number to warrant admission of the same kind of items allegedly taken in the burglary. *Id.*

In each cited case, the State produced some objective identification to establish the item(s) were the purported stolen items. By contrast, here there was no objective identification of that particular High Point rifle as the stolen rifle. There was no serial number to compare. It was found with six other firearms, none of

which were identified as having been stolen, and the State did not produce the police report description of the missing rifle.

Significantly, the owner of the stolen rifle did not testify the item at issue was indeed his rifle.

Evidence must be relevant to be admissible. 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. Even with the low standard for relevancy, the trial court abused its discretion in admitting the High Point rifle for the possession of a stolen firearm charge.

2. The Evidence Was Insufficient To Support A Conviction For Possession Of A Stolen Firearm.

The test on review of a criminal conviction is whether the evidence could justify a trier of fact to rationally find guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 899, 906-07, 567 P.2d 1136 (1977).

Here, even taking the evidence in the light most favorable to the state, the evidence in this case is insufficient to justify guilt beyond a reasonable doubt on the charge of possession of a stolen firearm.

To convict Mr. Smith of possession of a stolen firearm, the State was required to prove beyond a reasonable doubt that he possessed or was in control of a stolen firearm, knowing it was stolen. RCW 9A.56.310.

Incorporating the previous argument by reference, the State did not produce sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the High Point rifle was a stolen weapon.

The testimony, viewed in a light most favorable to the State, together with any reasonable inferences therefrom, falls short of the quantum of proof necessary to support a conviction for possession of a stolen weapon. Because there was no identification, it was conjecture it was the same rifle found in Mr. Smith's vehicle. The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 490, P.2d 1346 (1971).

In order to support a determination of the existence of a fact, evidence thereof must be substantial, that is, it must attain that character which would convince an unprejudiced, thinking mind of

the truth of the fact to which the evidence is directed. *State v. Zamora*, 6 Wn.App. 130, 491 P.2d 1342 (1971). Whether or not there is substantial evidence is a question of law for the court. *Id.*

In an attempt to make the HighPoint rifle distinguishable, the State tried to show the rifle was rare by eliciting testimony from Officer Songer. However, Officer Songer's testimony was that he was not an expert in firearms, but he had seen that type of rifle at gun shows and shops in Washington. There was nothing that would allow a logical inference that this particular rifle was such that its very type could distinguish it as the reportedly stolen rifle. The State's evidence was insufficient to support the conviction of possession of a stolen firearm.

3. The Court Erred In Admitting Evidence Of Other Bad Acts Under ER 404(B).

Here, the trial court had four evidentiary issues requiring an ER 404(b) analysis with respect to Mr. Lloyd's testimony. First, the allegation that Mr. Smith was trying to fill a large purchase order of guns in exchange for debt that he owed; Second, Mr. Smith procured stolen firearms from particular individuals in the past; Third, Mr. Smith knowingly drove around with stolen firearms in his car. Fourth, Mr. Smith was a drug dealer.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person or to show that a person acted in conformity with that character. Such evidence may be admissible for other purposes, including intent, knowledge, or absence of mistake. ER 404(b).

To be admitted, the trial court must find (1) by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Lastly, the court must conduct a balancing test of the probative value of evidence versus its potential prejudice, on the record, to ensure thoughtful consideration and facilitate appellate review. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

The extent of the trial court's analysis here on the issues was as follows:

The defendant was attempting to fill a large purchase order. That goes directly and has a nexus with the state's theory of the case that the defendant had in his possession several firearms and there was one stolen -- one stolen firearm that he knew was stolen. That he acquired the gun (inaudible) in Count 8 from two individuals -- that goes to the defendant's knowledge and the possible inference by the jury that in fact

he knew it was stolen.

That the defendant knew all the guns the defendant purchased in the past from at least one of these individuals had been stolen is admitted for the same reason. This is all through testimony of a witness, obviously, and the jury will make what they want of that...

The conversation in the car also seems to me to be relevant, more probative than prejudicial, and a proper usage of 404(b) to the extent that it is. So those are my rulings.

RP 71-72.

It appears the trial court conducted the first three steps of an ER 404(b) analysis on the allegation Mr. Smith was trying to fulfill a gun purchase order, and that he had obtained stolen weapons in the past from the same individual who sold him the High Point rifle. There is no balance of the probative value and prejudice of such evidence on the record.

Without more than a summary statement that the probative value was greater than the prejudice, the court also admitted the conversation that allegedly occurred between Mr. Smith and Mr. Lloyd about driving around "dirty."

This court held the trial court abused its discretion when it admitted certain evidence under ER 404(b) without properly weighing the probative value of evidence versus its prejudicial effect under ER 403, stating, "...it would have been apparent that evidence of the uncharged bad acts was highly prejudicial and

should not have been admitted at trial.” *State v. Trickler*, 106 Wn.App. 727,732, 25 P.3d 445 (2001).

In *Trickler*, the defendant was accused of possession of a stolen credit card belonging to a female. Most of the evidence the State introduced at trial concerned items of personal property belonging to others. *Id.* at 733. The reviewing court could not discern from the record whether the trial court balanced the probative value against the prejudicial impact of the evidence of other stolen property found in Trickler’s possession at the time the credit card was discovered. *Id.* at 733.

This court reasoned the jury’s knowledge of the superfluous information was highly prejudicial to Trickler, in violation of ER 404(b), stating, “...by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the state to prove that Mr. Trickler must have known the credit card was also stolen, the court violated the purpose of ER 404(b). The conviction was reversed and remanded for a new trial. *Trickler*, 106 Wn.App. at 734.

Similarly here, on three evidentiary issues, the record shows the court considered the purpose and relevance of the proposed testimony, but did not balance the probative value against the

prejudicial impact. Mr. Smith was not on trial for drug dealing or trafficking in firearms, stolen or otherwise. However, by allowing the jury to consider that Mr. Smith was trying to pay off a debt by procuring guns, that he had allegedly obtained stolen firearms from an individual in the past, and that he had previously driven around with allegedly stolen firearms, the court left the jury to conclude Mr. Smith was a “bad man” who trafficked in guns and drugs.

On the fourth evidentiary issue, that Mr. Lloyd sold drugs for Mr. Smith, the court conducted no analysis and admitted the testimony, despite defense counsel’s request and objection and the State’s earlier assurance that the State wished to keep Mr. Lloyd’s testimony related only to the gun charges. It was error to not conduct an ER 404(b) analysis on that particular issue.

In making a ruling on the admissibility of prior acts, the trial court must find that the evidence is logically relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting such evidence. *State v. Barragan*, 102 Wn.App. 754, 758, 9 P.3d 942 (2000). The court here conducted no analysis on relevance, materiality, purpose, and most significantly, did not balance the probative value against the unfairly prejudicial value.

Again, the jury here was left to conclude Mr. Smith was a drug dealer with a propensity to acquire firearms. Mere accusations are generally inadmissible, not only on the basis of Rule 404(b), but also because they are highly prejudicial. The unfairly prejudicial characterization as a drug dealer was especially significant because the State had dismissed all drug charges against Mr. Smith before this trial began.

During his testimony Mr. Lloyd stated he learned Mr. Smith owed money to his drug supplier and made arrangements to supply that individual with guns to pay off the debt. Even though the court sustained defense counsel's objection, the testimony only compounded the earlier unfairly prejudicial testimony.

The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined. *State v. Wade*, 98 Wn.App. 328, 333, 989 P.2d 576 (1998). Doubtful cases should be resolved in favor of the defendant. *Id.* at 334,

Because an evidentiary error is not of constitutional magnitude, reversal is required only if the error, within reasonable probability, materially affected the outcome. *State v. Briejer*, 172 WnApp. 209, 228, 289 P.3d 698 (2012)(internal citations omitted). If the evidence is of minor significance compared to the overall

evidence as a whole, the error is harmless. *State v.*

Everybodytalksabout, 145 Wn.2d 456, 469, 30 P.3d 294 (2002).

Here, the evidence of possession of a stolen firearm was quite weak. (See first assignment of error and argument). Testimony that Mr. Smith was a drug dealer, owed money to a drug dealer, was attempting to obtain up to 2,000 firearms to pay a \$2,400 debt to a drug dealer, and had allegedly acquired stolen weapons at some point in the past was highly prejudicial testimony. It was irrelevant accusation. It more than suggested Mr. Smith was guilty of possession of a stolen weapon on the basis of other activity for which he was not charged, and more than likely contributed to the jury's finding of guilt. The error was not harmless.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Smith respectfully requests this Court to reverse his conviction on the possession of a stolen firearm for insufficiency of the evidence and dismiss with prejudice. In the alternative, he asks this Court to reverse and remand for a new trial because the court violated the purpose of ER 404(b) and Mr. Smith was unfairly convicted.

Dated this 6th day of November 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for appellant Steven L. Smith, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on November 6, 2013, that a true and correct copy of the Brief of Appellant was emailed per agreement between the parties to:

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And by USPS mail, postage prepaid, first class, to:

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